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Joint Liability of Parent Companies in the European Union Competition Law

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Summary

The attribution of joint and several liability to parent companies is a highly disputed area of the European Union competition law. The body of relevant case law distinguishes the following issues. The current practice of the attribution of parental liability is founded on three pillars. First, the presumption of decisive influence over a wholly-owned subsidiary, second, the concept of one undertaking resulting in the attribution of liability in the absence of personal involvement in the infringement, third, the notion of the refutability of the presumption. The current practice attracts critique aimed at the alleged practical irrefutability of the presumption and the failure to observe the fundamental principle of personal responsibility. The objective of this thesis is to provide a comprehensive guidance in terms of conceptual and practical aspects relevant for the companies seeking to escape parental liability for the unlawful conduct of their subsidiaries. The thorough analysis of the relevant body of case law and scholarly debates addresses the arguments submitted by the companies in effort to rebut the presumption and their viability in the appeal procedure, resulting in a conclusion that, in the recent years, the Union Courts have adopted a more stringent review of the Commission's decisions concerning the duty of the latter to state reasons and address applicants' submissions. However, the settled practice concerning the application of the presumption remains effectively unaltered. In the current state of affairs, the single viable solution available for the companies seeking to rebut the presumption is to provide evidence that the interest it holds in respect of its subsidiary is based on purely financial considerations.

Abbreviations

AG	Advocate General
CFI	The Court of First Instance
CJEU	The Court of Justice of The European Union
E.C.L.R.	European Competition Law Review
ECR	European Court Reports
GC	The General Court of the European Union
OJ	Official Journal
TFEU	Treaty of Functioning of the European Union

1 Introduction. A Breakthrough in Anti-trust Proceedings or a Temporary Aberrance?

1.1 Research Problem

Settled practice

The Commission, with the support of the General Court and the Court of Justice follows a settled and rigorous practice of holding parent companies jointly and severally liable for the misdeeds of their subsidiaries engaged in anti-competitive conduct.

The emerge of the presumption

In order to facilitate the imputability of parental liability, the presumption of decisive influence has been established in the *Stora Kopparbergs* judgment in respect of the parents of wholly-owned subsidiaries. This line of sanctioning of anti-competitive conduct has been applied by the Commission and upheld by the Union Courts in numerous landmark cases of lasting impact¹. However, the approach adopted by the Union judicature has not been immune to controversy and criticism.

Risks carried by the application of the presumption

Joint liability raises a number of disputed implications, primarily of quantitative nature; first, joint liability is capable of significantly raising the maximum fining cap of 10% and the deterrence uplift as it takes into account the annual turnover of the group constituting the undertaking. It

¹ E.g., Akzo Nobel (C-97/08 P), Arkema (C-520/09 P), Quimica (C-90/09 P) etc. See further chapters for assessment and references.

inevitably and considerably exceeds the turnover attributable to a single subsidiary responsible for the infringement.

Other risks include increased possibility of finding recidivism; it may occur if one or more members of the corporate group had been previously sanctioned for anti-competitive conduct. Furthermore, the inadequate application of joint liability may cause an effect of overdeterrence and raise questions concerning the breach of personal responsibility².

The positive implications include the following. The parent and the subsidiary benefit from being treated as one undertaking in the sense that their intra-group agreements do not fall under Article 101 TFEU³. Furthermore, the Union benefits from an increased likelihood that the liability will be attributed to an actually solvent debtor, rendering potential rearrangements of assets of the corporate group irrelevant⁴. However, the capability of the positive effects to outweigh the numerous grave consequences remains uncertain.

An alleged shift in the Courts' attitudes

For decades, the Commission, enjoying full support of the Courts, has been persistent in applying the stringent line of enforcement, predominantly driven by the pursuit of deterrence and punitive motives⁵, however, recent successful appeals suggest the diminishing of the Courts' support.

Air liquide, Elf Aquitaine, Grolsch, Alliance One cases indicate the Courts' newfound willingness to, one may suggest, 'side' with the parent companies

² L La Rocca, *The Controversial Issue of the Parent Company Liability for the Violation of EC Competition Rules by the Subsidiary*, E.C.L.R. 2011, 32(2), p. 68. See below for detailed account.

³ J Kallaugher, A Weitbrecht, *Developments under the Treaty on the Functioning of the European Union, articles 101 and 102, in 2008/2009*, E.C.L.R. 2010, 31(8), p. 316.

⁴ Opinion of A. G. Kokott in Joined Cases C-628/10 P and C-14/11 P, *Alliance One International Inc. and Others v European Commission and Others*, 12 January 2012.

⁵ Italianer, A, Director General for Competition, *Recent developments regarding the Commission's cartel enforcement*, Studienvereinigung Kartellrecht Conference, 14 March 2012, Brussels. p. 3 www.ec.europa.eu, viewed on 17 May 2012.

in their attempts to overturn the Commission's decisions. In the recent judgments, they demand that the latter does not evade its obligation to state reasons according to an adequate standard or attribute parental liability in the absence of proper examination of evidence.

The need for change

Recent developments in the relevant case law may be viewed as a long-awaited breakthrough in the anti-trust proceedings, beneficial in the wider context of protection of fundamental rights and marking a significant turn in the European competition law or, on the contrary, one may be cautious in considering them to be more than merely a temporary aberrance, unlikely to have a long-lasting effect on the enforcement of the EU anti-trust law due to inconsistent rulings and/or appropriate adjustments in the Commission's policy.

The problem statement

In order to indicate workable solutions concerning the disputed concepts and practices, I have articulated the objective of finding viable arguments, in the context of the relevant body of case law, available for the companies faced with the attribution of joint liability for the conduct of their subsidiaries.

1.2 Delimitations

Case law

The boundaries of my thesis are drawn along the lines of prominent case law of fundamental and exemplary value. The commentary of judgments by the General Court and the Court of Justice is supplemented with Opinions of Advocate Generals. I do not engage in the analysis of primary and/or secondary Union law, i.e. Council Regulation 1/2003.

The scope

In terms of the scope of legal analysis, my focus is concentrated on the following: the application of the presumption of decisive influence; the related concept of one undertaking; the arguments submitted by the companies in rebuttal of the presumption; the commentary on the success and failures of the arguments in the Courts; the Courts' response: the critique and reasoning; potential implications for the companies.

Out of bounds

The actual participation (or lack thereof) in the competition law infringements by the companies in question is not examined. The assessment is limited to the stage of the court proceedings and concerns only the application of the presumption, in the absence of analysis of the Commission investigation, with the exception of addressing the relevant points of the adopted Commission Decisions.

For the purposes of consistency, a number of issues concerning the enforcement of competition rules is not discussed in detail, e.g. the controversies surrounding the imposition of fines.

1.3 Methods and Material

The sources

My sources of reference include the following. The primary importance is attached to the judgments of the GC and the CJEU. Among the cited sources, one will find the relevant Commission Decisions, references to primary and secondary Union legislation. A number of judgments are not currently available in English, therefore, when necessary, the citations are replaced with the accurate re-statement of the Courts' reasoning containing a reference to the relevant paragraph of the judgment in the footnotes.

The rationale behind attributing the primary importance to case law is, in part, due to the lack of substantial references in the Treaty and secondary legislation⁶, including the question of whose turnover is to be calculated in the fining process⁷. For insights and inspiration I turn to *Competition Law of the European Community* by Ivo Van Bael⁸ and numerous legal publications in periodicals. Notice on references: in rare instances, Official Journal reference numbers of cases and the Commission decisions have not been found.

The methods

The methods adopted in writing of this thesis have been chosen in accordance with a casuistic and development-stage character of the disputed issues. The approach of the analysis is as follows: upon an overview of the factual background of the relevant cases, the argumentative method is adopted. It allows arguing in favour of the companies while addressing the reasoning of the Union Courts. Upon statement of the claims submitted by the applicants and the Courts, I offer a reasoned conclusion.

When necessary, the comparative method is adopted in order to deliberate on the evolution undergone by the relevant concepts and/or the position of the Courts.

For the purposes of facilitating the navigation of the chapter content, I have chosen extensive and explanatory chapter titles, complemented by subtitles, dividing subchapters according to the topic and, where necessary, suggestive of the conclusion or used as clarifying remarks, written in cursive.

⁶ Council Regulation (EC) No 1/2003 of 16 December 2002, OJ L 1/1, 4 January 2003, Art. 23(2). In principle, Regulation merely establishes that the Commission may impose fines on undertakings and/or associations of undertakings.

⁷ A Riesenkampff, U Krauthausen, *Liability of parent companies for antitrust violations of their subsidiaries*, E.C.L.R. 2010, 31(1), p. 38.

⁸ I Van Bael, *Competition Law of the European Community*, Walters Kluwer Law and Business, 2010.

1.4 Dispositions

Chapter 2: the theory

I commence by discussing numerous applicable concepts of theoretical and practical considerations. Deliberations in respect of the controversial aspects of terms laid out in this chapter aim at providing clarification as to the root of the disputes between the companies and the Union judicature. The discussion concerns evolution undergone by some of the concepts and their interpretation by the Courts and Advocate Generals.

Chapter 3: the failed claims

The second part of my thesis has been conceived in order to explore the practical side of the parental liability-related proceedings. The intended outcome of this chapter is to assist in navigating the varied reasoning of the Courts in respect of claims aimed at rebutting the presumption. The assessment is limited to the failed arguments in unsuccessful appeals.

Admittedly, the vague and casuistic character of numerous claims limits the extent of comprehensive understanding of the Courts' position; nonetheless, the examination is valuable in predicting arguments unlikely to be favoured by the Courts.

Chapter 4: the potential shift

Finally, Chapter 4 concerns the most recent judgments that sparked the claims of revised attitudes within the Union Courts. In spite of the prevailing ambiguity in respect of the consequences and the lasting effect of the deviating judgments, I consider it of value and importance to examine the issue with the view of determining its implications for the companies at risk of parental liability.

The aim of the assessment is to indicate possible implications for companies attempting to escape the attribution of liability for the conduct of its subsidiaries, in the light of the current line of adjudication of the Union Courts and the likely appropriate adjustments in policy of the Commission.

2 The Relevant Concepts and Controversies

2.1 Introductory remarks

Before launching into a detailed account of the relevant case law, it is of value to provide a brief overview of a number of concepts habitually adopted by the Commission and supported by the Courts in the anti-trust proceedings.

The fundamental notions of ‘undertaking’, ‘joint and several liability’ and other constitutive elements of the enforcement of competition law have been ruled to carry the attributes of ‘an autonomous concept which must be interpreted by reference to the objectives and system of competition law of which it forms part and, where necessary, to the general principles deriving from the national legal systems as a whole’⁹.

The alleged autonomy of terms does not prevent contradictory outcomes, including an internal conflict with fundamental principles of personal responsibility and guilt.

2.2 The Dynamics of ‘Undertaking’ v. Legal Personality

Economic category adopted in legal proceedings

The controversy in the enforcement of the competition rules begins at the attempt to reconcile an EU competition law term ‘undertaking’ with a civil law term of ‘legal personality’. Consequently, I have chosen it as the first concept to be discussed.

⁹ Joined cases T-122/07 et al. Siemens/VA Tech, 3 March 2011, OJ C 140, 23.6.2007, para. 155.

It is argued that at the heart of the issue lies the following. First, an *economic* categorisation of affiliated companies as one undertaking is considered a sufficient *legal* basis for fining the members of the group regardless of their role in the cartel. Furthermore, there is no requirement to impute *individual* liability, on the contrary, the Commission has adopted a practice of the imposition of one fine and imputation of joint and several liability¹⁰.

The case law of the Union Courts provides extensive grounds to refer to the term ‘undertaking’ as an economic concept. The Commission and the Courts adopt an approach favouring the content over the formalities¹¹, thus, despite the lack of a formal definition of what constitutes an undertaking, rulings in *Höfner and Elser*¹², *J. C. J. Wouters*¹³ may serve to illustrate its economic nature. In these judgments, the CJEU has pronounced that “*According to settled case-law, in the field of competition law, the concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed*”.

‘An undertaking’ is a broader term in comparison to ‘legal personality’. Economic entities operating as separate legal entities in terms of civil law may be regarded as one undertaking unified by its conduct on the market as a connecting factor. In *Enichem Anic*, the GC shed some light on the constituting elements of an undertaking; the competition rules concern 1) an economic entity 2) comprised of personal and physical elements (staff and

¹⁰ S Thomas, *Guilty of Fault that one has not Committed. The Limits of the Group-Based Sanction Policy Carried out by the Commission and the European Courts in EU-Anitrust Law*, Journal of European Competition Law & Practice, 2012, Vol. 3, No. 1.

¹¹ C Cauffman, *Quimica: further developing the rules on parent company liability*, Mieke Olaerts, E.C.L.R. 2011, 32(9), 431-440

¹² Case C-41/90 Höfner and Elser [1991] ECR I-1979, para. 21.

¹³ Case C-309/99, *J. Wouters v Commission of the European Communities*, 19 February 2002, para. 46.

assets) that is 3) pursuing a single economic goal and is 4) capable of contribution to the infringement¹⁴.

The decisions aimed at anti-competitive conduct must be addressed to legal or natural persons, not an abstract notion of an undertaking as indicated, first, in the TFEU which provides for sanctioning of persons¹⁵, second, by the Union case law that has repeatedly maintained the necessity to identify and sanction the natural or legal persons responsible for the activities of the undertaking at issue, citing the purpose of enforcement¹⁶.

A 'solely practical purpose'. The addressing of the decisions

The present situation is capable of causing dichotomy regarding attribution of liability as the current business reality dictates that undertakings comprised of multiple companies are tied in complex legal forms and operate on the market at varied degrees of independency.

As AG Kokott has elaborated in her Opinion in the *Akzo Nobel* case, “*The ever increasing complexity of the organisational structure of economic operators can lead to a situation in which an undertaking is made up of more than one company and the natural or legal person actually responsible for a cartel offence is not or not solely the person who appears to outsiders to be the cartel participant*”¹⁷.

Among factors taken into account in determining the relationship between the companies are property rights and shareholders’ agreements. Furthermore, an importance is attached to the composition of the boards of directors¹⁸.

¹⁴ Case T-6/89, *Enichem Anic SpA v Commission of the European Communities*, 17 December 1991, para. 235.

¹⁵ “Acts of the Council, the Commission or the European Central Bank which impose a pecuniary obligation on persons other than States, shall be enforceable” (emphasis added) 299(1) TFEU, Brussels, 30 April 2008.

¹⁶ Case T-6/89, *Enichem Anic SpA v Commission of the European Communities*, 17 December 1991, para. 236.

¹⁷ Opinion of A.G. Kokott in *Akzo Nobel BV v Commission of the European Communities*, (C-97/08 P), 23 April 2009, para. 42.

¹⁸ Competition Law of the European Community, Ivo Van Bael, Walters Kluwer Law and Business, 2010. p. 27.

The impact of the doctrine

It is the doctrine of ‘a single economic entity’ that enables the Commission to sanction the entire corporate groups; it has resulted in EU authorities collecting roughly EUR 10 billion in fines in the period of 2005-2009, an enormous increase in comparison to the almost humble EUR 300 million in the period of 1995-1999¹⁹.

It is, however, essential, according to AG Mazak in his Opinion in *Quimica*²⁰, to establish which companies comprise the relevant economic unit. Notably, the determining, or at least, facilitating, role in this process has been attributed to the adoption of the presumption of decisive influence²¹.

2.3 The Notion of Decisive Influence

The problem: the lack of delimitations

The constituting elements of decisive influence have been central to the debate of attribution of joint liability; and with good reason. The concept has been established and developed in the early case law to serve as a foundation for the attribution of joint liability to companies enjoying separate legal personalities. It would not be an exaggeration to call it the rock on which the theoretical basis for joint liability rests.

First devised in early cases of *Dyestuffs*²², *AEG*²³, the concept has undergone a shift in paradigm: originally, it had been construed in a narrow and defined sense of power to exercise control over the subsidiary’s

¹⁹ S Thomas, *Guilty of Fault that one has not Committed. The Limits of the Group-Based Sanction Policy Carried out by the Commission and the European Courts in EU-Anitrust Law*, Journal of European Competition Law & Practice, 2012, Vol. 3, No. 1.

²⁰ Opinion of A.G. Mazak in *General Química v Commission* [2011] All E.R. (EC) 544; [2011] C.E.C. 606 at [62].

²¹ M Olaerts, C Cauffman, *Quimica: further developing the rules on parent company liability*, E.C.L.R. 2011, 32(9), p. 434.

²² Case 48-69, *Imperial Chemical Industries Ltd. v Commission of the European Communities*, 14 July 1972, [1972] ECR 619, para. 130-140.

²³ Case 107/82 *AEG-Telefunken v Commission*, 25 October 1983, [1983] ECR 3151.

commercial policy. This power means, in essence, that an economic unit, a subsidiary, may, in principle²⁴, be regarded as not acting independently on the market but rather operating under decisive instructions of the parent. As a result, it gives rise to liability on the part of the parent.

Over the years, however, the importance of commercial policy has been undermined in favour of determining the structure of the economic group²⁵; the emphasis has been placed on the establishment of the fact that the economic units in question form one undertaking.

The Akzo Test: two requirements

As regards finding of the fact that companies constitute one undertaking, a test of two cumulative criteria has been devised. Known as the Akzo Test²⁶, it requires that, first, the Commission would prove the capability of the parent company to control the subsidiary as regards its conduct on the market (no presumption applies²⁷) and, second, that it had actually exerted this power.

To facilitate the process as regards the second criterion, the CJEU has allowed the Commission to make use of a rebuttable presumption that the decisive influence has been exerted provided that the subsidiary is wholly-owned by the parent.

The concept has been extended, one may argue, even diluted to encompass somewhat broader terms of economic, legal and organisational links between the entities. As a result, the vastly broadened scope of the

²⁴ T-65/89, BPB Industries Plc v Commission of the European Communities [1993] E.C.R. II-389; [1993] 5 C.M.L.R. 32, para. 149. The use of the phrase “in principle” implies the possibility that the subsidiary does not necessarily act according to the instructions of the parent.

²⁵ L Atlee, Y Botteman, J Joshua, *Cartels and Leniency*, The European Antitrust Review 2012, <http://www.globalcompetitionreview.com/reviews/37/sections/130/chapters/1374/cartels-leniency/>, visited on 13 May 2012.

²⁶ S Thomas, *Guilty of Fault that one has not Committed. The Limits of the Group-Based Sanction Policy Carried out by the Commission and the European Courts in EU-Antitrust Law*, p. 12.

²⁷ *Ibid.* p. 19.

constituting elements of decisive influence has been said to have placed an even higher burden on companies attempting to refute the presumption²⁸.

2.3.1 The Narrow Concept of Commercial Policy

Adopted following practical considerations

In the *Dyestuffs*²⁹ case, the Court refused to adopt a formalistic view and dismissed claims that a separate legal personality of a subsidiary is sufficient in establishing that it acted independently on the market, thus eliminating joint liability of the parent company.

In its judgment, the Court illustrated the notion of decisive influence by pointing out to control of selling prices on the market³⁰. The Court went on to rule that the formal separate status originating from separate legal personalities of the economic entities “cannot outweigh the unity of their conduct on the market for the purposes of applying the rules on competition”³¹.

Control over the commercial policy has also been confirmed as manifestation of decisive influence (in addition to the whole ownership of the subsidiary) in the *Stora Kopparbergs* judgment³².

The term ‘commercial policy’ may encompass numerous business activities. As we have seen in *Dyestuffs*, it includes pricing, “corporate strategy, operational policy, business plans, investment, capacity, provision of finance, human resources and legal matters”³³ as listed in *El duPont*, also “sales targets, gross margins, sales costs, cash flow and stocks”³⁴.

²⁸ Ibid.

²⁹ Case 48-69, *Imperial Chemical Industries Ltd. v Commission of the European Communities*.

³⁰ Ibid., para. 137-138.

³¹ Ibid., para. 140.

³² Case C-286/98 P, *Stora Kopparbergs Bergslags AB v Commission of the European Communities*, 16 November 2000, [2002] ECR II-843, para. 27-28.

³³ T-76/08, *El du Pont de Nemours and Company v The European Commission*, 2 February 2012, OJ C 80/15, 17.3.2012, para. 62.

³⁴ Case T-102/92, *Viho v the Commission*, 12 January 1995, OJ C 54/15, 4.3.95, para. 40.

The rationale behind placing importance on control over commercial policy as indicative of decisive influence of a parent company may be based on practical considerations suggesting that a parent company exercising decisive control over the essential aspects of business listed above is bound to be aware of anti-competitive practices carried out by a subsidiary.

Teleological motives

Moreover, the argument behind placing unity of commercial policy (when the subsidiary follows, in all material aspects³⁵, instructions issued by the parent) at a higher value may be justified in terms of teleological approach.

If the mere fact that two companies have distinct legal personalities would be sufficient to rule out the possibility of attributing liability to the parent company, it would likely result in harnessing the Commission in its pursuit of enforcement of competition rules.

As a result, it would create a leeway for companies to escape responsibility for anti-competitive infringements on purely formal grounds not reflective of the actual relationship between the economic entities.

2.3.2 The Broad Concept of The Economic, Organisational and Legal Links

A formulation open to vast interpretations

The original criteria for decisive influence held the attributes of relative clarity pointing out to defined aspects of the activities of an economic entity, which came in assistance to companies attempting to refute the presumption of decisive influence.

However, the concept underwent modifications and, in recent years, the Courts had been known to place more emphasis on assessing “*the economic, organisational and legal links*”³⁶.

³⁵ See cases 48-69, Imperial Chemical Industries Ltd. v Commission of the European Communities, para. 133., T-76/08, El du Pont de Nemours and Company v The European Commission, para. 26.

The formulation has been repeated in numerous cases; however, as regards the actual content of the said links, the reader is left in the dark. Nowhere in their judgments do the Courts provide further explanation as to the meaning of this notion, thus, in essence, leaving it for the parties' discretion to flesh out the scarce formulation.

Beneficial to the Commission

The discussion as to the rebuttals the undertakings have put forth to fight the presumption of decisive influence may be found below. At this stage, it suffices to note that such a formulation, considerably broad in scope and vague in terms, operates in favour of the Commission. On the one hand, it is supported by the Courts in imposing fines on companies based solely on the presumption of the decisive control.

The parent, on the contrary, may find itself at a loss in its attempts to rebut the accusations as it is forced to prove the independence of the subsidiary based on factors whose identification in the situation of complete control is, it is argued, no easy task, in particular, given the lack of a defined list of what constitutes these links³⁷.

2.3.3 The Exercise of Decisive Influence

A two-fold concept

As the GC has noted in the *Otis*³⁸ judgment, the mere ability of an economic entity to exert decisive influence over a subsidiary appears to be insufficient. The Commission, in its decision against *Otis and others*³⁹, provided

³⁶ See cases C-520/09 P, *Arkema SA v The European Commission*, 14 December 2011, [2009] ECR. I-0000, OJ C 340/2, 19.11.2011, para. 38, C-97/08 P *Akzo Nobel and Others v Commission*, 10 September 2009, para. 58.

³⁷ L La Rocca, *The Controversial Issue of the Parent Company Liability for the Violation of EC Competition Rules by the Subsidiary*, p. 73.

³⁸ Cases T-141/07, T-142/07, T-145/07 and T-146/07, *General Technic-Otis v the European Commission*, 13 July 2011, OJ C 269/44, 10.9.2011, para. 58.

³⁹ The Commission Decision C (2007) 512 final of 21 February 2007 relating to a proceeding under Article 81 [EC] (Case COMP/E-1/38.823 – Elevators and Escalators), OJ 26.3.2008, C 75/19.

reasoning for the imputation of joint and several liability of the parent companies for the infringements of competition rules committed by their subsidiaries “*because they had been able to exercise decisive influence on the subsidiaries’ commercial policy during the time of infringement*”.

However, the GC ruled that, in principle, the Commission required to demonstrate that the influence has in fact been exerted. The Court went on to list “*any management power one [company] may have over another*”⁴⁰ as one of the possible manifestations of the exertion of decisive influence.

The strict approach by the GC may be justified in that the mere ability to exercise decisive influence, or control, is an inevitable legal attribute of a parent-subsidiary relationship. Being the owner of the subsidiary, the parent is bound to be able to exercise control over it.

Disturbance in application

On the other hand, the Court has not been entirely consistent in its approach. For instance, as AG Kokott has noted in her famous *Akzo Nobel* judgment⁴¹, in the *AEG* we see that the Court does not require taking into account whether the power to exercise the decisive influence has been used on the policy of distribution and pricing: it stated that an entirely owned subsidiary “*necessarily follows a policy laid down by the same bodies as, under its statutes, determine’ the parent company’s policy*”⁴².

Moreover, the fact that the influence has not been exercised poses a problem of its own; it may merely indicate that a parent chose a negative line of action, making a decision not to intervene in what may later be assessed by the Commission as infringements of EU competition rules.

The prevailing notion that the influence has to be actually exerted, while providing more tools to defend itself, nonetheless sees the parent company in a difficult position, as the Commission is then merely required to

⁴⁰ *General Technic-Otis v the European Commission*, para. 69.

⁴¹ Opinion of A.G. Kokott in *Akzo Nobel BV v Commission of the European Communities*, (C-97/08 P), 23 April 2009, ECR 2009 I-08237, para. 52.

⁴² Case 107/82 *AEG-Telefunken v Commission*, para. 50.

demonstrate that the subsidiary is wholly owned by the parent to invoke the presumption of decisive control.

2.4 The Presumption of Decisive Influence

2.4.1 The Alleged Source of Legal Certainty

Intermediary companies not immune to the presumption

The enforcement of the competition law requires legal certainty and clarity in rules⁴³. The presumption of decisive influence is one of the factors capable of providing it, according to AG Kokott⁴⁴.

The presumption is as follows; in the particular situation where the parent company owns 100 per cent shares of a subsidiary that has infringed the rules of competition law, a rebuttable presumption comes into play stating that the parent does in fact exercise decisive influence over its subsidiary.

In order to avoid jeopardising the effective application of the presumption, it remains valid in the case of ‘grandparent’ companies as well, when a company owns subsidiaries indirectly, via an interposed company. Were it not the case, parent companies could easily avoid liability by merely applying structural adjustments to the ownership of their subsidiaries⁴⁵.

No requirement for the Commission to adduce additional proof

To invoke the presumption of decisive influence and attribute the joint and several liability in the proceedings concerning affiliated companies, it is

⁴³ C Cauffman, M Olaerts, *Quimica: further developing the rules on parent company liability*, E.C.L.R. 2011, 32(9), p. 434.

⁴⁴ Opinion of A.G. Kokott in *Akzo Nobel BV v Commission of the European Communities*, para. 71.

⁴⁵ C Cauffman, M Olaerts, *Quimica: further developing the rules on parent company liability*, p. 433.

required for the Commission to prove that the subsidiary is fully owned by the parent⁴⁶.

Once the criteria for the invocation of the presumption has been satisfied, the Commission appears to be under no obligation to provide evidence that the subsidiary did not act independently on the market. It is then for the parent company to rebut the presumption in producing evidence demonstrating with sufficient certainty that the subsidiary has not been under the control and management of the parent.

Notably, in the *Spanish Tobacco*⁴⁷ case the Commission proved that it does not at all times rely solely on the presumption, to the ignorance on other possibly relevant factors, however, it has remained an exception to the settled practice. It will be discussed below.

In connection with this exception, it is noteworthy to discuss the two sides of the debate concerning elements or, perhaps, the standard of proof, as AG Kokott puts it⁴⁸, required for the presumption to be applied.

2.4.2 The Strict vs. Broad Reading: Is the Corporate Control Sufficient or is More Evidence Needed?

A previous dichotomy in interpretation

According to the ‘strict’ approach (it is not referred to as such in the relevant literature; I use the term descriptively), favoured by the CJEU and best articulated in the *Akzo Nobel*⁴⁹ judgment, it is sufficient for the Commission

⁴⁶ *Akzo Nobel NV and others v The Commission of the European Communities*, para. 60-61.

⁴⁷ Commission Decision of 20 October 2004 relating to a proceeding under Article 81(1) of the EC Treaty (Case COMP/C.38.238/B.2), Official Journal L 102 , 19/04/2007 P. 0014 – 0014. The Commission closed proceedings against parent companies Universal Corporation, Universal Leaf, Intabex and ANETAB as it considered that it had insufficient evidence of their exercise of decisive influence on the subsidiaries Deltafina, Taes and Agroexpansion.

⁴⁸ Opinion of A.G. Kokott in *Akzo Nobel BV v Commission of the European Communities*, para. 74.

⁴⁹ L La Rocca, *The Controversial Issue of the Parent Company Liability for the Violation of EC Competition Rules by the Subsidiary*, p. 68.

to prove the complete ownership of the subsidiary to the absence of any additional proof.

However, before *Akzo*, there remained doubts as to this requirement. A different point of view emerged suggesting the necessity to supplement the proof of complete corporate control with additional evidence indicating the lack of independence in management and conduct of the subsidiary on the market.

It may be referred to as broad or, perhaps, more lenient, merely to indicate that it provides more tools of defence for the companies, simultaneously restricting the Commission in the way that, were this approach to become prevalent and accepted and/or required by the Courts, it would find itself in the position of applying a higher standard of proof in attributing the joint liability.

Notably, examination of the position adopted by the GC in this regard suggests that it has not been entirely consistent in following the settled case law of the CJEU that, as it has been stated above, favours the position of requiring merely the proof of corporate control.

In *Bolloré*, the GC deviated from the line of the CJEU and suggested that the 100% shareholding, while serving as a strong indication that a decisive influence has been present, “*is not in itself sufficient to attribute liability to the parent for the conduct of its subsidiary... Something more than the extent of the shareholding must be shown, but this may be in the form of indicia.*”

⁵⁰.

Furthermore, the *Stora* judgment has been said to mark the beginning of a period defined by the lack of clarity as regards this issue⁵¹. In its ruling, the GC pointed out that “[T]he parent company in fact exercised decisive influence over its subsidiary’s conduct, particularly since it had found that during the administrative procedure the appellant had presented itself as

⁵⁰ T-136/02 *Bolloré v Commission*, 26 April 2007, [2007] ECR II-947, para. 132.

⁵¹ L La Rocca, *The Controversial Issue of the Parent Company Liability for the Violation of EC Competition Rules by the Subsidiary*, p. 70.

*being, as regards companies in the Stora Group, the Commission's sole interlocutor concerning the infringement in question.*⁵²”

This statement that was not followed by further clarification prevents us from drawing a conclusion whether the Court believed that the circumstance at hand is a decisive circumstantial evidence or, rather, merely one of the pieces of evidence. If the latter was true, the existence of the control over the subsidiary would be sufficient to attribute liability⁵³.

However, if it is the former, it indicates the Court’s willingness to agree with AG Mischo’s Opinion that “*Something more than the extent of the shareholding must be shown, but it may be in the form of indicia*”⁵⁴.

The establishment of no-additional-proof approach

However, AG Kokott, upon assessing the case law of the CJEU in her Opinion in the *Akzo Nobel*, unambiguously rejected the notion (notably, her Opinion was largely reflected in the judgment in the case). According to her, deviation from the presumption to require additional elements of proof finds no basis in previous judgments.

In her arguments, she quotes the aforementioned *Stora*⁵⁵ judgment and rejects the interpretation that the Court admitted the insufficiency of the whole ownership in the imputation of the joint liability when it ruled that the CFI (now the GC) “*did not hold that a 100 per cent shareholding in itself sufficed for a finding that the parent company was responsible*”.

Kokott disagreed that it may be interpreted as a statement about a requirement for the Commission to produce evidence of the actual exercise of decisive influence in the case of whole ownership. She argued that it

⁵² *Stora Kopparbergs Bergslags AB v Commission*, para. 28-29.

⁵³ L La Rocca, *The Controversial Issue of the Parent Company Liability for the Violation of EC Competition Rules by the Subsidiary*, p. 69.

⁵⁴ *Stora Kopparbergs Bergslags AB v Commission*, Opinion of A.G. Mischo [2000] E.C.R. I-9925; [2001] 4 C.M.L.R. 12, para. 48.

⁵⁵ Case C-286/98 P, *Stora Kopparbergs Bergslags AB v Commission of the European Communities*, para. 28.

merely serves as clarification that it is for the parent company to dispute the exercise of its influence by rebutting the presumption⁵⁶.

What we may derive from these deliberations is that the case line of the Courts is capable of appearing ambiguous. However, it may be said with sufficient certainty that, at this stage of the Union competition law, once the presumption of whole ownership has been established, the Commission may merely *choose* to rely on additional evidence and declare the lack thereof⁵⁷.

2.5 The Troublesome Relationship: Personal Responsibility or Collective Guilt?

2.5.1 The Conflict of Terms

Emphasis on the importance of personal responsibility

According to the settled practice of the CJEU, the liability for the infringements of the competition rules is attributed in compliance with the principle of personal responsibility⁵⁸. The GC has followed the lead in stating that ‘*according to the principle that penalties must be specific to the offender and the offence, a natural or legal person may be penalised only for acts imputed to him individually*⁵⁹; that principle applies in any

⁵⁶ Opinion of A.G. Kokott in *Akzo Nobel BV v Commission of the European Communities*, para 56-57.

⁵⁷ Commission Decision of 20 October 2004 relating to a proceeding under Article 81(1) of the EC Treaty (Case COMP/C.38.238/B.2), Official Journal L 102 , 19/04/2007 P. 0014 – 0014. See footnote 43 for more details.

⁵⁸ E.g. see cases C-97/08 P *Akzo Nobel and Others v Commission*, para. 56, C-49/92 P *Commission v. Anic Partecipazioni*, 8 July 1999, para. 145, C-279/98 P *Cascades v. Commission*, 16 November 2000, [2000] ECR I-9693, para. 78, C-280/06 *ETI and Others*, 11 December 2007, [2007] ECR I-10893, para. 39.

⁵⁹ Joined cases T-122/07 et al. *Siemens/VA Tech*, 3 March 2011, OJ C 140, 23.6.2007, para. 122. The GC refers to Joined Cases T-45/98 and T-47/98 *Krupp Thyssen Stainless and Acciai speciali Terni v Commission* [2001] ECR II-3757, para. 63.

*administrative procedure that may lead to the imposition of sanctions under Community competition law*⁶⁰.

In her recent Opinion, AG Kokott has also confirmed the obligation to observe this principle “in criminal and quasi-criminal proceedings”. She elaborated on the role of this principle in setting the limits to the imputability of joint and several liability as regards members of corporate groups. According to her, this principle imposes upon the EU Courts the duty to make it clear whether and on what conditions it is permitted to attribute parental liability⁶¹.

Theory vs. practice

However, Stefan Thomas argues, the claim about the compliance with the principle, repeated by the Court with frequency and conviction, is capable of raising considerable doubts as to its actual application given the sanctioning of the parent companies for the infringements of their subsidiaries irrespective of action or omission on the part of the parent.

The author submits that the current enforcement of competition rules is in breach of at least two fundamental principles: *nulla poena sine culpa* and *in dubio pro reo*.

2.5.2 Possible Breach of *Nulla poena sine culpa* and *In dubio pro reo*?

The alleged application of legal obligation to an economic entity

It has been noted above⁶², for the purposes of legal enforcement of competition rules, the addressee of a Commission decision or statement of

⁶⁰ Ibid., the GC refers to Case T-304/02 Hoek Loos v Commission [2006] ECR II-1887, para. 118.

⁶¹ Opinion of A. G. Kokott in Joined Cases C-628/10 P and C-14/11 P, Alliance One International Inc. and Others v European Commission and Others, 12 January 2012. OJ C 311, 54 22/10/2011.

⁶² See p. 7

objections may be only an entity with legal personality⁶³. An undertaking, however, is a purely economic term devoid of any legal personality, thus, incapable of being bound by legal obligations.

Therefore, it becomes clear that the significance of the issue goes beyond the purposes of enforcement. The question to be asked is the following. If an undertaking, an economic entity, is incapable of being bound by legal obligations, is it possible for it to breach them and, consequently, be held liable for conduct deemed to be considered an infringement?

Potential conflict with fundamental principles

To add to the problem the criminal nature of the fines⁶⁴, the uncertainty as to the actual application of personal responsibility acquires a character of a pressing issue as the bar for the standard of the protection of fundamental rights is raised.

Following the repeated statements of the CJEU that the attribution of personal responsibility constitutes a requirement to be fulfilled for the imputation of liability⁶⁵, one must wonder how it may be reconciled with the current reality of the enforcement of the EU competition rules where parent companies are routinely fined for the conduct of their subsidiaries, with the Union Courts explicitly stating that it is of no importance whether the parent had participated in the infringement or even had been aware of it⁶⁶.

The author submits⁶⁷ that such a state of affairs is contrary to the principles of *nulla poena sine culpa* and *in dubio pro reo* and, as such, is in breach of

⁶³ See 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 A/S and Others v Commission of the European Communities*, [2004] ECR I-123, para. 60, joined cases T-122/07 et al. *Siemens/VA Tech*, para. 134.

⁶⁴ I Forrester, *Due process in EC competition cases: A distinguished institution with flawed procedures*, 34 E.L. REV. December, 2009, p. 823.

⁶⁵ E.g., see *Akzo Nobel and Others v Commission*, para. 56-57, *General Quimica v Commission*, para. 36.

⁶⁶ *Akzo Nobel and Others v Commission*, para. 59.

⁶⁷ S Thomas, *Guilty of Fault that one has not Committed. The Limits of the Group-Based Sanction Policy Carried out by the Commission and the European Courts in EU-Anitrust Law*, p. 16.

the Articles 48-49 of the Charter of Fundamental Rights⁶⁸. It is even said to amount to the application of collective guilt.

Possible distortion of the principle of personal responsibility

If the role of the parent in the infringement is irrelevant and one legal person (notably, Charter of Fundamental Rights does not distinguish between natural and legal persons) may be punished for other legal person's conduct solely on the merits of being members of the same corporate group, then the term 'personal responsibility' loses its accepted meaning and may only be understood as a concept referring to the punishment of persons (for practical reasons of addressing the decision) and not responsibility attributed for personal conduct.

The issue has been raised numerous times by the CJEU and the GC; it resulted in repeated statements that the principle of personal responsibility has to be "brought in line with the notion of undertaking"⁶⁹ as interpreted by the case law⁷⁰.

However, first, the current line of case law suggests it is not put in practice. As we have seen, virtually every relevant judgment places emphasis on the fact that it is based on the concept of one undertaking, a single economic unit, and not on the actual conduct of the parent.

Second, the principle of personal responsibility, established in the Charter of Fundamental Rights and connected to the other indispensable principle of *nulla poena sine culpa*, both playing the role of safeguarding the rights of the defence, is of decidedly more fundamental significance than the notion of undertaking, thus it is not the principle but the concept of undertaking that ought to be reconciled, 'brought in line', with the former⁷¹.

⁶⁸ Charter of Fundamental Rights of the European Union, (2000/C 364/01). EN. 18.12.2000. *Official Journal* of the European Communities. C 364/1, 18.12.2000.

⁶⁹ ThyssenKrupp elevators and escalators, para. 107.

⁷⁰ Siemens/VA Tech, 3 March 2011, para. 122.

⁷¹ S Thomas, *Guilty of Fault that one has not Committed. The Limits of the Group-Based Sanction Policy Carried out by the Commission and the European Courts in EU-Antitrust Law*, p. 16.

Furthermore, the allegation that the current enforcement of competition rules is in breach of the principle of *in dubio pro reo* means that the anti-trust procedure does not ensure the presumption of innocence. The principle may be defined as establishing that an accused person (natural or otherwise) is not only presumed innocent until proven guilty, it also has all doubts operating in its favour. It is not the duty of the accused to prove its innocence⁷².

On the contrary, it is submitted that the doctrine of economic entity is not in compliance with this principle due to the application of the presumption of decisive influence⁷³. Once it may be demonstrated that the subsidiary is wholly owned by the parent, the Commission is no longer under the burden of proving the fact that decisive influence had been exercised; the burden to prove it did not exercise the influence is transferred to the company.

The alleged irrefutability

The author argues that this presumption is, in fact, the opposite of *in dubio pro reo*, as it operates against the company and puts it in the position of having to refute it. In *ThyssenKrupp*⁷⁴, the GC ruled that the presumption does not breach this principle provided it is rebuttable.

This statement does little to provide convincing clarification in the absence of consensus that the presumption is actually rebuttable. Currently, numerous applicants have claimed the irrefutability⁷⁵. Given the lack of guidance, let alone a relatively defined set of requirements, in terms of the legal standards and criteria to be met to have one's rebuttals accepted, the

⁷² The controversial use of criminal law terminology may be warranted by the attitude towards the competition law fines as having a 'clearly' criminal character, a point of view adopted by prominent scholars such as Ian Forrester, Stefan Thomas etc., despite the Commission's insistence on its administrative nature.

⁷³ S Thomas, *Guilty of Fault that one has not Committed. The Limits of the Group-Based Sanction Policy Carried out by the Commission and the European Courts in EU-Antitrust Law*, p. 18.

⁷⁴ *ThyssenKrupp elevators and escalators*, para. 117.

⁷⁵ E.g., the newest cases C-289/11 P *Legris Industries SA v Commission* and C-290/11 P *Comap SA v Commission*.

effectiveness of the refutability is called into question, thus raising doubts as to the observance of the principles at issue.

2.5.3 A Welcome Deviation from Settled Practice

Emphasis on proportionality and effectiveness

In spite of the controversial take on the personal responsibility and disregard of the actual role of the parent in the committal of the infringement, the Commission is capable of offering positive surprises. In June 2010, it adopted a decision⁷⁶ sanctioning multiple producers of pre-stressing steel for cartel agreements comprised of price-fixing and market sharing. Surprisingly, in October 2010, it reduced the fines by EUR 100 million in respect of a number of participants of the cartel.

What inspired the revision was the Commission's review of ArcelorMittal's, one of the offender's, parental liability over its subsidiaries. The Vice-President of the Commission Joaquín Almunia issued the following statement:

“[W]e decided to reduce the fines that have been imposed on the subsidiaries of two groups involved in the pre-stressing cartel. We took this decision because, in this specific case, *the parent companies were liable for only a small proportion of the infringement and therefore the fine, while the subsidiaries were solely liable for a much greater portion of the fine*. In other words, the liability gap was very wide and the normal application of our rules resulted in excessive and non-recoverable fines for the subsidiaries – several times their turnover, in fact. That is why we have greatly reduced the fines we had imposed earlier; a reduction that I consider necessary on grounds of proportionality and effectiveness.⁷⁷”

⁷⁶ Decision 94/215/ECSC of 16 February 1994 relating to a proceeding pursuant to Article 65 of the ECSC Treaty concerning agreements and concerted practices engaged in by European producers of beams (OJ 1994 L 116, p. 1; ‘the initial decision’).

⁷⁷ The speech by Vice-President Almunia at the St Gallen Competition Conference, April 8, 2011. Cited from J Ratliff ‘Major events and policy issues in EU competition law, 2010-11: Part 2’, International Company and Commercial Law Review, 2012, p. 3-4. Emphasis added.

Step in the right direction

It represents a desired, if rare, step in the right direction for the following reasons. First, the Commission indirectly acknowledged the role of personal responsibility in the committal of the breach, admitting that reliance on the turnover of the established ‘undertaking’ irrespective of the actual role of each offender may lead to disproportional and ineffective application of the Union law.

The failure to observe the principle of proportionality leads to unfair decisions, while ineffectiveness may be interpreted as meaning that the objective of deterrence is undermined, i.e., it is unclear from what and who the disproportionate fine is expected to deter⁷⁸.

Notably, the revision of fines on the basis of parental liability has remained an exception, therefore, it may not be referred to as an indication that the Commission has become more inclined to disregard the notion of ‘one undertaking’ and shift its focus on the issue of personal responsibility of each member of the undertaking in terms of setting fines and attributing liability⁷⁹.

2.5.4 The Internal Conflict of the Presumption

The alleged practical irrefutability of the presumption

Granted, the expressed views are controversial, if not bordering on extreme in their stern opposition to the settled practice of the Commission and the Union Courts, however, they touch upon a series of problems that are often overlooked, e.g. the contradictory relationship between the fundamental principles of defence and the central concepts of the enforcement of parental liability in competition law, even in the context of the rare exceptions where

⁷⁸ S Thomas, *Guilty of Fault that one has not Committed. The Limits of the Group-Based Sanction Policy Carried out by the Commission and the European Courts in EU-Anitrust Law*, p. 17.

⁷⁹ J Ratliff, *Major events and policy issues in EU competition law, 2010-11: Part 2*, p. 3.

the Commission adopts a deviating approach and, in fact, acknowledges the issue of personal responsibility.

Possibly one of the most controversial conclusions that may be derived from the considerations above is that the presumption is, in fact, as argued by Stefan Thomas, irrefutable not in the sense of the lack of arguments that the Courts are willing to accept but in the sense that, rather, it carries an internal contradiction.

If the basis for the attribution of joint liability stems from finding that the parent company exercised decisive influence over its offending subsidiary (the presumption facilitates the finding), it would suggest that the exercise of decisive influence is an indication that the parent played a role in the infringement of the competition rules, hence, the imputation of liability.

However, one may not refute the presumption by providing evidence that the parent did not participate in the committal of the infringement⁸⁰. The Union Courts follow a settled practice of maintaining that it is irrelevant whether the parent company has breached the competition rules⁸¹.

If proving that the company did not participate in the infringement does not rebut the presumption even though it would appear that it is what the presumption is aiming at, one may raise a legitimate doubt whether the presumption is actually refutable as such, irrespective of evidence may be submitted by the parties. The Courts, after all, will dismiss it as irrelevant.

Such conclusion would potentially find itself in conflict with Article 48 of the Charter of Fundamental Rights⁸². However, at the current stage of the enforcement of the European competition rules, this approach would find itself labelled as radical at best and is not supported by any of the judgments of the Courts.

⁸⁰ S Thomas, *Guilty of Fault that one has not Committed. The Limits of the Group-Based Sanction Policy Carried out by the Commission and the European Courts in EU-Antitrust Law*, Stefan p. 20.

⁸¹ *Akzo Nobel and Others v Commission*, para. 59.

⁸² 48(2). Respect for the rights of the defence of anyone who has been charged shall be guaranteed.

2.6 Findings. The Application of Concepts: Unsettled and Disputable

The need for reconciliation of concepts

The debate concerning the concepts of competition law indicates a number of unsettling issues. Upon examination of these concepts, the following patterns emerge.

First, a number of authors suggest that the initial conflict stems from the attempt to apply an economic term, or a doctrine of economic entity that is behind the term ‘undertaking’, to legal proceedings; furthermore, the controversy is aggravated by the fact that a non-legal entity is in the focus of the attribution of liability for the breach of legal obligations. It is argued that this doctrine is responsible for the imposition of enormous fines as it warrants the calculation of the fine based on the turnover of the whole corporate group.

Second, this Chapter addresses the presumption of decisive influence and the constitutive elements of the concept. In the context of the initial ambiguity surrounding the application of the presumption, it may be stated with sufficient certainty that, at present, the Courts support the position that, upon the establishment of whole ownership of the subsidiary, the Commission may apply the presumption without adducing additional evidence.

Third, perhaps, the most disputable finding concerns the alleged breach of personal responsibility and practical irrefutability of the presumption. The current case law vehemently rejects the alleged breach, however, there are strong indications pointing to a potential lapse in compliance with the principle of personal responsibility due to the attribution of liability to the parent irrespective of its role in the infringement.

Furthermore, the revealed problematic aspects of the presumption suggest that, first, it implies the existence of the parent's role in the infringement (i.e. by exercising decisive influence, the parent allegedly directed the unlawful conduct), second, the evidence indicating the lack of involvement in that conduct is incapable of refuting it since it has been deemed irrelevant by the Courts.

The implications

In principle, Chapter 2 is indicative of a number of unresolved issues; among suggested solutions - introduction of individual fining on the basis of each company's input in the infringement. The reduction of fines in the proceedings concerning ArcelorMittal indicates that the Commission is, in principle, willing take the issue of personal responsibility into account for the purposes of proportionality and effectiveness. It remains to be seen, however, whether this decision sets the precedent or retains the status of an exception.

The alleged practical irrefutability of the presumption, on the other hand, poses issues that are more complex. Currently, the internal conflict described in the Chapter is problematic on a theoretical and fundamental basis, however, in the practical context, the presumption is regarded 1) refutable 2) by presenting adequate evidence of the autonomy of the subsidiary. The constitutive elements of the 'adequate' evidence are, however, a different matter, one that is not easy to decipher. Chapters below represent the effort in addressing this issue.

3 The Failed Arguments and Rebuttals

3.1 The Rebuttal of the Presumption: Probatio Diabolica?

The continued hardship in the search for rebuttals

In the words of AG Kokott, the age-old saying that parents are responsible for their children is proved again and again in anti-trust proceedings⁸³.

The thorough assessment of the current position of the Union Courts and its impact on the possible conduct of the companies currently operating on the EU market would be incomplete without, first, turning, if briefly, to the early case law in search of the original approach of the Courts and the Commission and, second, discussing the arguments and justifications put forth by the companies in their largely unsuccessful attempts to avoid joint liability.

It is of value in the sense that getting to the root of the past failures of the parent companies provides material for learning from their mistakes and, accordingly, adjusting the corporate conduct for the future.

Since the early judgments in *ICI*⁸⁴ and *AEG*⁸⁵, parent companies facing sanctions for anti-competitive conduct, must produce evidence of the independence of their subsidiaries. With passing of the *Stora* judgment, in the situation of the whole ownership of the subsidiary, they are faced with a rebuttable presumption of decisive influence that, with an alarming lack of

⁸³ Opinion of A. G. Kokott in Joined Cases C-628/10 P and C-14/11 P, *Alliance One International Inc. and Others v European Commission and Others*, 12 January 2012.

⁸⁴ Case 48-69, *Imperial Chemical Industries Ltd. v Commission of the European Communities*.

⁸⁵ *AEG-Telefunken v Commission*.

success stories from which to draw inspiration, leaves them in a difficult position of assessing what evidence of independence would be accepted by the Commission and the Courts.

There are numerous factors rendering the defence difficult to organize and complicated in the vagueness of its requirements. First, the companies may find themselves on unequal footing with the Commission as the latter may merely make use of the presumption of the decisive influence in order to impute the joint liability.

However, in turn, it transfers the burden of proof to the company that must subsequently produce sufficient evidence of the autonomy of the subsidiary in terms of its conduct on the market, to a degree that it may demonstrate that the companies could not be considered one undertaking for the purposes of the Article 101 TFEU⁸⁶.

Reliance on vague criteria

What renders it largely indefensible, however, is that the exertion of the decisive influence may be inferred from a decidedly vague set of indirect, circumstantial evidence that is represented by the concept of economic, organisational and legal links favoured by the Courts in their recent judgments⁸⁷.

In fact, authors argue that the task of adducing proof of a negative fact, i.e. the lack of control, amounts to *probatio diabolica* and, consequently, renders the presumption *de facto* irrebuttable⁸⁸.

Ultimately, the requirement to demonstrate that the subsidiary did not act under the control of the parent to such a degree as to constitute one undertaking is in conflict with the reality of the business where the parent of

⁸⁶ L Atlee, Y Botteman, J Joshua, *Cartels and Leniency*.

⁸⁷ E.g. see *Arkema SA v The European Commission*, para. 38, *Akzo Nobel and Others v Commission*, para. 58.

⁸⁸ S Sorinas, *ECJ Clarifies Parental Liability Rules for Competition Infringements Committed by Wholly-Owned Subsidiaries*, *Case Comment*, Euro. News. 2009, 66(Nov), 1-3.

one or numerous members of the group operating in the form of the subsidiaries inevitably retains the legal power over companies that it owns. Nonetheless, the companies have made their attempts and in the following subsections, I will examine the arguments they put forth.

3.1.1 The Alleged Requirement of ‘Direct and Irrefutable’ Evidence

The claim of the applicant: The standard for proof is too high

In its appeal before the General Court in the *Arkema* proceedings, the appellant maintained that the possibility to produce “direct and irrefutable” proof of the autonomy of the subsidiary on the market is simply non-existent, thus this requirement ought to be deemed ‘*probatio diabolica*’, consequently, the presumption itself irrefutable.

The Court’s response: Allegation rejected as unfounded

The GC rejected the claim. It ruled that no requirement of direct and irrefutable evidence exists. On the contrary, it elaborated that the required evidence is to be merely ‘*capable of demonstrating that independence*’ (the GC also used the phrase ‘adequate evidence’⁸⁹). It added that the failure on the side of the parties to adduce evidence capable of rebutting the presumption does not indicate that the presumption ‘*cannot under any circumstances be rebutted*’⁹⁰.

When the appeal was brought before the CJEU⁹¹, the latter upheld the position of the GC. The Court also cited a remark expressed by the Commission that the capability to rebut the presumption does not mean it ought to be easy to do so⁹².

⁸⁹ Case T-168/05 *Arkema v Commission*, 30 September 2009, para. 100.

⁹⁰ *Ibid.*, para. 82.

⁹¹ Case C-520/09 P, *Arkema v. European Commission*, 14 December 2009, OJ C 340/2, 19.11.2011.

⁹² *Ibid.*, para. 29.

The viability of the argument: Low

What may be learned from the failure of this argument is that neither the GC nor the CJEU is willing to doubt the very refutability of the presumption. Thus the companies willing to save themselves from joint and several liability, given the current dispositions of the Union judicature, are advised against questioning the refutability of the presumption.

3.1.2 Parent Acting as a ‘Non-operational Holding Company’

The claim of the applicant: A holding company maintains only a financial interest

In the same proceedings before the General Court, in order to establish the independence of Arkema, a claim had been put forth that its parent company Elf Aquitaine acted merely as a “non-operational holding company that rarely intervenes in the management of its subsidiaries”⁹³. The Commission strongly disagreed and responded that, had it sufficed to refer to this argument to rebut the presumption, the latter would be stripped of its effectiveness.

The Court’s response: Insufficient proof as to the strictly limited interest.

The GC agreed and maintained that this argument is not sufficient “*to rule out the possibility*” that it had exercised decisive influence in regard of the subsidiary.

It elaborated that a holding company is in a position to influence the appellant’s (Arkema) conduct in the form of coordination of financial investing within the Elf Aquitaine group: “*In the context of a group of companies, a holding company that coordinates, inter alia, financial investments within the group is in a position to regroup shareholdings in*

⁹³ Ibid., para. 76.

various companies and has the function of ensuring that they are run as one, including by means of such budgetary control.”⁹⁴

Furthermore, Arkema maintained that it enjoyed independence in respect of financial affairs and was controlled by Elf Aquitaine solely in terms of investment/divestment operations that had been directed at long-term financial operations.

When reviewing the appealed judgment, CJEU stated that despite the lack of direct action on the market, a holding company of this kind may nonetheless influence the subsidiary “*in view in particular of its function of coordination and financial management*”, consequently, the application of the presumption is not flawed in the situation of whole ownership⁹⁵.

In *Shell*, the GC reached a similar conclusion. It ruled that, in order to rebut the presumption, the fact that Shell Petroleum was a non-operational holding company whose participation in the management of its subsidiaries was very limited was insufficient. The Court pointed out to the coordination of financial investments of the group and submitted that such budgetary control ensures a unitary control of the group, hence, may be deemed to be exercising decisive influence over its affiliates⁹⁶.

The viability of the argument: Generally low; includes exceptions (see further chapters)

A conclusion may be drawn from this that invocation of an argument of a formal relation between companies is insufficient to rebut the presumption. The rationale is that even a holding company whose interest in the subsidiary is allegedly limited to financial operations, in the eyes of the Courts, is nonetheless in a position to ensure the subsidiaries act in a unified manner in terms of structural changes or, budget-related affairs, thus, is

⁹⁴ Ibid., para. 76.

⁹⁵ Ibid., para. 48.

⁹⁶ Case T-38/07, *Shell Petroleum v. the Commission*, 13 July 2011, OJ C 269/40, 10.9.2011, para. 70.

capable of being regarded one undertaking for the purposes of Article 101 TFEU.

The rejection of the argument on the basis that the mere possibility of coordinative action, according to the Court, may not be “ruled out”⁹⁷ poses certain problems in terms of its consistency.

First, the requirement for “clear rules” and legal certainty⁹⁸ would suggest that condemning a company to be held liable for an infringement of competition rules and face fines of potentially millions of Euros on the basis of the mere likelihood of coordinative action does not constitute a sound argument.

Second, clarification is needed as to the reasons to reject the argument at issue, however, subsequently, if on limited occasions, to accept the essentially identical argument of ‘pure financial interest’ (see Chapter 4.2 Success of the Financial Argument: Alliance One).

3.1.3 Operation on Different Markets

The claim of the applicant: Separate spheres of operation

Further in the *Arkema* judgment, the GC rejected the notion that the independence of the subsidiary may be inferred from the fact that it operated on a different market than the parent company and, additionally, shared no connections as regards the base of customers and suppliers⁹⁹.

The Court’s response: Ordinary business practice fails to prove the autonomy

In its response, the GC expressed support to the Commission’s view that it is not contrary to the nature of a large group such as Elf Aquitaine but rather

⁹⁷ Case *Arkema v. European Commission*, para. 76.

⁹⁸ Opinion of A.G. Kokott in *Akzo Nobel BV v Commission of the European Communities*, para. 71.

⁹⁹ Case T-168/05 *Arkema v Commission*, 30 September 2009, para. 80.

an ordinary practice to adopt a “*division of tasks*”¹⁰⁰ which in no way may be presented as evidence that companies do not constitute one undertaking. The CJEU did not object to these findings.

The viability of the argument: Low

One may agree with the Court’s ruling in the sense that division such as described above does not in itself contain an explanation why a parent company operating on a separate market could not at the same time exercise decisive influence over its subsidiaries.

The failure of this argument indicates that a reference to ordinary practices of business conduct is unlikely to be considered a convincing piece of evidence by the Commission or the Courts.

3.1.4 Absence of a Reporting System on the Operational Matters

The claim of the applicant: Strictly limited connections between the companies

Yet another argument presented in the Arkema case was the absence of a reporting system to the parent company by the subsidiary on the market (specifically, it was a market for monochloroacetic acid, or MCAA)¹⁰¹.

The Court’s response: Deemed insignificant

Like numerous attempts before it, it failed to impress the Courts as it was deemed insufficient to rebut the presumption even if it had been proved.

As the Courts did not elaborate further, it is suggestive of their view that it is an insignificant point, not nearly as decisive as required to rebut the presumption of influence.

¹⁰⁰ Decision C(2004) 4876 final of 19 January 2005 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/E-1/37.773 – MCAA, recital 261.

¹⁰¹ Arkema SA v The European Commission, para. 78.

The rationale behind it may be connected to the desire on the part of the Courts for a consistent and comprehensive set of evidence as opposed to detached manifestations of business operation within the corporate group.

To illustrate, one may recall the famous Kokott Opinion (largely followed by the CJEU and held in high regard for its explanatory value) where she argued that “*the absence of such a single commercial policy as between a parent company and its subsidiary can be established only on the basis of an assessment of the totality of all the economic and legal links existing between them*”¹⁰².

Moreover, in *General Quimica* it was ruled that even though the parent-subsidiary relationship was defined by a mere authorization by a parent of the sale of subsidiary’s shares or real property, the lack of ‘operational’ character in these matters did not prevent them from constituting a convincing piece of evidence that the parent “*intervened significantly... in certain essential aspects of [the subsidiary’s] policy*”¹⁰³.

The viability of the argument: Low

In the absence of a detailed account by the Court, the following reasoning as to the failure of this argument may be suggested. First, it was deemed to be insufficient on its own merits, second, a number of cases, e.g. *Quimica*, suggest that the a positive response from the Court is more likely provided that the Court is presented with a comprehensive set of proof referencing economic, organisational and legal links.

3.1.5 Involvement of the Parent Solely in ‘High’ Strategic Decisions

The claim of the applicant: Influence only on the highest level

¹⁰² Opinion of A.G. Kokott in *Akzo Nobel BV v Commission of the European Communities*, para. 91.

¹⁰³ Case C-90/09 P *General Química and others v. Commission*, OJ C 80/2, C 80/2, 20 January 2011,

Similarly, in the case of *Total and Elf Aquitaine*¹⁰⁴, an argument had been submitted that the parent company had been merely involved in the adoption of high-level strategic decisions of the whole corporate group, in the absence of any activity by the parent in the process of implementation of the subsidiary's commercial policy or the business territory.

The Court's response: a possible indication of influence, not a rebuttal

The GC did not, however, find the argument convincing. On the contrary, it ruled that the parent company could have been considered to exercise decisive influence in the form of ensuring the unity of the corporate group, as it would make assessments of varied activities within the group and the geographical location of the companies group-wide¹⁰⁵.

The viability of the argument: Low

What may be learned from the failure of these and similar operational affairs-related arguments is that the Courts take into account a vast variety of forms of intervention by the parent companies and do not limit themselves to a particular kind of influence.

Furthermore, it may be derived that, quite the contrary to what the applicant had sought to achieve, a proof of influence concerning high level strategic decisions is more likely to reflect the assertion that the companies constituted one undertaking where the parent carried the responsibility of managing the corporate group as a unit.

3.1.6 Influence Limited to the Requirements of the

¹⁰⁴ Case T-190/06 *Total and Elf Aquitaine v. Commission*, 14 July 2011 OJ C 269/40, 10.9.2011.

¹⁰⁵ I Vandendorpe, T C Goetz, *Rebutting the Presumption of Parental Liability – a probation diabolica?*, *The International Comparative Legal Guide to: Cartels & Leniency*, 2012, http://www.iclg.co.uk/index.php?area=4&show_chapter=4924&ifocus=1&kh_publications_id=220, viewed on 17 May 2012.

Obligations under Applicable Law

The claim of the applicants: Influence dictated by law

In their efforts to rebut the presumption, the applicants in *Otis* submitted the argument that the supervision of its subsidiary was limited to the requirements of the applicable law in respect of the subsidiary's duties to its shareholders¹⁰⁶.

The Court's response:

The Court disagreed. Scarce reasoning, however, prevents detailed deliberations in respect of this argument. The sole commentary offered refers to the fact that this claim lacks a decisive character and, subsequently, is incapable of rebutting the presumption¹⁰⁷.

Moreover, according to the GC in *Total and Elf Aquitaine*, the independence of a subsidiary is evaluated not only as regards the operational matters but in respect of a decidedly wider set of links between the companies, therefore the communication in the form of reports between the parent and the subsidiary on regulatory and financial affairs in accordance with the requirements of law could not rebut the presumption.

The viability of the argument: Low

Arguments of this kind have not been frequent, hence the scarce case law on the subject. However, on the basis of what we have now, it may be presumed that parent companies would have a difficult time convincing the Commission or the Courts that the requirements of applicable law as regards the control of the subsidiary's actions may somehow rebut the presumption or provide a justification for the use of decisive influence that could warrant non-application of the parental liability.

¹⁰⁶ General Technic-Otis v the European Commission, para. 84.

¹⁰⁷ *Ibid.*, para. 83-84.

3.1.7 The Implementation of a Compliance Programme by the Parent

The claim of the applicant: The existence of a programme of compliance with competition rules

This argument, put forth in *Otis*¹⁰⁸, appears, at least initially, to be sound. Implementation of a programme of compliance with competition rules should indicate not only the company's determination to refrain from breaches of anti-trust law but also ensure that its affiliated companies follow the lead.

The Court's response: Compliance programmes indicate dependence, not autonomy

The GC, however, was in disagreement¹⁰⁹. The Court began by stating that the presentation of "formal written policies for compliance with competition law" is incapable of rebutting the presumption for the following reasons. It argued that the existence of such policies does not indicate the independence of the subsidiaries on the market as regards their commercial policy.

Quite the contrary, the GC interpreted the compliance with the imposed policies as a possible indication that the subsidiaries do not operate on an independent basis. While it certainly could not be referred to as an illogical conclusion, it raises the question whether there is *anything* a parent company can do to avoid joint and several liability.

Notably, the applicant argued that it is contrary to common sense and fundamental principles of justice to refer to the existence of instructions devised to prevent unlawful conduct in order to impute joint liability for that conduct when the said guidelines are not complied with by the subsidiaries.

The Court, however, rejected the claim stating that it is based on incorrect interpretation that the liability itself was established on the basis of the fact that the instructions existed. The actual basis for establishment of liability

¹⁰⁸ General Technic-Otis v the European Commission.

¹⁰⁹ *Ibid.*, para. 85-87.

was in fact the presumption of decisive influence¹¹⁰, thus the existence of the said guidelines is irrelevant, at least in the eyes of the Court.

It also dismissed claims that the disobedience of the instructions by the employees of the subsidiaries supports the position that the subsidiary acted autonomously. The Court noted that the distinction between subsidiaries of Otis and their employees is “artificial” as they are an integrate part of the companies in the economic sense and, consequently, are a part of the undertaking.

The viability of the argument: Low

While it may appear illogical to an extent, the position of the Court may be explained with a reference to the doctrine of one undertaking or a single economic entity adopted by the Union Courts.

As it has been pointed out above, the participation of the parent company in an infringement or lack thereof is irrelevant because the joint and several liability of a parent company is attributed upon the establishment of the fact of the existence of decisive influence resulting in the companies constituting one undertaking, “*without having to establish the personal involvement of the latter in the infringement*”¹¹¹.

The adopted position puts companies in an unenviable position where practical efforts to prevent the infringements of competition rules in the corporate group may result in a conclusion by the Union judicature that their subsidiaries lacked autonomy on the market.

As a result, compliance programmes constitute a commendable effort, however, one ought not to be under the illusion that they would be of a measurable benefit in fighting the Commission’s claims.

¹¹⁰ The Commission Decision C (2007) 512 final of 21 February 2007 relating to a proceeding under Article 81 [EC] (Case COMP/E-1/38.823 – Elevators and Escalators), recital 615.

¹¹¹ Akzo Nobel and Others v Commission, para. 59.

3.1.8 The Absence of Interlocking Board Memberships

The claim of the applicant: No inter-board relations

In *Otis*, the applicant also maintained that the autonomous status of the subsidiary may be derived from the absence of joint membership of directors of respective companies.

The Court's response

The Court, in agreement with the Commission, ruled that the independence of commercial policy may not be decisively established based on the fact that the parent and the subsidiaries have separate “governing and managing organs”¹¹².

The same conclusion had been reached in the *ThyssenKrupp* judgment¹¹³ where it had been reiterated that it could not be a decisive factor and that the influence of the parent over subsidiary's decisions could nonetheless be inferred from the “organisational, economic and legal links” between the companies¹¹⁴.

The viability of the argument: Low

Taking into consideration the frequent emphasis placed by the Courts on the economic, organisational and legal links between the companies, one may suggest that the argument at hand has the potential to be viable provided it constitutes a part of the evidence submitted by the applicants but is deemed to be considered insufficient when taken on its own.

¹¹² General Technic-Otis v the European Commission, para. 83.

¹¹³ Joined Cases T-144/07, 147-150/07 and 154/07 ThyssenKrupp v. Commission, 13 July 2011, [2001] ECR II 3757.

¹¹⁴ I Vandendorpe, T C Goetz, *Rebutting the Presumption of Parental Liability – a probation diabolica?*

3.2 Findings: Excessively High Threshold for Evidence

Assessment exceeds the operational side of business

What may be drawn from reviewing a wide variety of grounds for the rebuttal of the presumption submitted by the concerned companies is that The Union Courts apply a decidedly high threshold as regards evidence aimed at rebutting the presumption. When assessing the claims put forth by the applicants, the Courts have proved to apply standards so high they may be branded as excessive.

The findings of this Chapter may be summarized as follows:

First, the Courts and the Commission are immune to arguments referring to the ordinary business practices; division of markets and similar business strategies have failed to be considered as proof of the autonomous conduct.

Second, formal effort to prevent the participation in competition law infringements in the form of compliance programmes is ineffective for the following reasons. It does not indicate the autonomy of the subsidiary (on the contrary); moreover, it is irrelevant as the attribution of liability depends on the existence of decisive influence over the subsidiary and not the participation or lack thereof of the parent in the infringement.

Third, the argument possessing the highest degree of viability is that of non-operational holding company. While it has failed as incapable of removing the possibility of coordinative action, there are indications that the submission of evidence that the company maintains a strictly financial interest in the subsidiary may be sufficient to rebut the presumption. In that respect, *Alliance One* enjoyed more success. The discussion concerning the judgment may be found in Chapter 4.

4 The Shift: a String of Successful Appeals

4.1 Introductory Remarks. The Viability of ‘Pure financial interest’

The attitude: Caution vs. Optimism

The recent developments may be assessed from two perspectives. On the one hand, a string of successful appeals to annul the Commission’s decisions where companies succeeded in avoiding parental liability have been dismissed as questionable success based on merely procedural inadequacies that failed to provide any material guidance as regards the rebuttal of the presumption that remained as solid, or, as it appears from the practical perspective, as irrefutable as ever.

On the other hand, it must be taken into account that before the series – admittedly, a short one - of annulments, no companies had managed to convince the Courts in their favour. It warrants an optimistic view promising a more stringent legal review.

Potential exceptions of financial nature

Notably, there have been attempts to offer guidance on possible exceptions to the presumption of decisive influence in the case of whole ownership, AG Kokott’s Opinion¹¹⁵ being among the more authoritative examples.

In her Opinion, she cites the Commission and lists three rebuttals that, according to her, are capable of “*demonstrating that [the company] exercised restraint and did not influence the market conduct of its subsidiary*”.

¹¹⁵ Opinion of A.G. Kokott in Akzo Nobel BV v Commission of the European Communities, footnote 67.

First, the interest in the subsidiary must be of purely financial nature, i.e. the parent is an investment company and acts accordingly; second, the ownership of 100% shares is temporary and not intended for an extensive period of time; third, the parent is unable to exercise full control over the subsidiary on a law-related basis. Usage of the word ‘examples’ indicate that these conditions are neither accumulative nor constitute an exhaustive list.

4.2 Success of the Financial Argument: Alliance One

4.2.1 A Holding Company with No Activity

The claim: Pure financial interest

*Alliance One*¹¹⁶ judgment has been branded as a ray of hope¹¹⁷ in respect of acquiring a better understanding of what could constitute a viable rebuttal of the presumption. The company concerned was not Alliance One itself but its intermediary holding company, a subsidiary of the ‘ultimate’ parent. It managed to make use of the argument of ‘purely financial interest’ to achieve the annulment of the Commission decision as far as it concerned it on its merits rather than on procedural grounds.

The potential limitations

It is noteworthy that, for the following reasons, it is not entirely clear whether this judgment may be regarded as a textbook; first, the ultimate parental company concerned was Alliance One, formerly known as Standard Commercial Corp., ‘SCC’, which did not enjoy the whole ownership of the subsidiary (World Wide Tobacco España, ‘WWTE’)¹¹⁸), holding two thirds

¹¹⁶ Alliance One and others v. European Commission.

¹¹⁷ I Vandendorpe, T C Goetz, Rebutting the Presumption of Parental Liability – a probation diabolica?

¹¹⁸ Alliance One and others v. European Commission, para. 34.

of its shares. Second, the subsidiary's shares had been held through an intermediary (Trans-Continental Leaf Tobacco, 'TCLT'), a holding company that was considered by the GC to carry out no commercial activities.

However, these circumstances do not negate the potential of the judgment to become a landmark decision. As it has been established, first, the presumption deriving from the ownership of shares applies not only in situations when the parent enjoys direct ownership of the subsidiary but also in cases when the connection is facilitated through an intermediary company, or an "interposed subsidiary"¹¹⁹ such as in the case at issue.

Furthermore, recent judgments concerning joint ventures¹²⁰ serve as an illustration that in order to be held jointly and severally liable it is not required for parent companies have full ownership of the subsidiary¹²¹.

The Court's response

While the 'ultimate' or, in the words of AG Mazak, the 'grandparent' company had been held liable for the infringements of its subsidiary, in respect of the intermediary subsidiary TCLT, the General Court ruled that material relied upon by the Commission in its decision¹²² did not offer grounds for drawing the conclusion that it, the intermediary, had actually exercised decisive control over WWTE during the relevant period of time.

¹¹⁹ Opinion of A.G. Mazak in *General Química v Commission* [2011] All E.R. (EC) 544; [2011] C.E.C. 606 at [81].

¹²⁰ See cases T-7708, *Dow Chemical v Commission*, 2 February 2012, OJ C 80/15, 17.3.2012, T-76/08, *El DuPont de Nemours and Others v Commission*, 2 February 2012, OJ C 80/15, 17.3.2012.

¹²¹ H Urlus, *Parental Liability for Controlling Stakeholders of a (Full Function) Joint Venture*, *The National Law Review*, 14 February 2012, <http://www.natlawreview.com/article/parental-liability-controlling-stakeholders-full-function-joint-venture> (viewed on 17 May 2012). In judgments concerned, the joint liability had been applied despite the fact that, first, the parent companies each had 50% shares of the subsidiary, second, were prevented from imposing decisions on the venture and, third, the venture had the status of a "full function" venture as defined in the Merger Regulation.

¹²² Decision C(2004) 4030 final of the Commission of 20 October 2004, relating to a proceeding under Article 81(1) [EC] (Case COMP/C.38.238/B.2 — Raw tobacco — Spain).

The argument cited by the Court was that it was “*a company with no activity of its own and whose interest in WWTE [was] purely financial*”¹²³.

Further, without getting into a detailed account of the factual background of the case, the GC elaborated that the attribution of certain purchases carried out by WWT, the subsidiary, to the interposed subsidiary, had been done merely for “accounting and fiscal reasons”. The Court concluded by stating that, while some factors may point to an interest held by TCLT, they do not suffice to maintain that it had actually exercised decisive influence over the subsidiary¹²⁴.

The viability of the claim: High

The grounds for the dichotomy in assessment by the Court are not entirely clear; on the one hand, the non-operational holding company argument had been rejected in the *Arkema* judgment as failing to eradicate the potential for the exercise of decisive influence.

On the other hand, here we see a reversal of the argument; the Court now asserts that there is insufficient proof of the exercise of influence due to ownership of the company for financial motives only.

The citation of the reasoning of the GC¹²⁵ indicates that the potential success of this argument may require a certain condition to be fulfilled. The company ought to carry out no commercial activity as regards the subsidiary in question. The only activity that appears to be accepted by the Court must be of strictly fiscal character.

¹²³ Alliance One and others v. European Commission, para. 195.

¹²⁴ Ibid., para. 196.

¹²⁵ See footnote 106.

4.2.2 Private Equity Fund as Potential Recipient of a Fine: Goldman Sachs and Arques

A deviation from the acceptance of financial interest?

TCLT avoided liability upon the establishment that it operated out of purely financial interest. However, the holders of interests limited to financial character cannot, as of yet, expect this argument to succeed at all times.

In 2009, a German private equity fund Arques had been found jointly liable with one of its investments, SKW Stahl-Metallurgie¹²⁶. Currently, Arques' appeal is pending. The Commission's determination to attribute joint liability in the private equity context was confirmed in 2011, when Goldman Sachs admitted that it had been sent a Statement of Objections by the Commission.

The Commission seeks to hold it liable for an Italian enterprise Prysmian operating on the power cable market that currently is under the Commission's investigation for cartel-related infringements. In 2005, Prysmian was indirectly controlled by Goldman Sachs Group Inc.¹²⁷ via its direct private investment fund GC Partners¹²⁸.

The relevance of the Arques' decision and the current investigation stems from the companies' investment-related interest in the subsidiaries. A private equity fund is an investment company¹²⁹. Its activity is limited to investment and sale of companies, therefore, in theory, it ought to be able to make use of the argument of 'pure financial interest'.

¹²⁶ Commission Decision. C (2009) 5791 final of 22 July 2009 in Case COMP/39.396 - Calcium carbide and magnesium based reagents for the steel and gas industries, OJ C 301/18, 11.12.2009.

¹²⁷ <http://www.prysmian.com/about-us/history.html>, visited on 14 May 2012.

¹²⁸ Private Equity and Competition Law: Liability for Infringements by Portfolio Companies, Slaughter and May, July 2011, <http://www.slaughterandmay.com/media/1752856/private-equity-and-competition-law-liability-for-infringements-by-portfolio-companies.pdf>, visited on 14 May 2012.

¹²⁹ Farlex Financial Dictionary, <http://financial-dictionary.thefreedictionary.com/Private+Equity+Firm>, as it was on 5 May 2012.

While the Courts' position as regards consistency in assessing the argument of pure financial interest remains to be seen, the question concerning delimitations of terms arises. Clarification is needed to determine the conditions and circumstances when the EU judiciary is willing to accept the argument. Currently, it appears that the Commission and the Courts have adopted dissenting views as regards the issue.

It has been suggested that certain steps may be taken in effort to avoid the situation in which Goldman Sachs and Arques have found themselves. First, the investor, upon leaving the investment, could attempt to secure contractual protection from liability by signing appropriate agreements with the purchaser or the investee at the time of investment or exit¹³⁰. It has been said to pose difficulties in practice, furthermore, the effectiveness of such measures is yet to be seen.

4.2.3 Findings. The Inconsistency Remains

The practice remains unsettled

In terms of success of the argument of 'pure financial interest', the impact of *Alliance One* remains unclear. It is to be seen whether the Union Courts will follow this ruling and be more willing to accept the argument.

As the earlier case law suggests¹³¹, similar attempts had been less than successful, with Courts reasoning that a status of a holding company does not eradicate the potential for it to be in a position to coordinate the conduct, even if merely financial, to the extent that would amount to ensuring they run as one undertaking, as it has been ruled in the *Arkema*¹³² and *Shell*¹³³ judgments.

The Commission's unwillingness to accept the argument

¹³⁰ *Private Equity and Competition Law: Liability for Infringements by Portfolio Companies*, Slaughter and May, Briefing, July 2011, <http://www.slaughterandmay.com/media/1752856/private-equity-and-competition-law-liability-for-infringements-by-portfolio-companies.pdf>, viewed on 17 May 2012.

¹³¹ *Arkema v. European Commission*, para. 76.

¹³² *Ibid.*

¹³³ *Shell Petroleum v. the Commission*, para. 70.

Moreover, the recent issue of the Statement of Objections to Goldman Sachs and a decision in respect of Arques suggest that the Commission is not willing to give the green light on the basis that the company retains a strictly financial interest in a subsidiary. It appears that at present the application of the ‘purely financial interest’ is narrow and draws support only from the Courts.

4.3 Failure to Address Parties’ Arguments: *Elf Aquitaine, Air Liquide and Grolsch*

The obligation to state reasons: failures of the Commission

In the recent years, several parent companies successfully appealed the imposition of fines by the Commission. These judgments addressed the failure on the part of the Commission to address the evidence and arguments submitted by the companies in question.

Handing down these judgments, the CJEU cited Art. 253 EC (now 296 TFEU) that contains the requirement to “state the reasons on which [the decisions] are based”¹³⁴ sent an unequivocal signal to the Commission that the existence of the presumption of decisive influence does not in any way release it from the obligation to provide a reasoned account of evidence submitted by parties in their effort to prove the autonomy of their subsidiaries.

¹³⁴ The old Article 253 established the following: “Regulations, directives and decisions adopted jointly by the European Parliament and the Council, and such acts adopted by the Council or the Commission, shall state the reasons on which they are based /.../”, Treaty establishing the European Community (Nice consolidated version), Official Journal C 325, 24 December 2002. Currently, Art. 296(2) TFEU states: “Legal acts shall state the reasons on which they are based and shall refer to any proposals, initiatives, recommendations, requests or opinions required by the Treaties”, Official Journal of the European Union C 115/49.

4.3.1 The Harsh Critique: *Elf Aquitaine*

4.3.1.1 The History of the Proceedings

Attribution of liability by the GC on the basis of the presumption

In previous chapters, *Arkema* judgment had been cited¹³⁵ as an illustration of failed attempts at rebutting the presumption of decisive influence. Its parent Elf Aquitaine, however, proved to be more successful in its appeal. In 2005, Elf Aquitaine, along with its subsidiary Arkema, had been held jointly and severally liable for the participation in a cartel on a monochloroacetic acid market and fined EUR 45 million¹³⁶. The companies brought individual appeals before the GC, however, their claims had been deemed unfounded and, subsequently, the appeals were dismissed¹³⁷.

The reasoning relied on by the GC may be summarized thusly: the Court supported the Commission in its application of the presumption of decisive influence in respect of the parent company Elf Aquitaine and maintained that it had failed to adduce sufficient evidence as to the alleged independence of Arkema¹³⁸.

Separate appeals by the companies to the CJEU followed, and, in September 2011, the CJEU set aside the judgment of the GC in respect of Elf Aquitaine annulling the fine of EUR 45 million¹³⁹.

¹³⁵ See, in particular, sections 5.1.1., 5.1.2., 5.1.3.

¹³⁶ Decision C(2004) 4876 final of 19 January 2005 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/E-1/37.773 – MCAA).

¹³⁷ Case T-168/05 *Arkema SA v Commission* and Case T-174/05 *Elf Aquitaine SA v Commission*.

¹³⁸ The Court of Justice has set aside the judgment of the General Court and the Commission Decision in so far as the latter imputed to Elf Aquitaine participation by its subsidiary, Arkema, in a cartel on the market for monochloroacetic acid, Press Release No 101/11, Court of Justice of the European Union, Luxembourg, 29 September 2011, www.curia.europa.eu, viewed on 17 May 2012.

¹³⁹ *Ibid.*

4.3.1.2 The Evidence Submitted for the Purposes of Rebuttal

While the role played by the submitted evidence in the imputation of the joint liability by the Commission in this case is questionable¹⁴⁰, for the purposes of the topic of the thesis, it is nonetheless noteworthy to overview the arguments put forth by Elf Aquitaine in its effort to rebut the presumption. The arguments are as follows¹⁴¹:

- 1) Elf Aquitaine is a holding company that does not carry out any commercial activity; its activities consist of decentralised management of subsidiaries;
- 2) The management of the market conduct of Arkema (in the judgment, it is referred to as Atofina but the Court notes that it is referring to the same company¹⁴²) did not depend on instructions from Elf Aquitaine;
- 3) Arkema did not provide Elf Aquitaine with information on its market conduct;
- 4) Arkema had the power to enter into agreements without prior authorisation by the parent company;
- 5) Arkema was financially independent from Elf Aquitaine;
- 6) Arkema always planned its legal strategy independently;
- 7) In the final argument, Elf Aquitaine relied on the perception of third persons.

¹⁴⁰ Elf Aquitaine v. Commission, para. 168. The CJEU noted that it is impossible to understand whether the evidence had been rejected as unconvincing or whether the Commission had believed that the presumption was sufficient to attribute liability.

¹⁴¹ Ibid., para. 160.

¹⁴² Ibid., para. 2.

4.3.1.3 The Assessment of the CJEU

The requirement to state reasons

The decision attributing the joint and several liability was based exclusively on the presumption of decisive influence derived from the fact that the applicant held 98 per cent of shares of the subsidiary. In no way did the CJEU claim that the presumption had been applied incorrectly or that it could not have been the basis for the attribution of liability.

However, it was firm in its ruling that the Commission is nonetheless under obligation to provide adequate reasons in its decision. The Court emphasised that the presumption would become effectively irrefutable if the Commission refrained from stating adequate argumentation as to why the factual and legal circumstances submitted by the parties had not been sufficient to rebut the presumption¹⁴³.

The CJEU agreed that the Commission is not obliged to respond to every single piece of circumstances if it is irrelevant to the dispute or clearly minor in importance. However, it harshly criticised it for addressing the evidence in a very limited manner. According to the Court, the Commission, in essence, addressed the submitted proof in a single paragraph of the Decision¹⁴⁴ and provided what amounts to a series of assertions and negations that were repetitive and not at all detailed in nature¹⁴⁵.

The special duty to state reasons when deviating from previous decisions

Furthermore, the CJEU elaborated that the Commission had been under a special obligation to provide adequate reasons due to the fact that it had deviated from its previous decision in *Organic Peroxides*¹⁴⁶ where a company had not been held jointly and severally liable with its subsidiary

¹⁴³ Ibid. para. 153.

¹⁴⁴ Decision C(2004) 4876 final of 19 January 2005 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/E-1/37.773 – MCAA), para. 258.

¹⁴⁵ *Elf Aquitaine v. Commission*, para. 168.

¹⁴⁶ Commission Decision of 10 December 2003 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/E-2/37.857 — Organic peroxides), OJ L 110 , 30/04/2005 P. 0044 – 0047.

despite the lack of objective differences from the Elf Aquitaine in terms of its ties with its subsidiary.

The CJEU maintained that, given the change in attitude towards the applicant in comparison to that adopted by the Commission in *Organic Peroxides* decision, the CFI was under obligation to give special attention to the assessment of whether the Commission had adequately stated reasons why the evidence submitted by the applicant had been insufficient to rebut the presumption.

The CJEU went so far as to state that it was impossible to understand whether the Commission had dismissed the submitted proof as inadequate or felt that it was sufficient that the conditions for the presumption to be applied had been satisfied on the merits of Elf Aquitaine holding almost 100 per cent shares of its subsidiary¹⁴⁷.

4.3.2 Failure to State the Basis for the Application of the Presumption: *Grolsch*

4.3.2.1 The History of the Proceedings

Failure to differentiate between the parent and the subsidiary

If *Elf Aquitaine* had been a clear signal that the Commission has been lacking thoroughness in respect of its obligation to state reasons, in the *Grolsch* case it went even further.

In 2007, the Commission had sanctioned *Grolsch* for its participation in a beer cartel in the Netherlands and imposed a fine of over EUR 33 million¹⁴⁸. The company denied its direct participation even though it admitted that its wholly-owned subsidiary was involved in the cartel.

The appeal to the GC concerned the following issues. First, *Grolsch* claimed that the Commission was wrong in attributing the infringement to it when,

¹⁴⁷ *Elf Aquitaine v. Commission*, para. 168.

¹⁴⁸ Commission Decision C(2007) 1697 of 18 April 2007 relating to a proceeding under Article 81 [EC] (Case COMP/B/37.766 — Netherlands beer market), OJ 20.5.2008, C 122/1.

allegedly, only the subsidiary had to be held liable, provided it may be proved. Second, the Commission, in addressing the decision, did not make a distinction between Grolsch and its subsidiary¹⁴⁹.

In its decision, while naming the directors who had been involved in cartel-related meetings, the Commission failed to indicate which persons had been employed by the parent and which – by the subsidiary. Finally, it had not provided reasons on which it based the imputation of liability to Grolsch for its subsidiary's infringements.

4.3.2.2 Assessment of the GC

Denied the company the opportunity to refute the presumption

In its judgment, the Court maintained that in the situation where the Commission Decision is addressed to several companies, the latter is under obligation to provide adequate motivation in respect of each addressee. However, in this Decision it failed to carry out this duty on numerous instances.

First, the GC noted that the Commission did not in any way mention economic, organisational and legal links between the parent and the subsidiary. Furthermore, the name of the subsidiary is not even referred to in the appealed Decision¹⁵⁰.

Subsequently, the Court found that the Commission had not provided any grounds for the identification of the legal person (Grolsch) that, at the time of infringement, was responsible for the management of the company, in order to attribute the liability for the said person¹⁵¹ or give the opportunity

¹⁴⁹ Ibid., para. 18.

¹⁵⁰ Case T-234/07, Koninklijke Grolsch v. Commission, 15 September 2011, para. 88.

¹⁵¹ Commission Decision C(2007) 1697 of 18 April 2007 relating to a proceeding under Article 81 [EC] (Case COMP/B/37.766 — Netherlands beer market), para. 397.

for this person to rebut the presumption of decisive influence in respect of its subsidiary¹⁵².

In essence, the Commission had been slammed by the GC for the failure to provide the opportunity for the company to defend itself and refute the presumption. Based on these considerations, the GC annulled the Commission decision in respect of Grolsch. It is noteworthy that, in principle, the outcome of the case could have been entirely different, had the Commission taken the time to make a statement referring to the ownership of 100 per cent shares of the subsidiary¹⁵³.

4.3.3 Failure to Address the Evidence: *Air liquide*

4.3.3.1 The History of the Proceedings

Inadequate assessment of evidence

In 2006, The Commission passed a decision¹⁵⁴ holding Air liquide jointly and severally liable with its subsidiary Chemoxal for anti-competitive conduct on a bleaching agents market. In its appeal to the General Court, Air liquide submitted that the Commission had failed to observe its obligation to state reasons in that it had ignored the evidence put forth by the company in its effort to rebut the presumption that it had exercised decisive influence over its subsidiary Chemoxal.

It claimed that the Commission had referred only to some of the submitted arguments, without addressing them as to their merits, and based its decision

¹⁵² Case T-234/07, Koninklijke Grolsch v. Commission, 15 September 2011, OJ C 311, 54 22/10/2011, para. 89.

¹⁵³ S Harms, *Antitrust fines - the inevitability of parental liability revisited*, <http://www.natlawreview.com/article/antitrust-fines-inevitability-parental-liability-revisited>, viewed on 17 May 2012.

¹⁵⁴ Commission Decision of 3 May 2006 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/F/38.620 – Hydrogen Peroxide and Perborate), OJ L 353/54, 13.12.2006.

on third persons' perceptions¹⁵⁵ and additional circumstances. Subsequently, the GC ruled that the motives of the rejection of the submitted evidence are unclear¹⁵⁶.

4.3.3.2 The Evidence Submitted for the Purposes of Rebuttal

Structural and commercial proof of independence

Similar to the assessment of the *Elf Aquitaine* judgment¹⁵⁷, it is valuable to look into the evidence submitted by the applicant in its effort to prove the autonomy of its subsidiary. The parent company referred to the structural and commercial independence of Chemoxal:

- 1) Neither of the directors of the subsidiary had been a member of Air liquide's board of directors or similar organs of management; they enjoyed wide powers and independency in decision-making;
- 2) Chemoxal had multiple autonomous departments that allowed it to pursue its own course of commercial policies and activities;
- 3) Major commercial projects, budget planning, price and other commercial policy guidelines had been implemented solely under the instructions and on the initiative of the directors of Chemoxal;
- 4) Neither of the participants in cartel-related meetings had been employed by Air liquide, furthermore, no proof had been submitted as to the instructions issued by the parent to its subsidiary¹⁵⁸.

4.3.3.3 Assessment of the GC

Insufficient addressing of the arguments

¹⁵⁵ Case T-185/06, *Air liquide v. Commission*, 16 June 2011, OJ C 226, 30/07/2011 P. 0020 – 0020, para. 69.

¹⁵⁶ *Ibid.*, para. 70.

¹⁵⁷ See Chapter 6.3.1.

¹⁵⁸ *Air liquide v. Commission*, para. 67

The GC noted that, while it was in agreement that the Commission is not under obligation to address every piece of evidence submitted by the party if it is irrelevant or of clearly minor importance, however, it emphasised that the proof put forth by Air liquide was not mere assertions but, on the contrary, they had been supplemented by adequate documents, furthermore, they had addressed specific allegations made by the Commission.

Thus, the latter had the duty to state its response to the submitted proof and assess, whether the economic, organisational and legal links between the companies allow to make a conclusion that the subsidiary had carried out an autonomous activity on the market¹⁵⁹.

In essence, the Commission had received stark criticism for the fact that, first, it had not addressed the submitted evidence, second, based its decision on circumstantial proof and third persons' perceptions, third, failed to clarify the criteria on which it based its statement that the submitted evidence is insufficient – circumstances cited by it in response, while capable of being used to evaluate the relationship between the companies, had been deemed incapable of being an adequate assessment of the evidence¹⁶⁰.

4.3.4 The Latest Judgments: *Legris Industries* and *Comap*

Confirmed the presumption

The latest judgments of the CJEU¹⁶¹, passed on 3 May 2012 have proved to be favourable to the Commission. In 2006, the Commission had adopted a decision¹⁶² sanctioning Legris Industries and its wholly-owned subsidiary Comap for participating in a cartel on a copper fittings market. They

¹⁵⁹ Ibid., para. 74.

¹⁶⁰ Ibid., para. 77.

¹⁶¹ C-289/11 P *Legris Industries SA v Commission* and C-290311 P *Comap SA v Commission*. Unpublished.

¹⁶² Commission Decision C(2006) 4180 of 20 September 2006 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/F-1/38.121 – Fittings), OJ L 283 , 27/10/2007 P. 0063 – 0068.

appealed the decision but the General Court dismissed the claims as unfounded¹⁶³. Subsequently, the appeals had been lodged in the CJEU.

In its appeal to the CJEU, Legris disagreed with the attribution of parental liability. It claimed the *de facto* irrebutability of the presumption and maintained that, as a result, it was in breach of the EU law, “taking into account the penal nature of the sanction imposed on it”¹⁶⁴.

Notably, among the pleas one may find an allegation of “failure to comply with the case-law which disappplies that presumption of liability to financial holdings which do not engage in operational activity”, however, the judgments are currently unavailable, therefore, the examination of the Court’s response is limited to the press release.

In respect of the companies’ claims as regards the attribution of joint and several liability, the Court confirmed the applicability of the presumption of decisive influence in the situation like the one at hand, i.e., when the parent owns 99,9 per cent of the subsidiary’s shares.

As a result, following the settled practice established in *Akzo Nobel*, it expressed support for the Commission and confirmed that, in the absence of the rebuttal of the presumption, the Commission “must regard”¹⁶⁵ the companies as one undertaking and “may impute” the conduct of the subsidiary to the parent.

Company is in the best position to find evidence

¹⁶³ Legris Industries v Commission, OJ C 42, 24.2.2007, Case T-377/06, Comap v Commission, OJ C 42, 24.2.2007.

¹⁶⁴ Case C-289/11 P, Appeal brought on 9 June 2011 by Legris Industries SA against the judgment of the General Court (Eighth Chamber) delivered on 24 March 2011 in Case T-376/06 Legris Industries v Commission.

¹⁶⁵ *The Court upholds the fine of €46.8 million imposed on Legris Industries for its participation in a cartel on the copper fittings market, Court of Justice of the European Union*, Press release No 56/12, Luxembourg, 3 May 2012. The judgments are not yet available.

Furthermore, the Court dismissed the claim submitted by Legris that the presumption was irrefutable¹⁶⁶. It reasoned that the difficulty to present adequate evidence does not indicate the irrefutable character of the presumption and emphasised that this statement is particularly fitting in the present instance where “*the entity against which the presumption operates is best placed to find such evidence in the context of its activities.*”¹⁶⁷

In the absence of the full text of the judgment, it is difficult to draw conclusions, however, while one may agree with the Court that the company is normally in the best position to assess its ties with its subsidiaries, however, it may not be derived from this fact that the presumption of, in effect, refutable.

The criteria on which the Commission and the Courts rely to deem a piece or a set of evidence insufficient is vague (on numerous occasions, the Courts limit their assessment of evidence to the statement that it was ‘insufficient’¹⁶⁸) or not addressed at all (as it was the case in *Elf Aquitaine* and *Air liquide*).

Furthermore, the presumption has been rebutted on so few occasions (e.g., in *Alliance One*, where the Court did accept the argument of ‘pure financial interest’ in respect of an intermediary subsidiary who had been established to have maintained only fiscal ties with its own subsidiary while the ‘ultimate parent’ had remained liable¹⁶⁹) that it appears the company is far from being in the best position to rebut the presumption.

On the contrary, a statement that the company finds itself completely in the dark as regards acceptable rebuttals of the presumption may not be entirely without merit.

¹⁶⁶ For more details on companies attempting to use this argument, see subchapter 3.1.1. The alleged Requirement of ‘Direct and Irrefutable’ Evidence.

¹⁶⁷ *The Court upholds the fine of €46.8 million imposed on Legris Industries for its participation in a cartel on the copper fittings market, Court of Justice of the European Union*, Press release No 56/12.

¹⁶⁸ E.g., see *General Technic-Otis v the European Commission*, para. 58, *Shell Petroleum v. the Commission*, para. 70.

¹⁶⁹ *Alliance One and others v. European Commission*.

4.3.5 Findings: Stringent Review against Inadequate Decisions

No material revision

The outcome of *Elf Aquitaine*, *Grolsch* and *Air liquide* has drawn the attention of legal scholars and practitioners as a manifestation of apparent shift concerning parental liability. After years of unsuccessful appeals, 2011 was the year when the Union Courts appeared to have modified its stringent position, and the assurance of full support to the Commission, concerning evidence submitted by companies in their efforts to rebut the presumption. In principle, the presumption appeared effectively irrefutable.

However, it is too early to rejoice. For the following reasons, it may not be stated that the Courts' have revised its position in respect of 1) the alleged refutability of the presumption, 2) the problematic relation between the principles of personal and 'collective' responsibility and further issues.

The reasoning

First, in all three judgments, the Courts had confirmed the settled case law in respect of the presumption of decisive influence, citing, in particular, the judgment in *Akzo Nobel*¹⁷⁰.

Second, the Courts did not address the evidence on its merits, in terms or reliability or otherwise. The arguments submitted by the parties had been cited, however, for the purpose of establishing that it had indeed been submitted in an appropriate manner (supported by documentation, not irrelevant to the case) in attempt to rebut the presumption and that the Commission's response was inadequate to it or it had failed to address it all together¹⁷¹.

Third, in principle, the Court 'punished' the Commission for its sloppiness that, one may speculate, stems from overconfidence. Following the uninterrupted series of success in similar cases in the past, the Commission appears to rely on the presumption of decisive influence to such a degree

¹⁷⁰ See, for instance, *Air liquide v. Commission*, para. 21.

¹⁷¹ See, for example, *Total and Elf Aquitaine v. Commission*, para. 159.

that it anticipates nothing less than the Courts upholding their decisions irrespective of the quality of the argumentation. In *Grolsch*, it had not even bothered to include a statement why it had relied on the presumption in the first place.

As regards the issue of personal responsibility, the Courts continue to maintain that not only is the principle observed in the competition law proceedings, furthermore, the wording usually suggests that the attribution of liability is, in fact, based on the principle¹⁷².

4.3.6 The Implications

The anticipated action from the Commission

The Commission is likely to learn from its mistakes and ensure, first, that the future decisions address companies' arguments with sufficient thoroughness and precision, furthermore, it may be expected that it will make sure to address all companies held liable for the infringements of competition rules, having learnt from its mistake in *Grolsch*, where its failure, in part, resulted from making no distinction between the parent and the subsidiary, not acknowledged in the decision at all.

The implications for the companies

At first glance, neither the reasoning, nor the outcome of the cases in question, in the absence of an actual revision of the application of the presumption, appears particularly promising for the companies looking to escape joint liability with their subsidiaries. However, there are indications of emerging new opportunities for companies looking to benefit from the latest judgments in a perhaps more indirect way.

Proper attention from the Commission

¹⁷² E.g. see *Akzo Nobel and Others v Commission*, para. 56, *Commission v. Anic Participazioni*, para. 145, *Cascades v. Commission*, para. 78, *ETI and Others*, para. 39.

First, the expectation that the Commission will be forced to scrutinise the parties' arguments suggests a higher likelihood that it will grant the companies a proper chance to be heard, i.e., the claims will be thoroughly examined and addressed in a reasoned manner.

Distinction between the parent and the subsidiary: a double-edged sword

It is noteworthy that even in the absence of the revision of the presumption, in the recent cases (*Grolsch*, *Air liquide*, *Elf Aquitaine*), the parent companies did achieve the annulment of the Commission decisions in their respect while the subsidiaries remained liable.

The loss of benefits

On the one hand, one may inquire to what degree the parent companies actually benefit if it is taken into consideration that ultimately the fine will nonetheless be paid by a wholly-owned subsidiary. In principle, it is a major financial loss to the parent as well for the following reasons.

First, the parent holds all or the majority of the subsidiary's shares, hence, it retains a direct interest in the success of the subsidiary; furthermore, in the situation where an interest in the subsidiary is strictly financial (for instance, when the parent company's activity is primarily defined by the investment in companies as in the case of Goldman Sachs¹⁷³), it could be forced to sell the company before it had collected the anticipated profit; finally, dramatic amounts¹⁷⁴ of the imposed fines inevitably affect the whole corporate group as it is often the case that there is maintenance of financial ties within the group.

The potential for benefits

¹⁷³ On their website (<http://www.goldmansachs.com>), Goldman Sachs defines itself as an investment company. Visited on 14 May 2012.

¹⁷⁴ D Geradin, D Henry, *The EC fining policy for violations of competition law: An empirical review of the Commission decisional practice and the Community courts' judgments*, The Global Competition Law Centre Working Papers Series, GCLC Working Paper 03/05, 2005, p. 20.

On the other hand, the negative impact has the potential to be mitigated¹⁷⁵. The grave consequences may be bent by a successful appeal in the following circumstances.

First, if the subsidiary is the only one to bear the burden of liability, in the appeal the parent is entitled to request that the calculation of the fine would not take into consideration its turnover¹⁷⁶. The undesired outcome of a significantly lower fine is behind the Commission's insistence on the attribution to joint and several liability, taking into consideration the emphasis it places on the deterrent effect of the fines¹⁷⁷.

Furthermore, a successful appeal may prove to offer benefits in terms of removing the consequences of established recidivism. In avoiding joint liability with its subsidiary, the parent that has been previously held liable for anti-competitive practices, may prevent the increase of the fine, as the allegation of recidivism would no longer be applicable¹⁷⁸.

Finally, in the situation where the parent no longer owns the subsidiary after the adoption of the Commission Decision, as it was in *Air liquide*¹⁷⁹ case, the annulment of the Commission Decision in respect of the parent allows it to avoid financial loss; first, it does not retain the interest in the former subsidiary, second, the corporate group is not under obligation to carry the burden of the fine.

¹⁷⁵ S Harms, *Antitrust fines - the inevitability of parental liability revisited*.

¹⁷⁶ Article 32: "The final amount of the fine shall not, in any event, exceed 10 % of the total turnover in the preceding business year of the undertaking or association of undertakings participating in the infringement, as laid down in Article 23(2) of Regulation No 1/2003.", Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003,, Official Journal C 210 , 01/09/2006 P. 0002 – 0005.

¹⁷⁷ A Italianer, *Recent developments regarding the Commission's cartel enforcement*, p. 3.

¹⁷⁸ Article 28: "The basic amount may be increased where the Commission finds that there are aggravating circumstances, such as: - where an undertaking continues or repeats the same or a similar infringement after the Commission or a national competition authority has made a finding that the undertaking infringed Article 81 or 82: the basic amount will be increased by up to 100 % for each such infringement established /.../", Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003,, Official Journal C 210 , 01/09/2006 P. 0002 – 0005.

¹⁷⁹ ".../Air Liquide took the decision in 1996 to sell the company, which was completed in 1998", Air liquide press release, 13 April 2006, <http://www.airliquide.com/en/rss/announcement-by-the-european-commission.html>. viewed on 17 May 2012.

4.4 Conclusion. The Potential for Successful Appeals

The only viable argument - financial

Chapter 4 concerns successful appeals that have resulted in the annulment of joint liability in respect of the parent company, with the exception of the latest judgments of Legris and Comap that were included on the merits of being the most up-to-date manifestation of the CJEU's position in respect of the issue. The findings of this Chapter are as follows.

First, the examination of arguments and evidence submitted by the applicant companies allows to argue that, at present, the most viable argument a company may submit in order to refute the presumption of decisive influence is that of pure financial interest.

The argument cited by the General Court in the *Alliance One* suggests the following. A company that 1) carries out no commercial activity of its own and 2) whose interest is purely financial (the GC accepted the activities of 'accounting and fiscal' nature) may avoid liability.

The GC did not, however, in principle reject the notion of financially-interested company exercising decisive influence over its subsidiary; it merely ruled that, in spite of indications of a limited interest held by the company, the evidence submitted by the Commission had been insufficient. Therefore, the viability of the argument is considerable but conditional.

Proceedings concerning Goldman Sachs and the unfavourable decision against Arques, however, demonstrate a sceptical attitude of the Commission in respect of the argument.

The obligation to state reasons

The second finding of the Chapter is as follows. The existence of the presumption does not eradicate the obligation imposed on the Commission to state adequate reasons. The Courts have extended harsh critique of the Commission's shortcomings in addressing the companies' arguments. The Courts have sent a clear signal that, unless the following conditions are fulfilled, the Commission's decision will be overturned as insufficiently substantiated.

First, it must adequately address the companies, i.e. make a distinction between the parent and the subsidiary (*Grolsch*).

Second, it must indicate the grounds for the application of the presumption, i.e. whole ownership (*Grolsch*).

Third, it must address relevant evidence submitted by the companies in an adequate manner, i.e. provide explanation why the submitted proof is insufficient and avoid unsubstantiated assertions and repetitive negations (*Air liquide, Elf Aquitaine*).

More stringency in the judicial review

The final finding of the Chapter concerns the latest judgments by the CJEU. *Legris* and *Comap* have demonstrated that, first, the doctrine of the presumption remains unaltered, i.e., the notion of refutability remains. Second, the successful appeals in recent cases indicate the emerge of a more stringent review of the Commission's evidence but not a modified position in respect of the material aspects of the attribution of joint and several liability to parent companies.

5 Conclusion

5.1 The Underlying Motif of the Presumption. The Three Pillars

The controversy surrounding the attribution of joint and several liability to parent companies is at the heart of my research. I have focused on a number of complex and disputed issues concerning the applicable concepts and their operation in practice. Upon examination of the relevant sources aimed at the identification of these issues, the underlying motif of the presumption of decisive influence has emerged.

The body of relevant case law, put in a concise manner, reveal that the attribution of parental liability rests on three fundamental pillars. First, it is the presumption that a parent company, which holds whole ownership of a subsidiary, actually exercises decisive influence over it. Second, it follows that this influence forms ties resulting in defining the companies as one undertaking, therefore justifying the attribution of joint liability.

While the first and the second pillars refer to the corporate control, on which the Commission relies in attributing the liability, the third pillar offers the necessary safeguards to the companies concerned; the doctrine of the presumption of decisive influence possesses the attribute of refutability. The third pillar is the main source of disputes.

In my thesis, I address the assertions that, in practice, the presumption is impossible to rebut. The answer to this allegation has proved to be ambiguous.

5.2 Consistent Confirmation of the Settled Practice

The notion of the three pillars that I rely on derives from the following findings.

The attribution of joint liability to the parent companies has followed a twofold pattern of 1) a decidedly consistent adjudication 2) marked by relative conceptual incongruity.

1) From the early judgments in *ICI* and *AEG*, the members of corporate groups have accustomed to anticipate sanctions for the unlawful conduct of their subsidiaries. The imposition of sanctions has been largely based on the presumption.

The consistent character of the case law unfolds in the following patterns. Determined to attribute joint liability to parent companies, the Commission has proved to be deaf to evidence submitted in the effort to prove the autonomy of the subsidiary. Coupled with the full support of the Union Courts enjoyed by the Commission until 2011, it has resulted in a large body of failed appeals demonstrating that, in effect, no argument is sufficient to rebut the presumption.

2) Conceptual incongruity has manifested itself in a number of ways. One the one hand, the Courts have failed to address in an satisfactory manner the issue of personal responsibility. What has been pronounced to be in conformity with the principle, retains the attributes of collective guilt.

At present, no clarification has been provided as to how the settled practice of attribution of parental liability, in the context of an express statement that the role of the parent in the infringement is irrelevant, may be reconciled with the principle of personal responsibility.

The most troublesome inconsistency revealed by Stefan Thomas and discussed in the thesis potentially lies within the contradiction of the internal logic of the presumption. The presumption implies the exercise of complete control of the wholly-owned subsidiary sanctioned for an infringement. While unacknowledged, an assumption of the parent's role in the infringement emerges. The parent may not, however, defend itself by submitting evidence proving its innocence because it is sanctioned on the basis of comprising one undertaking with the subsidiary.

5.3 The Potential of Appeals

The central premise of this thesis has been based on the assertion that the Union Courts' position in respect of the attribution of parental liability has shifted in the following manner. First, it has adopted a more stringent judicial review of the Commission's decisions, second, it has become more willing to accept applicants' arguments submitted in effort to rebut the presumption, third, the single viable argument that emerged from the recent case law is that of purely financial interest.

As regards the first assertion. A comparative inquiry into the Union Courts' attitudes concerning the Commission decisions reveals the following findings. First, the Courts have indeed demonstrated newfound willingness to apply rigorous standards in respect of the argumentation on which the Commission relies in attributing the parental liability. In contrast to the pre-2011 body of case law, the recent judgments in *Elf Aquitaine*, *Grosch* and *Air liquide* reflect the emphasis on the following requirements:

- statement of reasons for the application of the presumption;
- making a distinction between the parent and the subsidiary;
- substantiated response to the companies' evidence capable of clarification as to why it is insufficient to rebut the presumption.

As regards the second assertion. This assertion may not be accepted. Comprehensive overview of the relevant judgments offers no indication that the Courts have revised their stance in respect of the presumption. First, the Commission decisions have been annulled as a result of errors in the reasoning of the Commission. The Courts did not rule on the merits of the cases, i.e. they did not address the question whether the applicants had submitted arguments capable of rebutting the presumption.

Furthermore, the latest judgments in *Legris* and *Comap* reflect the Courts' reliance on the settled practice concerning the presumption: its refutability

has been confirmed; the judgments largely mirrored the pre-2011 case law (comprehensive analysis has been prevented by the unavailability of the full text of the judgments).

As regards the third assertion. The answer to the question whether holding a purely financial interest secures the parent company an escape from joint liability is perhaps the single most important aspect of this thesis. The response is ambiguous, yet promising.

First, the ambiguity as to the viability of the argument stems from the following. A number of attempts to use similar evidence concerning non-operational holding companies have failed due to the remaining possibility of coordinative action on the part of the holding company.

One decision concerning the purely financially interested company Arques is pending, another, concerning Goldman Sachs, is under way. It follows that the Commission is dismissive of the argument.

The *Alliance One* judgment, on the other hand, calls for optimism. The CJEU has confirmed that a company, which, first, carries out no activity of its own, save for minor fiscal operations, second, holds a purely financial interest is capable of escaping the joint liability.

I predict that with the increased reliance on the argument, the Courts will clarify their position as to the conditions and circumstances determining its applicability. In the current state of affairs, there exist substantial grounds to draw the following conclusion. The argument of pure financial interest is, at present, the only viable piece of evidence capable of rebutting the presumption of decisive influence over the subsidiary by the parent company.

5.4 The Final Remarks

In my thesis, I have achieved the objective of assessing the body of EU competition law concerning the conceptual and practical aspects of the

attribution of parental liability and, subsequently, reached the ultimate goal of finding the most viable solution currently available for the companies.

I expect that my work reflects the initial aim of examining the topic from a practical perspective and has the potential to serve a comprehensive guide capable of aiding a company seeking to navigate the complex patterns of the attribution of parental liability.

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