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The presumption of parental liability and the
need for full judicial review

An analysis of based on the recent case of *Alliance One v
European Commission*.

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Summary

The *presumption of parental liability* is an important tool for the Commission, enabling it to hold parent companies jointly and severally liable with their subsidiaries. Parent companies claim however, that they cannot rebut the presumption and are thus rendered strictly liable for their subsidiaries' conduct. Due to the fact that parent companies repeatedly failed rebutting the presumption with evidence based arguments, they have changed their approach. Thus, parent companies started bringing appeals, claiming that their right to a fair trial was violated. This gave rise to a general debate regarding the compatibility of competition law proceedings, and in particular the presumption of parental liability, with Article 6 ECHR. This question has become increasingly interesting in the light of the CFREU and the possible future accession of the EU to the ECHR.

Abbreviations

- AG – Advocate General
- AOI – Alliance One International
- CFREU – Charter of Fundamental Rights of the European Union
- CJEU – Court of Justice of the European Union
- Cetarsa – Compañía española de tabaco en rama SA
- ECJ – European Court of Justice
- ECHR – European Convention on Human Rights
- ECtHR – European Court of Human Rights
- EFTA – European Free Trade Association
- EU – European Union
- GC – General Court
- SCC – Standard Commercial Corp.
- SCTC – Standard Commercial Tobacco Co. Inc.
- Taes – Tabacos Españoles SL
- TCLT – Trans-Continental Leaf Tobacco Corporation
- TFEU – Treaty on the Functioning of the European Union
- TEU – Treaty on the European Union
- TEC – Treaty establishing the European Community
- WWTE – World Wide Tobacco España SA

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1. Preface

This essay will be focused on the *presumption of parental liability*, which in EU competition law proceedings is frequently used to hold parent companies liable for their subsidiaries competition law infringements. Moreover, this essay will also examine the need for full judicial review, based on the fact that parent companies have consistently encountered difficulties in rebutting the presumption. For that purpose the essay will be based on the recent ECJ case of *Alliance One International Inc. v European Commission*. The case will be used to disclose the relationship between the presumption of parental liability and the requirement of full judicial review, which is protected under the fundamental right to a fair trial.

First the relevant legal background will be introduced. The legal background presented will include Article 101 TFEU and Article 6 ECHR and the relevant case law of the CJEU and ECtHR, respectively. Moreover, the aforementioned case of *Alliance One International Inc. v European Commission* will be presented. First of all, the section on Article 101 will focus on the notion of “undertaking”, the single economic unit doctrine and the *presumption of parental liability*. Secondly, the section regarding Article 6 ECHR will introduce the relevant case law of the ECtHR as to the extent of Article 6. Moreover, the relationship between the ECHR and the CFREU will be elaborated on. Thirdly, the case of *Alliance One International Inc. v European Commission* will be introduced. This section will focus on the Commission’s decision, the relevant corporate groups and *AOI*’s appeals to the GC and ECJ. It has to be noted that throughout this essay I relied heavily on my previous case note on the case *Alliance One International Inc. v European Commission*, especially with regards to the legal and factual matters surrounding the case and the *presumption of parental liability*.

After the establishment of the legal background, an analysis of the presumption of parental liability and the requirement of full judicial review will be conducted under consideration of the *AOI* case. First, the relevant legal questions concerning the presumption in general as well as the questions arising from *AOI* will be outlined. Secondly, rebuttable nature of the presumption of parental liability will be analyzed under consideration of exemplary case law. Thereafter, the need for full judicial review in light of the presumption in general and the *AOI* case in particular will be discussed.

Lastly, a conclusion regarding the presumption and the requirement of judicial review will be submitted. Throughout the concluding statement the opinion of the author will be voiced.

2. Legal Background

In the following the relevant legal background for the discussion of the presumption of parental liability will be introduced. The legal background that will be introduced includes Article 101 TFEU and its implications, as well as the single economic unit doctrine and the *presumption of parental liability*. Thereafter, the reader will be introduced to the case C-679/11 *Alliance One International v Commission*, around which the discussion of the presumption of parental liability will revolve.

2.1 Article 101

Article 101 TFEU, formerly Article 81 TEC, sets out a prohibition of any form of agreements between undertakings which may affect trade within the EU and which have either an anti-competitive object or effect on the internal market. Furthermore, Article 101(2) TFEU automatically voids any agreement fulfilling the aforementioned criteria.¹

Article 23 of Regulation 1/2003, on the implementation of Articles 101 and 102 TFEU, provides the Commission with the power to impose fines on undertakings and associations of undertakings which infringe the aforementioned provisions.²

2.1.1 The notion of “undertaking” under Article 101

The meaning of the term “undertaking” under Article 101 TFEU was defined neither in the TEC nor in the TFEU. Thus, the term was gradually defined through the jurisprudence of the CJEU. In *Höfner* the ECJ defined the term “undertaking” as an economic entity which covers any entity, regardless of the legal status thereof, as long as it is carrying out any form of economic activity.³ Thus, factors such as the legal status of an entity, the way it is financed and even whether or not its economic activity is profitable, do not affect whether the entity in question constitutes an “undertaking” pursuant to Article 101 TFEU.⁴ In doing so the ECJ adopted an economic approach to the notion of an “undertaking”, rather than following factors which, in most national law systems of member states, constitute core elements of the notion of corporate legal persons. The Commission, in its decision in *Akzo*, acknowledged the

¹ Article 101 of the Treaty on the Functioning of the European Union [TFEU], Consolidated Version (OJ 2012 C 326/88).

² Article 23 of Council Regulation 1/2003/EC of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, p. 20).

³ *Höfner v Macrotron* (C-41/90) [1991] E.C.R. I-1979, para. 21.

⁴ *Höfner v Macrotron* (C-41/90) [1991] E.C.R. I-1979, para. 21.

fact that the notion of “undertaking” in EU competition law does not follow national law approaches towards corporate legal persons.⁵

Moreover, the ECJ opened up the notion of “undertaking” to include parent companies with their subsidiaries as part of the same economic entity. In *Commercial Solvents* the ECJ ruled that a parent company and its subsidiary constituted one economic entity and consequently fell within the scope of one “undertaking” under Article 101 TFEU.⁶ Even the separate legal personality of a subsidiary, as a legal entity separate from its parent company, did not ensure, in the eyes of the court, to a sufficient degree of certainty, that the subsidiary determined its conduct individually and therefore, should be held responsible for that conduct individually as well.⁷ The court argued that the possibility of attributing responsibility for the subsidiary’s conduct to its parent company could not be excluded based merely on the fact that the subsidiary had a separate legal personality.⁸ While explaining this approach, the ECJ referred to market conduct as a decisive factor, as it stated in *ICI*.⁹ The court held that unity of market conduct overrides the separation between parent company and subsidiary, which is based on their separate legal personalities, in order to apply the rules on competition effectively.¹⁰ Consequently, parent companies and subsidiaries, constituting an “undertaking” pursuant to Article 101 TFEU, can be held jointly and severally liable under competition rules for the conduct of the subsidiary on its respective market. With regards to the liability it has to be noted that fines are calculated based upon the turnover of the entire corporate group constituting an “undertaking” rather than just on the turnover of the subsidiary.¹¹

As mentioned in the above, the CJEU and in particular the ECJ did, from an early stage, apply a very broad scope to the definition of the term “undertaking” in Article 101 TFEU. For the purpose of effectively applying the competition law rules of the EU the court held that competition law could override the formal legal separations between parent company and subsidiary and opted not to apply national law definitions of corporate legal persons to the

⁵ Commission Decision 2005/566/EC of 9 December 2004 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/37.533- Choline chloride), recital 167-176.

⁶ *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v. Commission*, (Joined Cases 6/73 & 7/73), [1974] E.C.R. 223.

⁷ *Imperial Chemical Industries Ltd v Commission of the European Communities* (48/69) [1972] E.C.R. 619, paras. 125-132.

⁸ *Imperial Chemical Industries Ltd v Commission of the European Communities* (48/69) [1972] E.C.R. 619, paras. 125-132.

⁹ *Imperial Chemical Industries Ltd v Commission of the European Communities* (48/69) [1972] E.C.R. 619, para. 11.

¹⁰ *Imperial Chemical Industries Ltd v Commission of the European Communities* (48/69) [1972] E.C.R. 619, para. 11.

¹¹ Paul Hughes, *Competition law enforcement and corporate group liability - adjusting the veil*, E.C.L.R. 2014, 35(2), 68-87, p. 13.

term “undertaking”. Thus, the Commission is not limited to investigating and fining subsidiaries for their respective competition law infringements but can hold parents and subsidiaries jointly and severally liable. This approach can be attributed to the complex and international organization of corporate groups. These complex corporate structures require a broad “catch-all” kind of mechanism in order to enable the Commission to effectively enforce competition law and to prevent those corporate groups from escaping liability by making their subsidiaries their scapegoats. Ultimately, the notion of an “undertaking” has to be understood in conjunction with the purpose Article 101 TFEU serves, which is the effective control and regulation of competition within the internal market of the EU.

The aforementioned line of case law constitutes the basis for the so called single economic unit doctrine which will be elaborated on in the following.

2.1.2 Single economic unit doctrine

Over the years the ECJ and GC followed the line of case law which had been established in *Höfner*, *Commercial Solvents* and *ICI*, amongst others. In *Bodson* the ECJ held that a corporate group may constitute a single economic unit and hence an “undertaking” for the purpose of Article 101 TFEU, if the subsidiary “[...] has no real freedom to determine its course of action on the market, [...]”.¹² However, the ECJ also held that parent companies and subsidiaries do not automatically constitute a single economic unit solely based on being part of the same corporate group.¹³ Therefore, other factors, such as personnel overlaps and directions from the parent company as well as commercial conduct on the market, have to be considered to determine whether or not the companies in question constitute a single economic unit. The ECJ, in *Viho*, reaffirmed the *Bodson* ruling. The court held that a wholly owned subsidiary and its parent company constitute a single economic unit, if the subsidiary lacks the freedom to determine its commercial conduct on the market due to the fact that it is determined by the parent company.¹⁴ Furthermore, companies are considered to form a single economic unit and hence an “undertaking” under Article 101 TFEU, if the parent company exercises decisive influence over the subsidiary.¹⁵ The concept of single economic unity being based upon the exercise of decisive influence was codified in the Commission guidelines on the applicability of Article 101 TFEU.¹⁶ Even before the ECJ’s decision in *Viho*, the GC had,

¹² *Bodson v SA Pompes Funèbres des Régions Libérées SA* (30/87) [1988] E.C.R. 2479, paras. 19-20.

¹³ *Bodson v SA Pompes Funèbres des Régions Libérées SA* (30/87) [1988] E.C.R. 2479, paras. 20.

¹⁴ *Viho Europe BV v Commission of the European Communities* (C-73/95 P) [1996] E.C.R. I-5457, para. 51.

¹⁵ *Viho Europe BV v Commission of the European Communities* (C-73/95 P) [1996] E.C.R. I-5457, para. 51.

¹⁶ Guidelines on the applicability of Art.101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] (OJ C11/1), para. 11.

in the same case, already reaffirmed the aforementioned *ICI* ruling, by holding that unity of market conduct overrides the legal separation between parent company and subsidiary, based on their respective legal personalities.¹⁷

However, in contrast to the ruling in *Viho*, where the subsidiary had been wholly owned, the ECJ in *Commercial Solvents* held that even a parent company which owned only 51% of its subsidiaries' shares fell in the scope of the single economic unit doctrine, given the fact that there were noteworthy personnel overlaps between the two companies in addition to the shares.¹⁸ In the case of *Dow and Du Pont* the two companies each owned 50 % of a joint venture and were found to be jointly and severally liable, despite the fact that the companies had joint control, and hence neither company had unilateral positive control over the joint venture.¹⁹ Thus, even negative control can render a parent company liable with its subsidiary as one single economic unit. The cases of *Viho*, *Commercial Solvents* and *Dow* illustrate how far reaching the single economic unit doctrine can be. When comparing these two exemplary cases it becomes apparent that the doctrine applies to whole ownership as well as partial or joint ownership. Similar to the notion of “undertaking” the courts have, through their case law, established a rather broad doctrine.

As has been set out in the court's case law, the single economic unit doctrine depends on several factors such as unity of market conduct, lack of autonomy of the subsidiary, personnel overlaps and most importantly, the exercise of decisive influence. Due to the single economic unit doctrine, even subsidiaries of partial or joint owners can form a single economic unit and consequently an undertaking under Article 101 TFEU. Therefore, a parent company or parent companies, as was the case in *Dow*, which have the possibility of exercising decisive influence over their subsidiary are at an increased risk of being held severally and jointly liable as one undertaking under Article 101 TFEU.²⁰

Due to the fact that the single economic unit doctrine overrides the separate legal personalities of parent company and subsidiary, the argument has frequently been raised that the doctrine is not compatible with the principle of personal responsibility, since not only the entity in breach of competition law is personally responsible but also its parent company, which can be held

¹⁷ *Viho Europe BV v Commission of the European Communities* (T-102/92) [1995] E.C.R. II-17, para. 50.

¹⁸ *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v. Commission*, Joined Cases 6/73 & 7/73, 1974 E.C.R. 223, [1974] 1 C.M.L.R. 309.

¹⁹ *Dow Chemical Co v European Commission* (T-77/08) [2012] 4 C.M.L.R. 19, para. 92.

²⁰ Paul Hughes, *Competition law enforcement and corporate group liability - adjusting the veil*, E.C.L.R. 2014, 35(2), 68-87, p. 2.

liable as well.²¹ However, AG Kokott in her opinion in *Akzo Nobel* reconciled the doctrine with the principle. She argued that the principle and the doctrine are compatible, due to the fact that the personal responsibility for competition law infringements is attributed to the legal person operating the undertaking in breach of EU competition law, namely the parent company. Thus, the parent or principal of a single economic unit, which constitutes an undertaking under Article 101 TFEU, bears personal responsibility and can therefore be held liable for the conduct of the entire economic unit.²² This is in stark contrast to corporate law in countries with a common law tradition, which is based upon a clear separate personal responsibility and limited liability.²³

2.1.3 Presumption of parental Liability

In the case of *AEG[-Telefunken]*, which was decided in 1983, the ECJ already referred to the presumption that a parent company that wholly owns a subsidiary exercises decisive influence over the conduct of the latter.²⁴ As a result of this judgment, the so called *presumption of parental liability* emerged and was throughout the years continuously applied and reaffirmed by the Court in recent judgments, such as the rulings in *Akzo Nobel* (C-97/08 P)²⁵, *Arkema SA* (C-520/09 P)²⁶, *Elf Aquitaine SA* (C-521/09 P)²⁷. Court decisions, such as the decision of the General Court in *Areva SA v European Commission* (T-117/07), show that the *presumption of parental liability* allows the Commission to rely on a known fact, such as the fact that holding 100% of a company's shares gives the parent company the opportunity to exercise decisive influence, as proof of an unknown fact, namely whether the parent company holding 100% of shares actually exercised decisive influence on the subsidiary.²⁸ The presumption follows the Court's jurisprudence and allows the Commission to assume that the criteria for a single economic unit, which were set out in judgments like *Viho*²⁹ and *Bodson*³⁰, are fulfilled in cases of whole ownership of a subsidiary by its parent company. In *Stora* the ECJ had

²¹ Julian Joshua, Yves Botteman and Laura Atlee, 'You can't beat the percentage' — *The Parental Liability Presumption in EU Cartel Enforcement*, in (Editor not stated) *The European Antitrust Review 2012 - a Global Competition Review Special Report*, available at http://www.stepto.com/assets/htmldocuments/GCR%20The%20Euro%20Antitrust%20Review%202012_Cartel_s_Joshua-Botteman-Atlee.pdf (visited 26 May 2014), p. 4-5.

²² Opinion of Advocate General Kokott in Case C-97/08P, *Akzo Nobel NV and Others v Commission* [2009] E.C.R. I-8237, para. 39.

²³ Paul Hughes, *Competition law enforcement and corporate group liability - adjusting the veil*, E.C.L.R. 2014, 35(2), 68-87, p. 9.

²⁴ *AEG Telefunken AG v Commission of the European Communities* (107/82) [1983] E.C.R. 3151, para. 52.

²⁵ *Akzo Nobel v Commission of the European Communities* (C-97/08 P) [2009] E.C.R. I-8237, para. 58.

²⁶ *Arkema SA v Commission of the European Communities* (C-520/09 P) [2011] 5 C.M.L.R. 30, para. 38.

²⁷ *Elf Aquitaine SA v European Commission* (C-521/09 P) [2011] ECR I-8947, paras. 56, 63.

²⁸ *Areva SA v European Commission* (T-117/07), [2011] 4 C.M.L.R. 26, para. 86.

²⁹ *Viho Europe BV v Commission of the European Communities* (C-73/95 P) [1996] E.C.R. I-5457.

³⁰ *Bodson v SA Pompes Funèbres des Régions Libérées SA* (30/87) [1988] E.C.R. 2479.

indicated that the presumption alone, based solely on the possession of all or the majority of shares of its subsidiary, in the absence of further evidence, could not be sufficient to hold a parent company liable.³¹ However, the ECJ gradually put the approach in *Stora* into perspective and moved away from it.³² In *Akzo Nobel* the ECJ clarified that it was sufficient for the Commission to rely solely on the *presumption of parental liability*, based on the possession of shares, for the purpose of holding parent companies jointly and severally liable with their subsidiaries as one single economic unit.³³ Therefore, the Commission is not required to take further evidence into consideration when applying the *presumption of parental liability*. The Commission can, however, take further evidence into consideration in addition to the presumption, when applying the so called “dual burden test” or “dual basis method”. The Commission may choose to apply the aforementioned “dual basis method” in order to strengthen their case, by supporting the presumption with additional evidence.³⁴ However, it has to be noted that when applying the “dual burden test” the Commission subjects itself to a higher burden of proof, as compared to the *presumption of parental liability*.

Consequently, the *presumption of parental liability* allows the Commission to presume that parent companies holding around 100% of their subsidiaries shares, exercise decisive influence over their market conduct, and therefore constitute a single economic unit that can be held jointly and severally liable. Furthermore, the presumption does not require the Commission to either prove or check whether the parent company in question actually exercises decisive influence, in order to hold a parent company liable for the infringements of EU competition law of its subsidiaries. The ECJ considered such checks regarding the actual exercise of decisive influence “superfluous” with regards to wholly owned subsidiaries, as can be seen in the aforementioned *AEG [-Telefunken]* judgment.³⁵ Consequently, the *presumption of parental liability* relieves the Commission of the burden to prove the exercise of decisive influence by parent companies over the market conduct of their subsidiaries.

³¹ *Stora Kopparberg Bergslags AB v Commission of the European Communities* (C-286/98 P) [2001] 4 C.M.L.R. 12.

³² See e.g. *Daimler Chrysler AG v Commission of the European Communities* (T-325/01) [2005] E.C.R. II-3319; *Coöperatieve Verkoop- en Productievereniging van Aardappelmeel en Derivaten Avebe BA v Commission* (T-314/01) [2006] ECR II-3085.

³³ *Akzo Nobel v Commission of the European Communities* (C-97/08 P) [2009] E.C.R. I-8237, paras. 61,62.

³⁴ Alexander Riesenkampff & Udo Krauthausen, *Liability of parent companies for antitrust violations of their subsidiaries*, E.C.L.R. 2010, 31(1), 38-41, p. 3.

³⁵ *AEG Telefunken AG v Commission of the European Communities* (107/82) [1983] E.C.R. 3151, para. 50.

Nonetheless, the presumption remains rebuttable as has been noted by the General Court on several occasions, including *Areva SA* (T-117/07)³⁶ and *Akzo Nobel* (T-330/01)³⁷. Based on these and other judgments of the GC and the ECJ, parent companies are afforded the opportunity to rebut the *presumption of parental liability*, in order to prevent being held jointly and severally liable for their subsidiaries conduct. The burden of proof for a rebuttal of the presumption lies completely with the parent companies. Thus, the *presumption of parental liability* relieves the Commission of the burden of proof, as mentioned above, by shifting the burden of proof to the parent companies, which would have to disprove the exercise of decisive influence on their part, in order to rebut the presumption. In *Akzo Nobel* (C-97/08 P)³⁸ and in *Avebe v Commission* (T-314/01)³⁹ the ECJ and GC respectively stated that in order to rebut the presumption, a parent company would have to produce “sufficient evidence” to establish that its subsidiary was independent and the subsidiary’s conduct can therefore not be imputable to the parent company.

The *presumption of parental liability* allows the Commission to presume that wholly owned subsidiaries are under decisive influence of their parent companies and lack autonomy to determine their market conduct independently. Therefore, in line with the case law mentioned above, on the notion of an “undertaking” and the single economic unit doctrine, the Commission can consider wholly owned subsidiaries and their parent companies to constitute a single economic unit without having to prove the exercise of decisive influence by the parent company. Subsequently, based on that presumption, the Commission can hold wholly owned subsidiaries and their parent companies jointly and severally liable as one single economic unit or “undertaking”. However, as has been continuously reiterated by the ECJ in *Akzo Nobel* and other judgments, the presumption is rebuttable. Parent companies would have to disprove criteria set out in the Court’s case law. In theory, according to the Court’s jurisprudence in cases like *Viho*⁴⁰, *Bodson*⁴¹, *ICI*⁴² and *Akzo Nobel*⁴³, parent companies would need to prove that they do not exercise decisive influence and that their subsidiaries enjoy autonomy to determine their market conduct, in order to rebut the *presumption of parental liability*.

³⁶ *Areva SA v European Commission* (T-117/07), [2011] 4 C.M.L.R. 26, para. 86.

³⁷ *Akzo Nobel v Commission* (T-330/01) [2006] E.C.R II-3389, paras. 82-83.

³⁸ *Akzo Nobel v Commission of the European Communities* (C-97/08 P), [2009] E.C.R. I-8237, para. 60.

³⁹ *Coöperatieve Verkoop- en Productievereniging van Aardappelmeel en Derivaten Avebe BA v Commission* (T-314/01) [2006] ECR II-3085, para. 136.

⁴⁰ *Viho Europe BV v Commission of the European Communities* (C-73/95 P) [1996] E.C.R. I-5457.

⁴¹ *Bodson v SA Pompes Funèbres des Régions Libérées SA* (30/87) [1988] E.C.R. 2479.

⁴² *Imperial Chemical Industries Ltd v Commission of the European Communities* (48/69) [1972] E.C.R. 619.

⁴³ *Akzo Nobel v Commission of the European Communities* (C-97/08 P), [2009] E.C.R. I-8237.

Theory however, does not always translate into practice as smoothly as it might seem. The actual rebuttability of the presumption of parental liability in practice will be discussed at a later stage in this essay, under consideration of case law of the CJEU.

2.2 Article 6 ECHR

Throughout the years the question of whether competition law proceedings fall within the scope of the fundamental right to a fair trial as protected by Article 6 ECHR, has frequently been raised. The question will be considered based on the ECtHR's case law and the CJEU's case law in the following. Moreover, the relationship between the ECHR and the Charter of Fundamental Rights of the European Union will be analyzed.

2.2.1 Extent of Article 6 according to the ECtHR

The ECtHR has in its case law established certain criteria and differentiation concerning Article 6 ECHR, which will be presented in the following. First the notion of "criminal charges" and whether EU competition law proceedings can be considered to deal with such "criminal charges" will be examined. Thereafter, proceedings leading to the imposition of fines by administrative bodies, like the European Commission, and the compatibility of such proceedings with Article 6 will be discussed, under consideration of the ECtHR's case law. Lastly, the ECtHR's differentiation of "criminal charges" into hard core criminal charges and non-traditional criminal law will be introduced, as well as the implications this distinction carries with regards to the application of Article 6 ECHR. Each of those subsections will also discuss the implications that the respective ECtHR rulings have with regards to competition law proceedings under EU law.

2.2.2 The notion of "criminal charges" under Article 6

The text of Article 6 ECHR⁴⁴ refers to "criminal charges" and "criminal offences", therefore, whether or not proceedings fall within the scope of Article 6 depends on the nature or classification of an offence. The ECtHR has established its own interpretation as to what constitutes "criminal charges". In *Engel* the ECtHR established that in determining the nature of an offence, it will consider the classification of such an offence under domestic law, the specific nature of the offence in itself, and the degree of severity of the punishment.⁴⁵ With regards to those criteria it has to be noted that they are not cumulative, thus only one criterion has to be fulfilled in order to render a charge "criminal". Moreover, the ECtHR considers the

⁴⁴ Article 6 of the European Convention on Human Rights.

⁴⁵ *Engel v. The Netherlands*, ECtHR [1976] Series A, No. 022, para. 82.

latter two criteria to carry more importance with regards to the nature of an offence than the classification of a charge under domestic law.⁴⁶

The ECtHR in *Bendenoun* elaborated on the latter two criteria. The ECtHR concluded that, considering the specific nature of an offence, the rule in question has to be generally applicable to all citizens equally, in order for an offence to be classified as “criminal”.⁴⁷ In the same judgment the ECtHR held, with regards to the severity of punishment, that if the sanction for the infringement of such a generally applicable rule is of a punitive nature, has a deterrent effect and carries a degree of stigma, the offence can be considered to be “criminal”.⁴⁸ Based on the aforementioned criteria the ECtHR, in *Bendenoun*, considered a tax surcharge, having both deterrent and punitive character, to render the offence in question “criminal” and thus to fall under Article 6(1) ECHR.⁴⁹

Even before the judgment in *Bendenoun* the ECtHR had, based on the *Engel*-criteria, opened up the notion of “criminal charges” to apply to customs and administrative penalties, in the cases of *Salabiaku*⁵⁰ and *Öztürk*⁵¹ respectively. In *Janosevic*, the ECtHR reaffirmed its *Bendenoun* decision in holding that Swedish tax surcharges fell within the notion of “criminal” because the penalties were severe, deterrent and punitive.⁵² Following the judgments in *Öztürk* and *Salabiaku*, the ECtHR opened up Article 6 ECHR to competition law. In the case *Societe Stenuit* the ECtHR held that French competition law proceedings were concerned with a “criminal charge”, due to the fact that competition law like criminal law protected the society’s general interest and due to the fact that the fines in French competition law clearly had a deterrent character.⁵³ In a more recent judgment, with implications regarding the EU’s rules of competition law, the ECtHR reaffirmed its decision in *Societe Stenuit*. In *Menarini*, the ECtHR confirmed that fines imposed under Italian competition law could be considered “criminal” given their severity as well as their punitive and deterrent character.⁵⁴ The special significance of this case, as compared to the *Stenuit* case, with regards to EU

⁴⁶ *Öztürk v Germany*, ECtHR [1984] Series A, No. 73, para. 52.

⁴⁷ *Bendenoun v. France*, ECtHR [1994] Series A, No. 284, para. 46.

⁴⁸ *Bendenoun v. France*, ECtHR [1994] Series A, No. 284, para. 47.

⁴⁹ *Bendenoun v. France*, ECtHR [1994] Series A, No. 284, para. 47.

⁵⁰ *Salabiaku v. France*, ECtHR [1988] Series A, No. 141-A.

⁵¹ *Öztürk v. Germany*, ECtHR [1984] Series A, No. 73.

⁵² *Janosevic v. Sweden*, ECtHR [2002] 2002-VII, para. 66-69.

⁵³ *Societe Stenuit v. France*, ECtHR [1992] Series A, No. 232 A, para. 62-64.

⁵⁴ *Menarini Diagnostics v. Italy*, ECtHR [2011] Application No. 43509/08.

competition law lies in the fact that Italy shaped its competition law after the EU's competition law.⁵⁵

Subsequently, EU competition law can be considered to be “criminal” due to the *Engel*-criteria. Article 101 TFEU is generally applicable to all undertakings equally, as does Regulation 1/2003. Furthermore, competition law protects the general interest of the society in a free market competition in the same way in which criminal law protects other general interests of the society, as stated in *Societe Stenuit*.⁵⁶ Most importantly though, the fines imposed in EU competition law that can be up to 10% of an undertakings worldwide turnover, according to Article 23(2) of Regulation 1/2003,⁵⁷ can be considered to be of a “criminal” nature. Due to their severity, those fines have to be considered to have deterrent character, are of a punitive nature and attach a stigma to competition law infringements. Moreover, the Commission openly aims to achieve effective deterrence by imposing such fines.⁵⁸ In line with the ECtHR's case law in *Janosevic*, the severity of the fines and their deterrent and punitive character are sufficient to render them “criminal” within the meaning of Article 6 ECHR. As mentioned above, the classification under national law does not carry the same weight as the other criteria, thus Article 23(5) of Regulation 1/2003, which states that competition law fines in EU law do not have a criminal character, does not invalidate or outweigh the aforementioned criteria.⁵⁹ Lastly, the *Menarini* judgment gave a clear indication that Article 6 applies to Italy's competition law, and thus should apply to the competition law of the EU likewise.⁶⁰ Consequently, EU competition law proceedings, which have as their objective the imposition of fines, fall within the scope of Article 6 ECHR.

2.2.3 Imposition of fines by administrative authorities

The Court of Human Rights, furthermore, had established that administrative authorities may prosecute, impose fines and punish infringements in accordance with Article 6 ECHR, if the possibility of an effective appeal exists. More specifically, the ECtHR held in *Öztürk* and

⁵⁵ Anne Vallery & Marco Bronckers, *Business as usual after Menarini?*, MLex Magazine, January-March 2012, 44-47, p. 44.

⁵⁶ *Societe Stenuit v. France*, ECtHR [1992] Series A, No. 232 A, para. 62-64.

⁵⁷ Article 23(2) of Council Regulation 1/2003/EC of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003), p. 20.

⁵⁸ Julian Joshua, Yves Botteman and Laura Atlee, ‘*You can't beat the percentage*’ — *The Parental Liability Presumption in EU Cartel Enforcement*, in (Editor not stated) *The European Antitrust Review 2012 - a Global Competition Review Special Report*, available at http://www.steptoelaw.com/assets/html/documents/GCR%20The%20Euro%20Antitrust%20Review%202012_Cartel_s_Joshua-Botteman-Atlee.pdf (visited 26 May 2014), p. 4.

⁵⁹ Article 23(5) of Council Regulation 1/2003/EC of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003), p. 20.

⁶⁰ *Menarini Diagnostics v. Italy*, ECtHR [2011] Application No. 43509/08, paras. 41-42.

Bendenoun that administrative authorities can be entrusted with the prosecution, punishment and imposition of fines for infringements, as long as the charged has the possibility of effectively appealing the administrative authority's decision to a judicial body with full jurisdiction.⁶¹ In this context it has to be noted that, following the ECtHR's argumentation on *Golder*, Article 6 ECHR does not exclusively apply to proceedings in front of the respective courts of appeal, but also to the administrative authorities themselves.⁶²

The aforementioned requirement of effectiveness of an appeal is protected under Article 13 ECHR, the right to an effective remedy.⁶³ In practice the ECtHR often does not apply Articles 6 and 13 in conjunction anymore, due to the fact that the requirement of an effective remedy is often dealt with when considering a case under Article 6 already. For example, in the case of *Mendel*, the ECtHR did not examine Article 13, after finding that the applicant was not granted the possibility to practically and effectively appeal an administrative decision in violation of Article 6(1) ECHR.⁶⁴

Regarding the requirement of full jurisdiction, the court, in *Janosevic*, reiterated and stressed the fact that full jurisdiction has to include the power to review the facts and law of a case as well as the power to quash the administrative body's decision.⁶⁵ Furthermore, the ECtHR reaffirmed the importance of the full jurisdiction requirement in the recent *Menarini* judgment, as well.⁶⁶

Consequently, the role of the European Commission in competition law proceedings, as an administrative body, which investigates, prosecutes, and imposes fines for infringements, may be considered to be compatible with the fair trial principle, protected under Article 6 ECHR, as long as the aforementioned criteria are fulfilled. Therefore, the appellant of a Commission decision must have an effective right to appeal and the GC and the ECJ, have to have full jurisdiction to review the facts and law of competition law cases, in order for the current system of EU competition law proceedings to be compatible with Article 6 ECHR. The GC does have full jurisdiction in competition law cases according to Articles 261 TFEU and 263 TFEU⁶⁷ in conjunction with Article 31 of Regulation 1/2003⁶⁸. Moreover, this was reaffirmed

⁶¹ See e.g. *Öztürk v. Germany*, ECtHR [1984] Series A, No. 73, para. 56; *Bendenoun v. France*, ECtHR [1994] Series A, No. 284, para. 46.

⁶² *Golder v. The United Kingdom*, ECtHR [1975] Series A, No. 018, para. 36,46.

⁶³ Article 6 of the European Convention on Human Rights.

⁶⁴ *Mendel v. Sweden*, ECtHR [2009], Application No. 28426/06, para. 81.

⁶⁵ *Janosevic v. Sweden*, ECtHR [2002] 2002-VII, para. 81.

⁶⁶ *Menarini Diagnostics v. Italy*, ECtHR [2011] Application No. 43509/08, paras. 41-42.

⁶⁷ Articles 261,263 of the Treaty on the Functioning of the European Union [TFEU], Consolidated Version (OJ 2012 C 326/88).

in the *Cimenteries* judgment.⁶⁹ The full jurisdiction requirement, regarding the GC and the ECJ, can thus be considered to be fulfilled, despite the fact that they do not make frequent use of it.⁷⁰ The possibility of practically and effectively appealing the presumption of parental liability will be discussed throughout the analysis of the courts' case law.

2.2.4 Hard core- and non-traditional criminal law

Following the broadening of the notion of “criminal charge” after the introduction of the *Engel*-criteria, the ECtHR, in *Jussila*⁷¹ introduced a distinction between different types of “criminal charges”. The court argued that administrative law, customs law, and competition law can be considered “criminal” in accordance with the *Engel*-criteria, but are not traditionally in the sphere of criminal law.⁷² The court went on to state that tax surcharges, which were the issue in question in *Jussila*, could not be considered to be part of the hard core of criminal law, thus the protections guaranteed in Article 6 ECHR will not necessarily be applied with the same stringency as they would be concerning hard core criminal law.⁷³ The *Jussila* judgment led to the widespread assumption among legal practitioners and scholars that competition law would also fall outside the hard core of criminal law, and thus Article 6 would not be applied with full stringency with regards to competition law.⁷⁴ However, others have argued that competition law could fall within the hard core of criminal law considering the severity of competition law fines as compared to the tax surcharges in *Jussila*.⁷⁵ Moreover, it has been argued that the ECtHR in *Menarini* did not determine competition law to fall outside the hard core of the notion of “criminal”, as it had done in *Jussila*.⁷⁶ Therefore,

⁶⁸ Article 31 of Council Regulation 1/2003/EC of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003).

⁶⁹ *Cimenteries CBR and Others v Commission* (Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95) [2000], ECR II-491, para. 71.

⁷⁰ Themistoklis K. Giannakopoulos, *Due Process in European Union Law*, in Themistoklis K. Giannakopoulos, *Safeguarding Companies' Rights in Competition and Anti-dumping/Anti-subsidies Proceedings*, International Competition Law Series, Volume 12, (Kluwer Law International 2011), 7 – 27, p. 25.

⁷¹ *Jussila v. Finland*, ECtHR [2006] 2006-XIV.

⁷² *Jussila v. Finland*, ECtHR [2006] 2006-XIV, para. 43.

⁷³ *Jussila v. Finland*, ECtHR [2006] 2006-XIV, para. 43.

⁷⁴ See e.g. Themistoklis K. Giannakopoulos, *Due Process in European Union Law*, in Themistoklis K. Giannakopoulos, *Safeguarding Companies' Rights in Competition and Anti-dumping/Anti-subsidies Proceedings*, International Competition Law Series, Volume 12, (Kluwer Law International 2011), 7 – 27, p. 24; Wouter P.J Wils, *The Increased Level of EU Antitrust Fines, Judicial Review, and the European Convention on Human Rights*, in Jose Rivas (ed.), *World Competition Law and Economic Review*, Vol. 33, Issue 1, (Kluwer Law International 2010), 5-30, pp. 14–15.

⁷⁵ Anne Vallery & Macro Bronckers. *No Longer Presumed Guilty? The Impact of Fundamental Rights on Certain Dogmas of EU Competition Law*, in Jose Rivas (ed.), *World Competition Law and Economic Review*, Vol. 34, Issue 4, (Kluwer Law International 2011), 535–570, p. 539.

⁷⁶ Anne Vallery & Macro Bronckers. *No Longer Presumed Guilty? The Impact of Fundamental Rights on Certain Dogmas of EU Competition Law*, in Jose Rivas (ed.), *World Competition Law and Economic Review*, Vol. 34, Issue 4, (Kluwer Law International 2011), 535–570, p. 540.

it can be argued that competition law, based on the severity of its fines and the fact that the ECtHR did not declare it to fall outside the hard core of “criminal”, can be considered to fall within the hard core under Article 6 ECHR, which would therefore, have to be applied with full stringency to competition law cases.

Consequently it appears to be possible that EU competition law, like the Italian in *Menarini*, would not fall outside the hard core of Article 6 ECHR, due to its severe, deterrent and punitive fines. Moreover, it has to be noted that fines under EU competition law, especially under consideration of the presumption of parental liability, exceed the fine imposed in *Menarini* considerably, due to the fact that fines up to 10% of an “undertaking’s” global turnover may be imposed. The classification of competition law procedures under EU law does not however affect the requirement of full judicial review, which in either case has to be fulfilled in order for the Commission’s role as investigator, prosecutor and decision making authority to be in conformity with Article 6 ECHR.⁷⁷ This argument can be reaffirmed with reference to the EFTA Court, which has frequently been a source of inspiration for the ECJ. In *Postem Norge* the court argued that given the severity of the charge and the stigma attached to it, a competition law charge could not be considered a “minor” criminal charge.⁷⁸

Subsequently, throughout the discussion of the requirement of full jurisdiction and full judicial review, in the later part of this essay, no distinction will be made with regards to the two categories of “criminal charges”, as that requirement applies to either classification of competition law proceedings. This essay will mainly be concerned with the right to fair trial under Article 6 ECHR. More specifically, the focus will be put on the full jurisdiction requirement and the right to an effective appeal, whereas issues relating to the presumption of innocence or the *ne bis in idem* principle are not going to be discussed with regards to the *presumption of parental liability*.

2.2.5 ECHR and the CFREU

As a result of the entry into force of the Treaty of Lisbon, the Charter of Fundamental Rights of the European Union [CFREU], which had been drafted in 2000, became binding. Article 6(1) TEU stipulates that the CFREU shall have the same legal value as the TEU and TFEU,

⁷⁷ Igor Nikolic, *Full judicial review of antitrust cases after KME: a new formula of review?*, E.C.L.R. 2012, 33(12), 583-588, p. 4.

⁷⁸ Eric Barbier de la Serre, *A lesson on judicial review from the other European Court in Luxembourg*, Kluwer Competition Law Blog, 27 April 2012, available at <http://kluwercompetitionlawblog.com/2012/04/27/a-lesson-on-judicial-review-from-the-other-european-court-in-luxembourg/> (visited 28 April 2014).

thus the CFREU does have direct effect like the Treaties.⁷⁹ Moreover, Article 6(3) TEU codified that the fundamental rights ECHR protected by the ECHR shall be general principles of EU law. This, however, is of minor importance considering the fact that Article 52(3) CFREU, which is intended to safeguard consistency between the ECHR and CFREU, stipulates that the rights guaranteed in the ECHR shall form the minimum protection afforded by the CFREU.⁸⁰ More specifically, Article 52(3) provides rights contained in the CFREU, which correspond to rights protected under the ECHR, shall have the same meaning and scope as those corresponding ECHR rights. Moreover, AG Trstenjak argued that the reference to the ECHR, in Article 52(3) CFREU, is a dynamic reference and thus includes the case law of the ECtHR.⁸¹ Therefore, the right to a fair trial and effective remedy, in Article 47 CFREU, the presumption of innocence, in Article 48 CFREU, and the principles of legality and proportionality, in Article 49 CFREU, shall have the same meaning and scope as their corresponding rights, namely Article 6 ECHR. Furthermore, following AG Trstenjak's argumentation in the *N.S.* case, even the ECtHR's case law concerning Article 6 ECHR has to be taken into account regarding the scope and meaning of the rights contained therein. Nonetheless, it has to be noted that Article 52(3) CFREU does not render the ECHR directly applicable, rather the ECJ would have to interpret the CFREU in the light of the ECHR and the ECtHR's case law.

2.2.6 Article 6 ECHR and the CJEU

Prior to the CFREU becoming binding, the European Commission as well as the courts of the EU, the ECJ and GC, did not share the aforementioned view that the fines imposed by the Commission render EU competition law "criminal". This view was founded on Article 23(5) of Regulation 1/2003, which states that the Commission's fining decisions shall not be of a criminal nature.⁸² The Commission and the ECJ made their view regarding the applicability of Article 6 ECHR clear in several cases. They considered Article 6 ECHR not to be applicable to the Commission's decision, due to the fact that the Commission was an administrative authority and did not constitute a tribunal under Article 6 ECHR.⁸³ In light of the drafting of the CFREU the ECJ gradually departed from its aforementioned view. In *Shell*, the GC

⁷⁹ Article 6 of the Treaty on the European Union [TEU], Consolidated Version (OJ 2012 C 326/01).

⁸⁰ Article 52(3) of the Charter of Fundamental Rights of the European Union [CFREU] (OJ 2007 C 303/1).

⁸¹ Opinion of Advocate General Trstenjak in Case C-411/11, *N. S. v Secretary of State for the Home Department* [2011], ECR I-0000, para. 145.

⁸² Article 23(5) of Council Regulation 1/2003/EC of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003).

⁸³ See e.g. *Van Landewyck, Federation Belgo-Luxembourgeoise des Industries du Tabac (FEDETAB) v Commission* (joined cases C-209-215/78 and 218/78) [1982], E.C.R. 3125, paras. 79-81; *Musique Diffusion (Pioneer) v Commission* (joined cases C-100-103/80) [1983], E.C.R. 1825, paras. 7-9.

stipulated that the Commission has to follow the general principles of EU law, which include the ECHR, during the administrative procedure.⁸⁴ Furthermore, in *Hüls* the Court acknowledged that Article 6(2) ECHR, the presumption of innocence, is protected under the EU legal order and, moreover, even applies to competition law proceedings.⁸⁵ The ECJ specified that Article 6(2) was found to be applicable to competition law proceedings, due to the nature of the infringements of competition law and the nature and severity of the fines.⁸⁶ It can be noted that in *Hüls* the ECJ applied the *Engel*-criteria in considering the nature of the infringement and the degree of severity of the punishment. Thus, the ECJ followed the line of legal reasoning that the ECtHR established in the aforementioned judgments. However, following the *Jussila* judgment the ECJ has yet to determine whether it considers Article 6 ECHR to apply with full stringency or reduced stringency, depending on whether competition law is considered to be hard core or peripheral criminal law. In the recent case of *Schindler* the GC confirmed the applicability of Article 6 ECHR, however it did not consider competition law to fall within the hard core of criminal law.⁸⁷ Following the ECtHR's *Menarini* judgment, the ECJ in *KME*⁸⁸ and *Chalkor*⁸⁹ the ECJ held that the courts of the EU, when conducting a judicial review, have to conduct an in-depth review of the law and the facts. The ECJ went on to state that the margin of discretion, the courts afford the Commission, cannot constitute a reason to dispense of this in-depth review of law and facts.⁹⁰ However, the ECJ clarified that the courts' unlimited jurisdiction shall not compel them to conduct judicial review on their own motion.⁹¹ With regards to the judgments in *KME* and *Chalkor*, it is noteworthy that the ECJ refrained from referring to the full jurisdiction requirement under Article 6 ECHR and the related case law of the ECtHR, but rather referred to Article 47 CFREU. Nonetheless, it appears as if the ECJ, in the aftermath of the ECtHR's *Menarini* ruling, realized that it had to change the approach the GC and ECJ had taken towards competition law cases over the years, in order for the proceedings to remain compatible with Article 6 ECHR.

After initial denial, the Commission and the courts of the EU have acknowledged that Article 6 ECHR does apply to competition law proceedings in EU law. Based on Article 52(3) CFREU Articles 47, 48 and 49 have to be read in the light of Article 6 ECHR and the related

⁸⁴ *Shell v Commission* (T-11/89) [1992], ECR II-757, para. 39.

⁸⁵ *Hüls AG v Commission* (C-199/92 P) [1999], E.C.R. I-4287, paras. 149-150.

⁸⁶ *Hüls AG v Commission* (C-199/92 P) [1999], E.C.R. I-4287, paras. 150.

⁸⁷ *Schindler v Commission* (T-138/7) [2011], E.C.R. II-0000, paras. 52-54.

⁸⁸ *KME v Commission* (C-272/09 P) [2011], E.C.R. I-0000, paras. 102-104.

⁸⁹ *Chalkor v Commission* (C-386/10 P) [2011], E.C.R. I-0000, paras. 50-51.

⁹⁰ *KME v Commission* (C-272/09 P) [2011], E.C.R. I-0000, paras. 102-104.

⁹¹ *KME v Commission* (C-272/09 P) [2011], E.C.R. I-0000, para. 104.

case law of the ECtHR. Subsequently, the ECJ and the GC have, as can be seen in *Hüls*, accepted and applied the *Engel*-criteria, rendering competition law to fall within the scope of Article 6 ECHR. Moreover, the ECJ in *KME* and *Chalkor* reacted to the ECtHR's *Menarini* judgment and stipulated that the Commission's margin of discretion must not diminish the extent of judicial review, conducted by the GC and the ECJ. However, it is not yet clear whether Article 6 ECHR applies to competition law with full stringency, as the ECtHR has not addressed that issue yet. As mentioned above, the GC in *Schindler* indicated that Article 6 could not be applied with full stringency to competition law. While the *Schindler* judgments indicates that the GC considers competition law not to fall within the hard core of criminal law, the final determination whether or not Article 6 applies with full stringency to competition law will most likely have to be made by the ECtHR, rather than any EU court. Considering the fact that the ECtHR had the opportunity in *Menarini*, but decided not to declare competition law to fall outside the hard core of criminal law can be understood to indicate that the ECtHR does not consider competition law to be strictly outside the hard core of criminal law, given the severity of competition law fines and their punitive and deterrent nature. This decision in *Menarini* is very much in contrast to the ECtHR's decision regarding tax law surcharges in *Jussila* for example, which the court declared to be outside the scope of hard core criminal law. Thus, if the ECtHR considered competition law not to belong to the hard core of criminal law in the same way as tax law, it could have done so in *Menarini*, but did not. Consequently, there is little legal precedent by the ECtHR to suggest that competition law is considered to fall strictly outside the hard core of criminal law, whereas there is some indication that the ECtHR might consider it to fall within the scope of hard core criminal law and therefore, competition law would be subject to the stringent application of Article 6 ECHR.

After all, the ECJ's judgment in *KME* can be understood to be the ECJ's attempt to change the approach taken towards competition law cases. Some argued that the ECJ would gradually increase the degree of judicial reviews and narrow the Commission's discretion.⁹² It can be interpreted to constitute the beginning of a more coherent and more extensive approach in regards to judicial review in competition cases, which would have to be applied by the courts of the EU and the GC in particular. However, these changes, expected following the *KME* ruling, are just theoretical until they are consistently implemented in practice. In order to examine whether *KME* did lead to a more comprehensive approach regarding judicial review

⁹² Igor Nikolic, *Full judicial review of antitrust cases after KME: a new formula of review?*, E.C.L.R. 2012, 33(12), 583-588, p. 7.

in subsequent cases, this essay will in the following, focus on the case of *Alliance One International v Commission*, which was decided in 2013.

2.3 C-679/11 Alliance One v European Commission

The analysis of the *presumption of parental liability* will be revolving around the *AOI* case, which was decided in September 2013. For the purpose of the analysis, the different stages and relevant aspects of the *AOI* case will be presented in the following. First of all, the factual background of the competition law infringement in question will be introduced. Secondly, the relevant corporate groups, namely the subsidiaries and parent companies that were implicated in the infringement, will be introduced. The focus of this section is to identify and present the shareholdings of parent companies over their subsidiaries, which are relevant with regards to the *presumption of parental liability*. Thereafter, the Commission's decision as well as *AOI's* appeal to the GC will be presented. It has to be noted that for the purpose of this issue the fines imposed by the Commission will not be at issue, rather the reasoning of the Commission and the GC will be under observation. Lastly, the focus will be put on the appeal to the ECJ and the legal questions arising from it.

2.3.1 Factual background of Commission Decision C(2004) 4030

Having conducted investigations and inspections, which lead to a statement of objections being issued, the Commission found *Agroexpansión SA*, *Compañía española de tabaco en rama SA [Cetarsa]*, *Tabacos Españoles SL [Taes]* and *World Wide Tobacco España SA [WWTE]*, which are Spanish processors of raw tobacco in Spain, and *Deltafina SpA [Deltafina]*, an Italian company which was the principal purchaser of raw tobacco in the Spanish market, to be involved in a buyers' cartel.⁹³ Thus, Commission Decision C(2004) 4030⁹⁴ is based on the Commission's finding that a horizontal buyers cartel in the Spanish raw tobacco market had been set up and implemented. According to the results of the Commission's investigation, this buyers' cartel fixed delivery prices and shares of quantities of raw tobacco annually, between 1996 and 2001, and established price brackets for each variety of raw tobacco and minimum prices, between 1999 and 2001.⁹⁵ This conduct of fixing purchasing prices, fixing certain trading conditions and sharing the market of raw tobacco falls under the hardcore restrictions in EU competition law and constitutes a breach of Article

⁹³ Commission Decision C(2004) 4030 of 20 October 2004 relating to a proceeding under Article 81(1) [EC] (Case COMP/C.38.238/B.2-Raw tobacco-Spain), p. 100.

⁹⁴ Commission Decision C(2004) 4030 of 20 October 2004 relating to a proceeding under Article 81(1) [EC] (Case COMP/C.38.238/B.2-Raw tobacco-Spain).

⁹⁵ Commission Decision C(2004) 4030 of 20 October 2004 relating to a proceeding under Article 81(1) [EC] (Case COMP/C.38.238/B.2-Raw tobacco-Spain), p. 100.

101(1) TFEU.⁹⁶ Thus, the Commission did exercise its power to impose fines on the companies involved in the cartel for the infringement of Article 101 TFEU, in accordance with Article 23 of Regulation 1/2003.

2.3.2 Relevant corporate groups

All shares of *Agroexpansión*, which had been established in 1988 as a family enterprise, were purchased by *Intabex Netherlands BV [Intabex]* in November 1997.⁹⁷ Thus, *Agroexpansión* was wholly owned by *Intabex*. Since April 1997 *Intabex* itself had been wholly owned by *Dimon Inc. [Dimon]*, rendering *Agroexpansión* to be wholly owned by *Dimon* through *Intabex*.⁹⁸ *Agroexpansión* became part of the corporate group led by *Dimon* in 1997 about a year after the cartel among Spanish raw tobacco processors had been implemented. Subsequently, *Agroexpansión* was not owned, neither wholly nor partially, by either *Dimon* or *Intabex* in 1996, when the cartel was set up and implemented according to the aforementioned Commission's decision. The merger of *Dimon* with the American *Standard Commercial Corp. [SCC]* resulted in the formation of *AOI*, in May 2005.⁹⁹ Thus, *AOI*, formerly *Dimon*, is *Agroexpansión's* ultimate parent company, while *Intabex* is an intermediary parent of the latter.

Around 90% of *WWTE's* shares were held by *Standard Commercial Tobacco Co. Inc. [SCTC]* and *Trans-Continental Leaf Tobacco Corporation [TCLT]*, since May 1998. Before May 1998, since 1995, two-thirds of *WWTE's* shares were held by *TCLT*.¹⁰⁰ Both, *TCLT* and *SCTC* are wholly owned by *SCC*.¹⁰¹ Thus, *SCC* owned 90% of *WWTE's* shares through its wholly owned subsidiaries *TCLT* and *SCTC* as intermediaries, rendering *SCC* to be *WWTE's* ultimate parent company. However, *SCC* owned only two-thirds of *WWTE's* shares in 1996, when the infringement of Article 101 TFEU commenced. Moreover, even after 1998 *WWTE* was not a wholly owned subsidiary of either *SCC* or one of the intermediaries. As mentioned above, *SCC* is the same company that merged with *Dimon* to become *AOI*, in 2005. This aforementioned merger renders *AOI* to be not only ultimate parent company *Agroexpansión*

⁹⁶ *Alliance One International Inc. v European Commission* (C-679/11) [2013], E.C.R I-000 (not yet reported), para. 9.

⁹⁷ *Alliance One International Inc. v European Commission* (C-679/11) [2013], E.C.R I-000 (not yet reported), para. 4.

⁹⁸ *Alliance One International Inc. v European Commission* (C-679/11) [2013], E.C.R I-000 (not yet reported), para. 4.

⁹⁹ *Alliance One International Inc. v European Commission* (C-679/11) [2013], E.C.R I-000 (not yet reported), para. 4.

¹⁰⁰ Commission Decision C(2004) 4030 of 20 October 2004 relating to a proceeding under Article 81(1) [EC] (Case COMP/C.38.238/B.2-Raw tobacco-Spain), p. 87, recital 388.

¹⁰¹ Summary of the Commission Decision C(2004) 4030 of 20 October 2004 relating to a proceeding under Article 81(1) [EC] (Case COMP/C.38.238/B.2-Raw tobacco-Spain), (OJ L 102/14, 19.04.2007), p. 2.

but also *WWTE*'s, from May 2005 onwards. *Intabex*, *TCLT* and *SCTC* remained in their roles as intermediaries.

Taes and *Deltafina*, were both subsidiaries of *Universal Leaf Tobacco Co. Inc.* [*Universal Leaf*]. While *Universal Leaf* wholly owned *Deltafina*, it owned only 90% of *Taes*' shares prior to 2002, since December 2002 *Taes* is wholly owned by *Universal Leaf* as well.¹⁰² All shares of *Universal Leaf* were entirely owned by *Universal Corp.* [*Universal*], making it *Taes*' and *Deltafina*'s ultimate parent company, while *Universal Leaf* was an intermediary.¹⁰³ *Universal*, consequently owned *Taes* and *Deltafina* both, largely or wholly, at the time the cartel was established and implemented in 1996.

Cetarsa is a public undertaking which, prior to 1990, was the only company allowed to process raw tobacco in Spain.¹⁰⁴ Based on the fact that it held a legal monopoly on processing raw tobacco, *Cetarsa* bought and processed the largest amount of raw tobacco among all processors. However, due to the fact that it is a public undertaking it is of minor relevance for the purpose of this essay.

2.3.3 The Commission's Decision

On October 2004, in Decision C(2004) 4030, the Commission imposed fines on *Cetarsa*, *Deltafina*, *Taes*, *Agroexpansión* and *WWTE* for the aforementioned infringement of Article 101 TFEU. The latter two were held jointly and severally liable with their respective parent companies, whereas *Deltafina*'s and *Taes*' were not held jointly and severally liable.¹⁰⁵ Therefore, *Dimon* was considered liable with regards to *Agroexpansión*'s conduct and *SCC*, *TCLT* and *SCTC* with regards to the conduct of *WWTE*.¹⁰⁶

The Commission decided, after hearing the parties, not to hold *Deltafina*'s and *Taes*' parents, *Universal Leaf* and *Universal*, and *Agroexpansión*'s intermediate parent, *Intabex*, jointly and severally liable.¹⁰⁷ The Commission argued that it could not find *Universal Leaf* or *Universal* to be "materially involved" in their subsidiaries conduct in breach of Article 101 TFEU.¹⁰⁸

¹⁰² Summary of the Commission Decision C(2004) 4030 of 20 October 2004 relating to a proceeding under Article 81(1) [EC] (Case COMP/C.38.238/B.2-Raw tobacco-Spain), (OJ L 102/14, 19.04.2007), p. 2.

¹⁰³ *Alliance One International Inc. v European Commission* (C-679/11) [2013], E.C.R I-000, para. 10.

¹⁰⁴ Summary of the Commission Decision C(2004) 4030 of 20 October 2004 relating to a proceeding under Article 81(1) [EC] (Case COMP/C.38.238/B.2-Raw tobacco-Spain), (OJ L 102/14, 19.04.2007), p. 2.

¹⁰⁵ Summary of the Commission Decision C(2004) 4030 of 20 October 2004 relating to a proceeding under Article 81(1) [EC] (Case COMP/C.38.238/B.2-Raw tobacco-Spain), (OJ L 102/14, 19.04.2007), p. 6.

¹⁰⁶ Summary of the Commission Decision C(2004) 4030 of 20 October 2004 relating to a proceeding under Article 81(1) [EC] (Case COMP/C.38.238/B.2-Raw tobacco-Spain), (OJ L 102/14, 19.04.2007), p. 6.

¹⁰⁷ Summary of the Commission Decision C(2004) 4030 of 20 October 2004 relating to a proceeding under Article 81(1) [EC] (Case COMP/C.38.238/B.2-Raw tobacco-Spain), (OJ L 102/14, 19.04.2007), p. 2.

¹⁰⁸ Commission Decision C(2004) 4030 of 20 October 2004 relating to a proceeding under Article 81(1) [EC] (Case COMP/C.38.238/B.2-Raw tobacco-Spain), p. 84, recital 376.

Moreover, *Intabex* was exempted from liability due to the fact that the Commission considered its shareholding in *Agroexpansión* to be of a “purely financial” nature.¹⁰⁹ The Commission later clarified that, even though it had referred to a “material involvement” criterion in exempting *Universal* from liability, it had actually applied the “dual burden test” to these parent companies and their subsidiaries, taking into account the respective shareholdings as well as further evidence.¹¹⁰ Due to the fact that the Commission did not find further evidence indicating *Universal’s* or *Universal Leaf’s* material involvement in their subsidiaries infringement of Article 101, the Commission thus found them not to be jointly and severally liable for those infringements. However, it is noteworthy that the Commission found *Universal* and *Universal Leaf* to be jointly and severally liable for *Deltafina’s* participation in an Italian raw tobacco cartel.¹¹¹

With regards to *Dimon* and *Agroexpansión* the Commission, however, relied on the aforementioned case law of the CJEU and applied the *presumption of parental liability* to hold *Dimon* jointly and severally liable.¹¹² Moreover, the Commission considered other factors, such as “activity reports” informing *Dimon* of *Agroexpansión’s* conduct, to confirm this presumption.¹¹³ Therefore, one could argue that the Commission applied the “dual burden test”. However, the Commission stated that its decision to hold *Dimon* jointly and severally liable was based on the presumption that *Dimon*, due to the fact that it wholly owned *Agroexpansión*, exercised decisive influence over its subsidiary.¹¹⁴ Even in later proceedings in front of the GC the Commission explained that it held *Dimon* liable solely based on the presumption.¹¹⁵ Thus, the evidentiary quality of the aforementioned activity reports was irrelevant with regards to *Dimon* being jointly and severally liable. Nonetheless, the GC found that the Commission, according to the court’s interpretation of Decision C(2004) 4030, had applied the “dual burden test” to all parent companies, including *Dimon*.¹¹⁶ This gave rise to *Dimon’s* claim that the GC established the “dual burden test” as the relevant standard of proof

¹⁰⁹ Commission Decision C(2004) 4030 of 20 October 2004 relating to a proceeding under Article 81(1) [EC] (Case COMP/C.38.238/B.2-Raw tobacco-Spain), p. 84, recital 376.

¹¹⁰ *Alliance One International Inc. v European Commission* (C-679/11) [2013], E.C.R I-000 (not yet reported), para. 29.

¹¹¹ Commission Decision of 20 October 2005 relating to a proceeding under Article 81(1) of the EC Treaty (Case COMP/C.38.281/B.2 – Raw Tobacco Italy), p. 86, recital 348.

¹¹² Commission Decision C(2004) 4030 of 20 October 2004 relating to a proceeding under Article 81(1) [EC] (Case COMP/C.38.238/B.2-Raw tobacco-Spain), p. 85, recital 378.

¹¹³ Commission Decision C(2004) 4030 of 20 October 2004 relating to a proceeding under Article 81(1) [EC] (Case COMP/C.38.238/B.2-Raw tobacco-Spain), p. 85, recitals 378-379.

¹¹⁴ Commission Decision C(2004) 4030 of 20 October 2004 relating to a proceeding under Article 81(1) [EC] (Case COMP/C.38.238/B.2-Raw tobacco-Spain), p. 85, recitals 378.

¹¹⁵ *Alliance One International Inc. v European Commission* (C-679/11) [2013], E.C.R I-000 (not yet reported), para. 29.

¹¹⁶ *Alliance One International Inc. v European Commission* (T-41/05) [2011], E.C.R II-7101, paras. 117-119.

ex post facto to which all companies had been subjected, as will be elaborated on in the following sections.

2.3.4 The appeal to the General Court

In January 2005 *Dimon*, now *AOI*, brought action for annulment of the Commission's decision. *Dimon* argued that first of all that Article 101(1) TFEU and Article 23 Regulation 1/2003 as well as the principle of proportionality were infringed by holding *Dimon* liable for *Agroexpansión's* unlawful conduct, participating in a buyers' cartel.¹¹⁷ Secondly, *Dimon* argued the Commission had violated the principle of proportionality by not showing that *Dimon* directly participated in *Agroexpansión's* infringement of Article 101(1) TFEU.¹¹⁸ Thirdly, the principle of proportionality and personal liability, as well as Article 23(2) Regulation 1/2003 were breached in holding *Dimon* jointly and severally liable for *Agroexpansión's* conduct prior to being wholly owned by *Dimon* in November of 1997.¹¹⁹ Fourthly, the principle of legitimate expectations was breached by not considering mitigating circumstances in calculating the amount of the fine.¹²⁰ Lastly, *Dimon* argued that the Commission failed to fulfill its obligation to state reasons for its decision.¹²¹

The GC dismissed all grounds of appeal raised by *Dimon* except for the third, namely the GC upheld that *Dimon* should not be held liable for *Agroexpansión's* infringements of Article 101(1) before becoming part of the *Dimon group*.¹²² As mentioned above, the Commission found in its decision that the Buyers' cartel in the Spanish raw tobacco market, in which *Agroexpansión* participated, had fixed purchasing prices from 1996 onwards. Thus, *Agroexpansión* was involved in unlawful conduct in violation of Article 101(1) TFEU for, as far as the Commission can prove it, at least over a year before becoming a subsidiary of *Dimon*, through *Intabex*. This ruling by the GC, however, did not result in the annulment of the entire decision *Dimon* had been striving for, but resulted instead in the ruling that *Dimon*

¹¹⁷ *Alliance One International Inc. v European Commission* (C-679/11) [2013], E.C.R I-000(not yet reported) , para. 22.

¹¹⁸ *Alliance One International Inc. v European Commission* (C-679/11) [2013], E.C.R I-000 (not yet reported), para. 22.

¹¹⁹ *Alliance One International Inc. v European Commission* (C-679/11) [2013], E.C.R I-000 (not yet reported), para. 22.

¹²⁰ *Alliance One International Inc. v European Commission* (C-679/11) [2013], E.C.R I-000 (not yet reported), para. 22.

¹²¹ *Alliance One International Inc. v European Commission* (C-679/11) [2013], E.C.R I-000 (not yet reported), para. 22.

¹²² *Alliance One International Inc. v European Commission* (C-679/11) [2013], E.C.R I-000 (not yet reported), para. 23.

simply could not be held jointly and severally liable for the infringements prior to November 1997.¹²³

Moreover, the GC, as mentioned above, came to the conclusion, which was based on its own interpretation of the decision, that the Commission had applied the “dual burden test” to all parent companies, despite the fact that the Commission had in a written explanation to the court stated the contrary.¹²⁴ The Commission had, in the aforementioned written explanation, confirmed that *Dimon* was held liable solely based on the *presumption of parental liability*, whereas the liability of other parent companies had been established through the “dual burden test”.¹²⁵

2.3.5 The appeal to the ECJ

Following the unsuccessful appeal to the GC, *AOI* brought an appeal to the ECJ against the GC’s ruling in T-41/05, which was fully rejected by the ECJ.¹²⁶ The Commission lodged a cross-appeal mainly directed against paragraph 214 of the GC’s decision, reducing the fines imposed on *Agroexpansión* and its parent company.¹²⁷ However, the focus of this essay will be on *AOI*’s appeal.

AOI appealed to the ECJ, seeking the GC’s ruling to be set aside and the Decision of the Commission to be annulled. *AOI* based its appeal on four grounds, which can be summarized as follows: First of all, *AOI* claimed that the GC misapplied Article 101(1) TFEU and 23(2) of Regulation 1/2003. The GC breached *AOI*’s rights of defense and Article 296 TFEU, the obligation to state reasons for decisions, by clarifying *ex post facto* in the judgment that the Commission had applied the “dual basis test”. Furthermore, *AOI* considered the application of the “dual-burden test” to be arbitrary, due to the fact that evidence is not required in general to attribute liability. As a result thereof, the *presumption of parental liability* might be applied strictly in some cases, whereas the “dual burden test” is applied in other cases.¹²⁸ Moreover, *AOI* argued that according to the Commission’s explanation *Dimon* was held liable solely based on the presumption, while other parent companies, like *Universal Leaf* and *Universal*,

¹²³ *Alliance One International Inc. v European Commission* (C-679/11) [2013], E.C.R I-000 (not yet reported), para. 23.

¹²⁴ *Alliance One International Inc. v European Commission* (T-41/05) [2011], E.C.R II-7101, paras. 117-119.

¹²⁵ *Alliance One International Inc. v European Commission* (C-679/11) [2013], E.C.R I-000 (not yet reported), para. 29.

¹²⁶ *Alliance One International Inc. v European Commission* (C-679/11) [2013], E.C.R I-000 (not yet reported), para. 116.

¹²⁷ *Alliance One International Inc. v European Commission* (C-679/11) [2013], E.C.R I-000 (not yet reported), para. 90.

¹²⁸ *Alliance One International Inc. v European Commission* (C-679/11) [2013], E.C.R I-000 (not yet reported), para. 30.

were held to a different standard, as their liability was established through the “dual burden test”.¹²⁹ *AOI* argued that the evidence concerning *Universal’s* exercise of decisive influence was as solid or not solid as the evidence concerning *Dimon’s* involvement, thus had the “dual burden test” been applied both parent companies should have faced the same outcome.¹³⁰ Secondly, *AOI* argued that a presumption of guilt is in principle forbidden. Therefore the GC’s decision violates its fundamental rights under Article 48 and 49 of the Charter of Fundamental Rights of the European Union, namely the right to the presumption of innocence and the principles of legality and individual liability for criminal offences and penalties. Thirdly, *AOI* argues that the GC upheld the discriminatory way in which the fines were calculated. Lastly, *AOI* claims that the GC erred in not applying Section B, Point 3 of the 1998 Guidelines on fines.¹³¹

For the purpose of the discussion of the presumption of parental liability, this essay will be focused on the first and second ground of appeal brought by *AOI*.

The ECJ rejected the first ground of appeal, namely that the GC breached *AOI’s* right to defense by not finding the Commissions’ statement of reasons insufficient and clarifying *ex post facto* the “dual-burden test” to be the standard of proof the Commission had applied in its decision.¹³² In its decision the Commission itself had not indicated the application of the “dual burden test” in its decision, but referred to the absence of “material involvement” as a criterion for exempting companies, such as *Universal* and *Universal Leaf*, from being held jointly and severally liable for the infringements of their subsidiaries.¹³³ Moreover, *AOI* claimed that the “dual burden test” was applied arbitrarily, as mentioned above.¹³⁴ The ECJ dismissed this plea based on the fact that it considered the GC’s decision to be correct in rejecting a “material involvement test” reading of recital 376 of the decision, due to the fact that “material involvement” was not the standard, according to the Courts case law, by which

¹²⁹ *Alliance One International Inc. v European Commission* (C-679/11) [2013], E.C.R I-000 (not yet reported), para. 29.

¹³⁰ *Alliance One International Inc. v European Commission* (C-679/11) [2013], E.C.R I-000 (not yet reported), para. 31.

¹³¹ Appeal brought on 27 December 2011 by Alliance One International, Inc., formerly Dimon, Inc., against the judgment of the General Court (Fourth Chamber) delivered on 12 October 2011 in Case T-41/05: Alliance One International, Inc., formerly Dimon Inc., v European Commission available at <http://curia.europa.eu/juris/document/document.jsf?doclang=EN&text=&pageIndex=0&part=1&mode=DOC&docid=119650&occ=first&dir=&cid=88754> (visited 26 May 2014).

¹³² *Alliance One International Inc. v European Commission* (C-679/11) [2013], E.C.R I-000 (not yet reported), para. 28.

¹³³ Commission Decision C(2004) 4030 of 20 October 2004 relating to a proceeding under Article 81(1) [EC] (Case COMP/C.38.238/B.2-Raw tobacco-Spain), p. 84, recital 376.

¹³⁴ *Alliance One International Inc. v European Commission* (C-679/11) [2013], E.C.R I-000 (not yet reported), para. 30.

parental liability was established.¹³⁵ Moreover, the GC, according to the ECJ, did not err in recognizing the Commission's application of the "dual burden test", instead of the "material involvement" method, which *AOI* claimed had been applied.¹³⁶ The GC, in the eyes of the ECJ, had correctly based its assessment of the applied "dual basis" method on its own interpretation thereof, thus rendering *AOI's* argument, that the GC had *ex post facto* defined the application of the "dual-basis" method in this case, unfounded.¹³⁷ Furthermore, the ECJ stated that the GC had correctly held that the dual "basis method" had not applied it arbitrarily as claimed by *AOI*, but that it had in fact been applied to all of the parent companies concerned by the Commission's Decision equally.¹³⁸ In doing so the ECJ reaffirmed the GC's ruling, despite the fact that the Commission had, in a written response to the GC, admitted to holding *Dimon* liable based solely on the *presumption of parental liability*, while applying the "dual basis" method to some other parent companies.¹³⁹ More explicitly the ECJ stated that the GC's finding regarding this argument, concerning the application of different standards of proof, could not have been invalidated by the aforementioned response of the Commission, even though the Commission had confirmed that *Dimon* had been held to a different standard.¹⁴⁰ The ECJ invalidated the core of *AOI's* argumentation by stating that the Commission's written explanation to the GC could not invalidate the GC's own interpretation of the Commission's decision. Subsequently, the arbitrary application of different standards of proof, namely the *presumption of parental liability* and the "dual burden test", was considered to be inexistent, despite the fact that the Commission had acknowledged it.

The second ground of appeal, namely that *AOI's* fundamental rights including the presumption of innocence had been infringed, was declared inadmissible.¹⁴¹ The ECJ based this decision on the fact that *AOI* had not raised these arguments in the appeal to the GC.¹⁴² Administrative rules limit the ECJ's jurisdiction to review only the pleas that had already

¹³⁵ *Alliance One International Inc. v European Commission* (C-679/11) [2013], E.C.R I-000 (not yet reported), para. 44.

¹³⁶ *Alliance One International Inc. v European Commission* (C-679/11) [2013], E.C.R I-000 (not yet reported), para. 43.

¹³⁷ *Alliance One International Inc. v European Commission* (C-679/11) [2013], E.C.R I-000 (not yet reported), para. 46.

¹³⁸ *Alliance One International Inc. v European Commission* (C-679/11) [2013], E.C.R I-000 (not yet reported), para. 47.

¹³⁹ *Alliance One International Inc. v European Commission* (C-679/11) [2013], E.C.R I-000 (not yet reported), para. 29.

¹⁴⁰ *Alliance One International Inc. v European Commission* (C-679/11) [2013], E.C.R I-000 (not yet reported), para. 47.

¹⁴¹ *Alliance One International Inc. v European Commission* (C-679/11) [2013], E.C.R I-000 (not yet reported), para. 59.

¹⁴² *Alliance One International Inc. v European Commission* (C-679/11) [2013], E.C.R I-000 (not yet reported), para. 59.

been raised at the GC.¹⁴³ Despite being rejected by the ECJ in *AOI*, fundamental rights, as grounds of appeal, are an interesting issue with regards to the rebuttability of the *presumption of parental liability*, especially considering the increasing number of parent companies invoking fundamental rights in their attempt to rebut the presumption.

3. Analysis

In the following, the legal and factual circumstances, which were explained above, will be analyzed. The Analysis will be focused on parent companies' chances to rebut the *presumption of parental liability*, as well as the aforementioned requirement of full judicial review in the light of the recent *Menarini* and *KME* judgments. First the legal questions regarding the presumption, around which the analysis will revolve, will be introduced. Thereafter, the general rebuttability of the presumption of parental liability will be examined under consideration of exemplary case law. The rebuttable nature of the presumption will be examined under consideration of several factors. First the extent of the notion of "exercise of decisive influence" will be analyzed. Secondly, the decreased standards regarding the notion of "lack of autonomy" will be analyzed. Thereafter, the focus of the analysis will turn to the increased importance of corporate links. Lastly, the effectiveness of fundamental rights arguments will be analyzed. After analyzing these different factors, it will be argued that the presumption of parental liability is in practice not rebuttable. The analysis part of this essay will be concluded with the analysis of the *AOI* ruling, in the light of the requirement of full judicial review.

3.1 Legal questions

The main legal question regarding the presumption has in general always been how companies can rebut the presumption. It has been argued that parent companies are very much in the dark as to what evidence they would have to produce to rebut the presumption. Thus, the question, more specifically, has to be what kind of evidence parent companies would have to present, in order to be accepted by the Commission and to successfully rebut the presumption.

The *AOI* case raises further questions as to the consistency of the Commission's application of legal standards, in this case the *presumption of parental liability* and the "dual burden test". The fact that the Commission, as mentioned above, acknowledged that it had applied the presumption to *Dimon*, while applying different criteria to the remaining parent companies,

¹⁴³ *Alliance One International Inc. v European Commission* (C-679/11) [2013], E.C.R I-000 (not yet reported), para. 60.

emphasizes that the alleged arbitrary application of either standard is not merely a fabrication of the applicant. Moreover, this also raises questions concerning the Commission's duty to state reasons under Article 296 TFEU. The application of different standards to different parent companies would, at the very least, have to be justified pursuant to the obligation to state reasons for the decision. Furthermore, the Commission's referral to the absence of "material involvement" as the main reason as to why *Universal* and *Universal Leaf* were exempted from liability inevitably led to legal uncertainty. This could in reverse be construed to mean, that material involvement would have to be proven by the Commission to hold companies liable under the "dual burden test". Subsequently, the Commission's statement of reasons in Decision C(2004) 4030 led to considerable uncertainty, as to which standard had been applied and how it had been applied, which became apparent throughout the appeals to the GC and the ECJ. Therefore, the Commission's decision raised considerable questions regarding the Commission's standards of reasoning, and more importantly regarding its standards in holding parent companies liable for infringements of the subsidiaries.

AOI's failed appeal to the GC raises questions regarding the judicial review conducted by the GC and the margin of appreciation afforded to the Commission by the GC. The GC disregarded the lack of substantial reasoning in dismissing *AOI's* fifth ground of appeal, despite the fact that the Commission had admitted that its decision should have been phrased more clearly.¹⁴⁴ Furthermore, the GC superseded the Commission's written explanation, stating that different standard had been applied with regards to *Dimon* as compared to other companies, with its own interpretation of the decision.¹⁴⁵ As mentioned before, this led to *AOI's* claim that the GC had *ex post facto* established the legal standard of the Commission's decision, which according to Article 296 TFEU should have been established in the decision itself. Moreover, questions regarding the GC's judicial review can also be raised in light of the fact that the Commission exempted *Universal* and *Universal Leaf* from liability in the Spanish cartel case, but in another geographical market found them liable, based on the identical parent-subsidiary relationship as in the Spanish cartel.¹⁴⁶ Thus, one has to question the stringency and comprehensiveness of the GC's judicial review, in law and in fact, of

¹⁴⁴ *Alliance One International Inc. v European Commission* (T-41/05) [2011], E.C.R II-7101 para. 117.

¹⁴⁵ *Alliance One International Inc. v European Commission* (C-679/11) [2013], E.C.R I-000 (not yet reported), para. 29.

¹⁴⁶ See e.g. Commission Decision of 20 October 2005 relating to a proceeding under Article 81(1) of the EC Treaty (Case COMP/C.38.281/B.2 – Raw Tobacco Italy), p. 86, recital 348; Alexander Riesenkampff & Udo Krauthausen, *Liability of parent companies for antitrust violations of their subsidiaries*, E.C.L.R. 2010, 31(1), 38-41, p. 2; Luis Ortiz Blanco, Ángel Givaja Sanz & Alfonso Lamadrid de Pablo, *Fine Arts in Brussels: Punishment and Settlement of Cartel Cases under EC Competition Law*, in Raffaelli (ed) *Antitrust: between EC Law and National Law* (Brussels: Bruylant, 2008).

Commission decisions. Moreover, it has to be questioned whether the judicial review conducted by the GC, even after *KME*, fulfills the criteria of full judicial review under Article 6 ECHR and subsequently Article 47 CFREU.

In light of these questions regarding the comprehensiveness and stringency of the judicial review of Commission decisions, questions can also be raised with regards to the effectiveness of the remedy of appeal to the GC. *AOI*'s appeals to the GC and ECJ illustrate the validity of these questions concerning the effectiveness of appeals against Commission decisions, and the judicial review afforded to parent companies in those appeals.

In general the case emphasizes the existing questions as to whether and how parent companies can effectively rebut the presumption, as even the apparently successful rebuttal of the liability of Universal and Intabex was not elaborated on in the Commission's decision. Despite the fact that Universal, Universal Leaf and Intabex were found not to be jointly and severally liable with their respective subsidiaries, the Commission did not provide parent companies with an indication as to what evidence would have to be produced, in order to rebut the presumption.¹⁴⁷

3.2 Rebuttability of the presumption of parental liability

The GC and ECJ have, in their respective case law, time and again reiterated the rebuttable nature of the presumption of parental liability.¹⁴⁸ However, this rebuttable nature has to be enforceable in practice for it to be of any legal value for parent companies, being held liable with their subsidiaries. Thus, in the following the rebuttable nature of the presumption will be examined under consideration of case law. For that purpose not only the *AOI* case but other cases in which parent companies tried to rebut the presumption will be discussed.

Considering the case law of both courts of the EU, one could argue that parent companies first and foremost have to prove that they do not exercise decisive influence over their subsidiaries conduct, in order to rebut the *presumption of parental liability*. The criterion of exercise of decisive influence, which even includes negative control over a subsidiary, has been established in case law and has since been codified in the Guidelines on the applicability of

¹⁴⁷ Alexander Riesenkauff & Udo Krauthausen, *Liability of parent companies for antitrust violations of their subsidiaries*, E.C.L.R. 2010, 31(1), 38-41, p. 3.

¹⁴⁸ See e.g. *Areva SA v European Commission* (T-117/07), [2011] 4 C.M.L.R. 26, para. 86; *Akzo Nobel v Commission* (T-330/01) [2006] E.C.R. II-3389, paras. 82-83; *Coöperatieve Verkoop- en Productievereniging van Aardappelmeel en Derivatens Avebe BA v Commission* (T-314/01) [2006] ECR II-3085, para. 136; *Akzo Nobel v Commission of the European Communities* (C-97/08 P), [2009] E.C.R. I-8237, para. 60.

Article 101.¹⁴⁹ Parent companies would most likely also have to prove that their subsidiaries do not lack the autonomy to determine their market conduct autonomously.¹⁵⁰ In this context it is noteworthy to remember that in applying the *presumption of parental liability* the Commission can presume the exercise of decisive influence based on 100% shareholding. Thus, the Commission does not have to prove that decisive influence was in fact exercised by the parent company. Moreover, parent companies have to disprove a presumption, which has not been proven by the Commission, rather than disproving factual evidence. Subsequently, it has been argued by some that the *presumption of parental liability effectively* renders the Commission's task to prove exercise of decisive control a walkover, based on the fact that exercise of influence can be presumed rather than having to be proven.¹⁵¹ Nonetheless, according to the case law of both, ECJ and GC, parent companies should, in theory, be able to rebut the presumption and avoid parental liability by adducing "sufficient evidence", proving the autonomy of the subsidiary as well as disproving the exercise of decisive influence.¹⁵²

In practice, however, parent companies face considerable problems proving their subsidiaries autonomy, and disproving the exercise of decisive influence. Not only did the ECJ in *Akzo* and subsequent judgments not define what would qualify as "sufficient evidence", but the courts gradually broadened the notion of "exercise of decisive influence".¹⁵³

3.2.1 The notion of "exercise decisive influence"

In *Gascogne*, the GC interpreted the requirement of exercise of decisive influence in a very liberal way and subsequently broadened the notion of "exercise of decisive influence". The court, on several occasions throughout the judgment, referred to the fact that *Gascogne* could intervene or had the possibility to intervene.¹⁵⁴ Moreover, the court interpreted *Gascogne's* decision not to change its subsidiaries management personnel to constitute an exercise of

¹⁴⁹ See e.g. Guidelines on the applicability of Art.101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] (OJ C11/1), para. 11; *Imperial Chemical Industries Ltd v Commission of the European Communities* (48/69) [1972] E.C.R. 619, paras. 133; *Viho Europe BV v Commission of the European Communities* (C-73/95 P) [1996] E.C.R. I-5457, para. 51; *Dow Chemical Co v European Commission* (T-77/08) [2012] 4 C.M.L.R. 19, para. 92.

¹⁵⁰ *Bodson v SA Pompes Funèbres des Régions Libérées SA* (30/87) [1988] E.C.R. 2479, paras. 20.

¹⁵¹ Julian Joshua, Yves Botteman and Laura Atlee, 'You can't beat the percentage' — *The Parental Liability Presumption in EU Cartel Enforcement*, in (Editor not stated) *The European Antitrust Review 2012 - a Global Competition Review Special Report*, available at http://www.stepto.com/assets/htmldocuments/GCR%20The%20Euro%20Antitrust%20Review%202012_Cartel_s_Joshua-Botteman-Atlee.pdf (visited 26 May 2014), p. 4.

¹⁵² *Akzo Nobel v Commission of the European Communities* (C-97/08 P), [2009] E.C.R. I-8237, para. 60.

¹⁵³ Julian Joshua, Yves Botteman and Laura Atlee, 'You can't beat the percentage' — *The Parental Liability Presumption in EU Cartel Enforcement*, in (Editor not stated) *The European Antitrust Review 2012 - a Global Competition Review Special Report*, available at http://www.stepto.com/assets/htmldocuments/GCR%20The%20Euro%20Antitrust%20Review%202012_Cartel_s_Joshua-Botteman-Atlee.pdf (visited 26 May 2014), p. 4.

¹⁵⁴ *Groupe Gascogne SA v European Commission* (T-72/06), [2011], E.C.R. II-00400, para. 83-88.

decisive influence.¹⁵⁵ Actual changes concerning the management personnel would have certainly constituted an exercise of decisive influence, whereas the court considered the decision not to implement changes to constitute an exercise of decisive influence in itself. The court, in equating the indicative value of actions and non-actions of a parent company, relaxed the standards with regards to the actual “exercise” of decisive influence. Subsequently, this can be construed to indicate that not the actual exercise of decisive influence, but rather the possibility or ability to exercise decisive influence are sufficient to establish parental liability in the eyes of the GC. Thus, the ability to exercise of decisive influence appears to be the criterion by which parental liability is actually being established, despite the fact that the case law of the courts consistently referred to the exercise of decisive influence. As mentioned above the court had, in cases like *Bodson*¹⁵⁶ and *Viho*¹⁵⁷, established that exercise of decisive influence was considered to be the determining factor of whether a parent company and its subsidiary formed a single economic unit or “undertaking” under Article 101 TFEU. Moreover, the Guidelines on the applicability of Article 101 refer only to the actual exercise rather than the ability to exercise decisive influence.¹⁵⁸ Furthermore, in the case of *Parker Hannifin* the GC extended the notion of “exercise” of decisive influence to include the attempt to exercise influence.¹⁵⁹ *Parker Hannifin* claimed that it was unaware of the conduct of its subsidiary and that it unsuccessfully attempted to exercise influence over the latter.¹⁶⁰ The court did not consider the evidence produced by *Parker Hannifin* to be sufficient to establish that *Parker Hannifin* was legitimately prevented from exercising decisive influence over the subsidiary.¹⁶¹ The court based that assessment on the fact that *Parker Hannifin* could have replaced the personnel, which prevented the exercise of decisive influence.¹⁶² Thus, the court reaffirmed that the possibility or ability to exchange personnel can be considered to fall within the exercise of decisive influence. The GC’s interpretations concerning *Gascogne’s* and *Parker Hannifin’s* conduct has to be received with some skepticism, due to the fact that the decision not to exercise influence over its subsidiary, when applied consistently, should

¹⁵⁵ Bettina Leupold, *Effective enforcement of EU competition law gone too far? Recent case law on the presumption of parental liability*, E.C.L.R. 2013, 34(11), 570-582, p. 6.

¹⁵⁶ *Bodson v SA Pompes Funèbres des Régions Libérées SA* (30/87) [1988] E.C.R. 2479.

¹⁵⁷ *Viho Europe BV v Commission of the European Communities* (C-73/95 P) [1996] E.C.R. I-5457.

¹⁵⁸ Guidelines on the applicability of Art.101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] (OJ C11/1), para. 11

¹⁵⁹ Bettina Leupold, *Effective enforcement of EU competition law gone too far? Recent case law on the presumption of parental liability*, E.C.L.R. 2013, 34(11), 570-582, p. 7.

¹⁶⁰ *Parker ITR Srl and Parker-Hannifin Corp. v European Commission* (T-146/09) [2013], E.C.R. II-000 (not yet reported), paras. 187-193.

¹⁶¹ *Parker ITR Srl and Parker-Hannifin Corp. v European Commission* (T-146/09) [2013], E.C.R. II-000 (not yet reported), paras. 187-193.

¹⁶² *Parker ITR Srl and Parker-Hannifin Corp. v European Commission* (T-146/09) [2013], E.C.R. II-000 (not yet reported), paras. 192.

exonerate the parent company in question. Nonetheless, in extending the notion of “exercise” of decisive influence to include the ability and the attempt to exercise, the GC has considerably broadened the standard used to determine whether two companies form a single economic unit. Especially considering wholly owned subsidiaries it seems unlikely that parent companies could adduce “sufficient evidence” to prove that they did not have the possibility or ability to exercise decisive influence. Therefore, parent companies will inevitably find it more difficult to prove that they do not have the ability or possibility to exercise influence, as compared to proving that they do not exercise influence.

Thus, *AOI* would have had to prove that it neither exercised nor had the possibility to exercise decisive influence over its subsidiary *Agroexpansión*, in order to rebut the presumption. *Universal* is considered to be the only parent company to successfully rebut the Commission’s presumption, despite the fact that the Commission did not elaborate on how *Universal* did prove that it did not exercise decisive influence or, as the Commission put it, was not materially involved in the infringement.¹⁶³ However, this has to be understood in the light of the fact that the Commission did hold *Universal* liable for *Deltafina*’s infringement in the Italian raw tobacco cartel.¹⁶⁴ It is difficult to imagine that the Commission applied this broad notion of exercise of decisive influence to *Universal*, and found no indication that *Universal* had the possibility to exercise influence or to be materially involved in its wholly owned subsidiaries conduct.

3.2.2 Decreased standards regarding the notion of “lack of autonomy”

In *ENI* the ECJ ruled, that the degree of autonomy *ENI*’s subsidiary enjoyed was not sufficient to consider them not to constitute a single economic unit, due to the fact that the subsidiary was not autonomous on a financial level.¹⁶⁵ One has to wonder, especially considering the *presumption of parental liability*, whether any wholly owned subsidiary can be considered to be financially autonomous from its parent company. Moreover, in the aforementioned *Gascogne* case the GC acknowledged that the subsidiary had a “grande” autonomy regarding its market conduct.¹⁶⁶ *Gascogne*’s subsidiary determined its costs, prices,

¹⁶³ Alexander Riesenkampff & Udo Krauthausen, *Liability of parent companies for antitrust violations of their subsidiaries*, E.C.L.R. 2010, 31(1), 38-41, p. 5.

¹⁶⁴ See e.g. Commission Decision of 20 October 2005 relating to a proceeding under Article 81(1) of the EC Treaty (Case COMP/C.38.281/B.2 – Raw Tobacco Italy), p. 86, recital 348; Alexander Riesenkampff & Udo Krauthausen, *Liability of parent companies for antitrust violations of their subsidiaries*, E.C.L.R. 2010, 31(1), 38-41, p. 2; Luis Ortiz Blanco, Ángel Givaja Sanz & Alfonso Lamadrid de Pablo, *Fine Arts in Brussels: Punishment and Settlement of Cartel Cases under EC Competition Law*, in Raffaelli (ed) *Antitrust: between EC Law and National Law* (Brussels: Bruylant, 2008).

¹⁶⁵ *Eni SpA v European Commission* (C-508/11 P) [2013], E.C.R. I-000 (not yet reported), para. 64.

¹⁶⁶ *Groupe Gascogne SA v European Commission* (T-72/06), [2011], E.C.R. II-00400, para. 74.

margins, targets, and technical improvements autonomously.¹⁶⁷ Nonetheless, the GC considered *Gascogne* to exercise or to have the ability to exercise decisive influence over its subsidiary, despite the great autonomy the subsidiary enjoyed.¹⁶⁸ Thus, the GC rejected *Gascogne's* appeal which was based on the autonomy of its subsidiary.

In *Viho*¹⁶⁹ and *Bodson*¹⁷⁰ the ECJ had established that the subsidiary has to lack the autonomy to determine its market conduct to render parent company and subsidiary to constitute a single economic unit. The extent of such autonomy remained unspecified in the case law of the courts. The case law did however, specifically refer to the autonomy to determine ones market conduct, which arguably was given especially in *Gascogne* considering the “grande” autonomy it enjoyed.¹⁷¹ Considering the *ENI* case, it has to be noted that the requirement of financial autonomy of a subsidiary was not stated in the courts case law. Moreover, it appears unrealistic that a parent company could prove the financial autonomy of its wholly owned subsidiary. *ENI* and *Gascogne* illustrate that even “grande” autonomy does in the eyes of the court not suffice to fulfill the requirements. It has to be questioned how a subsidiary, which in the eyes of the GC has “grande” autonomy can be following its parents instructions in all material aspects, despite its autonomy.¹⁷² Thus, one can argue that the extent of the notion of “autonomy” of a subsidiary, which a parent company would have to prove to avoid liability, has been broadened considerably. The courts have gradually abandoned the concept of autonomy regarding market conduct, and applied a far more extensive concept of autonomy, which is not tied to market conduct anymore. Similar to the example concerning the exercise of decisive influence above, these cases indicate how broadly the courts interpret the criteria as to whether parents and subsidiaries constitute a single economic unit. Therefore, from the perspective of a parent company, proving that one’s subsidiary determines its market conduct autonomously is not sufficient in order to avoid being held liable as one “undertaking”.

3.2.3 Increased relevance of links between companies

Traditionally parental liability was established based on the exercise of decisive influence and the subsidiaries subsequent lack of autonomy to determine its own market conduct, as explained in the section on the single economic unit doctrine. In recent cases however, the GC

¹⁶⁷ *Groupe Gascogne SA v European Commission* (T-72/06), [2011], E.C.R. II-00400, para. 74,92.

¹⁶⁸ Bettina Leupold, *Effective enforcement of EU competition law gone too far? Recent case law on the presumption of parental liability*, E.C.L.R. 2013, 34(11), 570-582, p. 8.

¹⁶⁹ *Viho Europe BV v Commission of the European Communities* (C-73/95 P) [1996] E.C.R. I-5457.

¹⁷⁰ *Bodson v SA Pompes Funèbres des Régions Libérées SA* (30/87) [1988] E.C.R. 2479.

¹⁷¹ *Groupe Gascogne SA v European Commission* (T-72/06), [2011], E.C.R. II-00400, para. 74.

¹⁷² Bettina Leupold, *Effective enforcement of EU competition law gone too far? Recent case law on the presumption of parental liability*, E.C.L.R. 2013, 34(11), 570-582, p. 8.

in particular focused more on legal, economic and organizational links between parent companies and subsidiaries. In *Akzo* the ECJ held that parent companies can be held liable for their subsidiaries conduct, if the subsidiary lacks autonomy due to organizational, economic or legal links to the parent company.¹⁷³ Thus, the aforementioned links between companies render the exercise of decisive influence on the subsidiaries market conduct to be no longer necessary to determine whether a parent company and subsidiary form a single economic unit. The GC followed the ECJ's precedent set in *Akzo* on several occasions. In *E.ON Ruhrgas* the GC reaffirmed that, in order to determine whether two companies constitute a single economic unit, all relevant legal, economic and organizational links have to be taken into account.¹⁷⁴ Moreover, in *FLS Plast* the court stated that the subsidiary's autonomy determining its market conduct is irrelevant, if there are other factors, such as economic, organizational and legal links between the subsidiary and the parent company, to determine that the two companies constitute a single economic unit.¹⁷⁵ Some have argued that the possibility to establish the existence of a single economic unit based on links between parent companies and subsidiaries further erodes the "exercise of decisive influence" requirement.¹⁷⁶ Even though the concept of exercise of decisive influence has been extended considerably, as mentioned above, it can be rendered irrelevant, if there are sufficient links between parent company and subsidiary. Thus, despite the fact that the broadened concept regarding the exercise of influence is very difficult to rebut, the Commission does not need the concept of decisive influence to find companies to constitute a single economic unit, as long as there are sufficient links between the parent and subsidiary.¹⁷⁷ Therefore, parent companies face a considerable hurdle in attempting to rebut the presumption of parental liability, as any wholly owned subsidiary inevitably has economic, legal and organizational links to its parent company.

Thus one can conclude from the sections above, that disproving decisive influence and the lack of autonomy, which had been established as criteria for a single economic unit, is increasingly difficult. This is due to the fact that, as can be seen from the examples above, the

¹⁷³ *Akzo Nobel v Commission of the European Communities* (C-97/08 P), [2009] E.C.R. I-8237, para. 58.

¹⁷⁴ *E.ON Ruhrgas AG and E.ON AG v European Commission* (T-360/09) [2012], E.C.R. II-000 (not yet reported), para. 179.

¹⁷⁵ *FLS Plast A/S v European Commission* (T-64/06) [2012], E.C.R. II-000 (not yet reported), paras. 28-31.

¹⁷⁶ Bettina Leupold, *Effective enforcement of EU competition law gone too far? Recent case law on the presumption of parental liability*, E.C.L.R. 2013, 34(11), 570-582, p. 8.

¹⁷⁷ Bettina Leupold, *Effective enforcement of EU competition law gone too far? Recent case law on the presumption of parental liability*, E.C.L.R. 2013, 34(11), 570-582, p. 8.

courts gradually broadened the criteria, which companies would have to disprove to avoid liability, rendering them virtually unable to rebut the presumption of parental liability.¹⁷⁸

With the emerging importance of legal, economic and organizational links in mind, one can only wonder how the Commission came to two different decisions regarding the liability of *Universal* and *Universal Leaf* concerning the competition law infringements of its subsidiary *Deltafina*. As mentioned above, *Universal* was exempted from liability in the Spanish tobacco case, whereas it was held liable in the Italian case.¹⁷⁹ The relationship between *Universal* and its subsidiaries was identical in the Spanish and the Italian case.¹⁸⁰ Thus, the legal, economic and organizational links can be considered to have been identical, or at the very least nearly identical. Based on the aforementioned rulings in *Akzo*¹⁸¹, *E.ON*¹⁸² and *FLS*¹⁸³ one can conclude that identical links between parent company and subsidiary in two separate cases should result in the same decision regarding the parent companies liability. Following the line of reasoning in the aforementioned cases, the links between *Universal*, *Universal Leaf* and the two subsidiaries *Deltafina* and *Taes* should have been sufficient to hold *Universal* liable jointly and severally. However, the Commission's decisions in the Spanish and Italian tobacco cartel cases illustrate the contrary. *Universal* was held liable in the Italian case, whereas it was exempted from liability in the Spanish case, despite the fact that the corporate links between *Universal* and *Deltafina* were the same. It has to be reiterated that the Commission exempted *Universal* from being jointly and severally liable with its subsidiary, due to the fact that it could not find any "material involvement" of *Universal*. One has to question how the Commission could come to two manifestly different decisions concerning the same set of links. How could the Commission find *Universal* not to be materially involved in *Deltafina*'s conduct in Spain, while finding it to be exercising decisive influence over *Deltafina* in Italy? This illustrates an arbitrariness regarding the standards applied by the

¹⁷⁸ Bettina Leupold, *Effective enforcement of EU competition law gone too far? Recent case law on the presumption of parental liability*, E.C.L.R. 2013, 34(11), 570-582, p. 2.

¹⁷⁹ See e.g. Commission Decision C(2004) 4030 of 20 October 2004 relating to a proceeding under Article 81(1) [EC] (Case COMP/C.38.238/B.2-Raw tobacco-Spain), p. 84, recital 376; Commission Decision of 20 October 2005 relating to a proceeding under Article 81(1) of the EC Treaty (Case COMP/C.38.281/B.2 – Raw Tobacco Italy), p. 86, recital 348.

¹⁸⁰ See e.g. Alexander Riesenkampff & Udo Krauthausen, *Liability of parent companies for antitrust violations of their subsidiaries*, E.C.L.R. 2010, 31(1), 38-41, p. 2; Luis Ortiz Blanco, Ángel Givaja Sanz & Alfonso Lamadrid de Pablo, *Fine Arts in Brussels: Punishment and Settlement of Cartel Cases under EC Competition Law*, in Raffaelli (ed) *Antitrust: between EC Law and National Law* (Brussels: Bruylant, 2008).

¹⁸¹ *Akzo Nobel v Commission of the European Communities* (C-97/08 P), [2009] E.C.R. I-8237, para. 58.

¹⁸² *E.ON Ruhrgas AG and E.ON AG v European Commission* (T-360/09), E.C.R. II-000 (not yet reported), para. 179.

¹⁸³ *FLS Plast A/S v European Commission* (T-64/06), E.C.R. II-000 (not yet reported), paras. 28-31.

Commission in different cases, as *AOI* claimed in its appeal to the ECJ.¹⁸⁴ Furthermore, it reaffirms the questions *AOI* raised regarding the Commission's reasoning.¹⁸⁵ The role of the GC which upheld the Commission decision, despite the flawed reasoning, can also be called into question.

3.2.4 Fundamental rights arguments

Parent companies began to raise fundamental rights arguments in their appeals, due to the fact that the courts considerably broadened the concepts of lack of autonomy and exercise of decisive influence and subsequently rejected countless attempts to rebut or appeal the *presumption of parental liability*. Aside of the cases discussed above, the courts have rejected a wide array of rebuttal attempts brought by parent companies.¹⁸⁶ Moreover, neither the courts nor the Commission afforded any guidance to parent companies as to what evidence would be considered sufficient to rebut the presumption.¹⁸⁷ Thus, many parent companies, including *AOI*, resorted to bringing appeals against the presumption based on their fundamental rights, due to the fact that the presumption is considered to be virtually impossible to rebut, as discussed in the above.

In several cases, including *AOI*, the ECJ declared appeals based on Article 6 ECHR inadmissible, due to the fact that the parties had not raised the right to a fair trial in their appeal to the GC.¹⁸⁸ It has been argued that such decisions made it impossible for parent companies, like *Legris* or *AOI*, to bring appeals based on the violation of their right to a fair trial.¹⁸⁹ In the recent *Eni* case the ECJ declared the complaint regarding a violation of the fair trial principle admissible, under rather restricted circumstances.¹⁹⁰ However, after finding that the plea based on Article 6 ECHR and Article 47 CFREU was admissible, the ECJ did not

¹⁸⁴ *Alliance One International Inc. v European Commission* (C-679/11) [2013], E.C.R I-000 (not yet reported), para. 30.

¹⁸⁵ *Alliance One International Inc. v European Commission* (C-679/11) [2013], E.C.R I-000 (not yet reported), para. 22.

¹⁸⁶ See e.g. Bettina Leupold, *Effective enforcement of EU competition law gone too far? Recent case law on the presumption of parental liability*, E.C.L.R. 2013, 34(11), 570-582, p. 3; Julian Joshua, Yves Botteman and Laura Atlee, 'You can't beat the percentage' — *The Parental Liability Presumption in EU Cartel Enforcement*, in (Editor not stated) *The European Antitrust Review 2012 - a Global Competition Review Special Report*, available at

http://www.steptoec.com/assets/htmldocuments/GCR%20The%20Euro%20Antitrust%20Review%202012_Cartel_s_Joshua-Botteman-Atlee.pdf (visited 26 May 2014), p. 7.

¹⁸⁷ Alexander Riesenkaempff & Udo Krauthausen, *Liability of parent companies for antitrust violations of their subsidiaries*, E.C.L.R. 2010, 31(1), 38-41, p. 5.

¹⁸⁸ See e.g. *Legris Industries SA v European Commission* (C-289/11 P) [2012], E.C.R. I-000 (not yet reported) para. 34; *Alliance One International Inc. v European Commission* (C-679/11) [2013], E.C.R I-000 (not yet reported), para. 59.

¹⁸⁹ Bettina Leupold, *Effective enforcement of EU competition law gone too far? Recent case law on the presumption of parental liability*, E.C.L.R. 2013, 34(11), 570-582, p. 11.

¹⁹⁰ *Eni SpA v European Commission* (C-508/11 P) [2013], E.C.R. I-000 (not yet reported), para. 41.

discuss them anymore throughout the judgment. Subsequently, the ECJ reaffirmed the GC's decision without focusing at great length on the fair trial issue in question.¹⁹¹ Thus, the ECJ did not examine whether or not the judicial review conducted by the GC was in conformity with Articles 6 ECHR and 47 CFREU. This indicates the ECJ's tendency to uphold and endorse the GC's decisions which in turn endorses and strengthens the Commission's decisions, as was the case in *AOI*. Therefore, even if *AOI* appeal based on the fair trial argument had been admitted by the ECJ, it most likely would not have resulted in an annulment of the GC's decision.

Moreover, the argument that the *presumption of parental liability* is in violation of the principle of personal liability has frequently been rejected. As was explained in the section on the single economic unit doctrine the principle is considered to apply to the "undertaking" or corporate group, rather than the individual company in breach of competition law.¹⁹² Some argue that this approach effectively equals a denial of the right of personal responsibility, due to the fact that "undertakings" cannot rely on this right because they have no legal personality.¹⁹³

All in all, neither the principle of personal liability nor the right to a fair trial has yet been used successfully to avoid liability. Thus, neither appeals based on factual arguments nor appeals based on fundamental rights a viable option for parent companies to rebut the presumption and prevent being held jointly and severally liable. However, the referrals to Article 6 ECHR raise questions as to whether the competition law proceedings under EU law are compatible with the right to a fair trial.

3.2.5 Is the presumption rebuttable in practice?

While the courts reiterate the theoretical rebuttable nature of the presumption of parental liability in their case law, the presumption appears to be not rebuttable in practice. As mentioned above, the courts have time and again rejected various forms of evidence and legal arguments, produced by parent companies in order to rebut the presumption of parental liability.¹⁹⁴ Moreover, neither the courts nor the Commission have provided any guidance

¹⁹¹ Bettina Leupold, *Effective enforcement of EU competition law gone too far? Recent case law on the presumption of parental liability*, E.C.L.R. 2013, 34(11), 570-582, p. 11.

¹⁹² Opinion of Advocate General Kokott in Case C-97/08P, *Akzo Nobel NV and Others v Commission* [2009] E.C.R I-8237, para. 39.

¹⁹³ Bettina Leupold, *Effective enforcement of EU competition law gone too far? Recent case law on the presumption of parental liability*, E.C.L.R. 2013, 34(11), 570-582, p. 11.

¹⁹⁴ See e.g. Bettina Leupold, *Effective enforcement of EU competition law gone too far? Recent case law on the presumption of parental liability*, E.C.L.R. 2013, 34(11), 570-582, p. 3; Julian Joshua, Yves Botteman and Laura Atlee, 'You can't beat the percentage' — *The Parental Liability Presumption in EU Cartel Enforcement*, in

regarding what evidence would be deemed sufficient to rebut the presumption.¹⁹⁵ The notions of “exercise of decisive influence” and “lack of autonomy” were extended considerably through the jurisprudence of the courts. As a result thereof, the requirement of exercise of decisive influence has been eroded. Thus, disproving the exercise of decisive influence and proving the autonomy of a subsidiary has been rendered impossible.¹⁹⁶

The case law of the GC, and in particular the *AOI* case, shows that the GC has developed a tendency to afford the Commission a margin of appreciation and to look past possible deficiencies in the Commission’s decisions.¹⁹⁷ The GC can often be found to strengthen and support the Commission’s decisions, as can be observed in *AOI*. Moreover, The ECJ did also develop a tendency to uphold and endorse the GC’s decisions.

However, in *Air Liquide*, the GC annulled a Commission decision based on the insufficient degree of legal reasoning provided by the Commission.¹⁹⁸ Similarly, in *Elf Aquitaine* the ECJ broke with the tendency to reaffirm most GC decisions and declared that the GC had erred in not finding the Commission’s statement of reasons to be insufficient.¹⁹⁹ However, this does not change the overall situation regarding the rather irrebuttable nature of the presumption, as in both cases no decision was made based on the merits of the respective cases, but solely based on the insufficient statement of reasons under Article 296 TFEU. The Commission will draw consequences from the *Air Liquide* judgment and will provide more sufficient legal reasoning in future decision. The GC will likewise adjust its judicial review slightly. However, neither case gives parent companies a perspective of successfully rebutting the presumption.

(Editor not stated) *The European Antitrust Review 2012 - a Global Competition Review Special Report*, available at

http://www.stepto.com/assets/htmldocuments/GCR%20The%20Euro%20Antitrust%20Review%202012_Cartels_Joshua-Botteman-Atlee.pdf (visited 26 May 2014), p. 7.

¹⁹⁵ Alexander Riesenkauff & Udo Krauthausen, *Liability of parent companies for antitrust violations of their subsidiaries*, E.C.L.R. 2010, 31(1), 38-41, p. 5.

¹⁹⁶ See e.g. Bettina Leupold, *Effective enforcement of EU competition law gone too far? Recent case law on the presumption of parental liability*, E.C.L.R. 2013, 34(11), 570-582, p. 16; Julian Joshua, Yves Botteman and Laura Atlee, ‘You can’t beat the percentage’ — *The Parental Liability Presumption in EU Cartel Enforcement*, in (Editor not stated) *The European Antitrust Review 2012 - a Global Competition Review Special Report*, available at http://www.stepto.com/assets/htmldocuments/GCR%20The%20Euro%20Antitrust%20Review%202012_Cartels_Joshua-Botteman-Atlee.pdf (visited 26 May 2014), p. 8.

¹⁹⁷ Julian Joshua, Yves Botteman and Laura Atlee, ‘You can’t beat the percentage’ — *The Parental Liability Presumption in EU Cartel Enforcement*, in (Editor not stated) *The European Antitrust Review 2012 - a Global Competition Review Special Report*, available at http://www.stepto.com/assets/htmldocuments/GCR%20The%20Euro%20Antitrust%20Review%202012_Cartels_Joshua-Botteman-Atlee.pdf (visited 26 May 2014), p. 7.

¹⁹⁸ *L’Air liquid v European Commission* (T-185/06) [2011], E.C.R. II-02809, paras. 80-83.

¹⁹⁹ *Elf Aquitaine SA v European Commission* (C-521/09 P) [2011], E.C.R. I-08947, para. 170.

Nonetheless, the *AOI* case indicates that the GC still follows its tendency to uphold and strengthen Commission decision, even if there are obvious deficiencies with regards to the Commission's statement of reasons. As mentioned above, the GC disregarded the Commission's admission that its decision should have been phrased clearer and that *AOI* had been held to a different standard than the other companies.²⁰⁰ Moreover, the ECJ upheld and endorsed the GC's judgment.

In conclusion, the theory and practice regarding the rebuttable nature of the presumption do not match up. The *presumption of parental liability* was, as mentioned in the above, considered to render the notion of "exercise of decisive influence" a walkover criterion.²⁰¹ This criterion has to be considered to be even less tangible after the courts extended the notions of "exercise of decisive influence" and "lack of autonomy" to a point where parent companies cannot under normal circumstances disprove either of them. In addition, the courts' tendencies to support the Commission's decisions make it even harder for parent companies to successfully defend against the *presumption of parental liability*. Consequently, the *presumption of parental liability* is, contrary to what the ECJ and GC reiterate time and time again, not rebuttable. Moreover, one could argue that in fact the presumption of parental liability actually renders parent companies to be strictly liable for their subsidiaries conduct with regards to competition law.

3.3 Full judicial review

In the following it will be examined whether the *Menarini* ruling by the ECtHR and the subsequent *KME* ruling by the ECJ actually changed the approach and extent of judicial review. *KME* raised some hope that the GC's approach toward judicial review of Commission decisions would become more comprehensive and stringent.²⁰² Moreover, it will be examined if case like *AOI* would satisfy the requirements of Article 6 ECHR.

²⁰⁰ See e.g. *Alliance One International Inc. v European Commission* (C-679/11) [2013], E.C.R I-000 (not yet reported), para. 29; *Alliance One International Inc. v European Commission* (T-41/05) [2011], E.C.R II-7101 para. 117.

²⁰¹ Julian Joshua, Yves Botteman and Laura Atlee, 'You can't beat the percentage' — *The Parental Liability Presumption in EU Cartel Enforcement*, in (Editor not stated) *The European Antitrust Review 2012 - a Global Competition Review Special Report*, available at http://www.steptoe.com/assets/htmldocuments/GCR%20The%20Euro%20Antitrust%20Review%202012_Cartels_Joshua-Botteman-Atlee.pdf (visited 26 May 2014), p. 4.

²⁰² Anne Vallery & Marco Bronckers, *Business as usual after Menarini?*, MLex Magazine, January-March 2012, 44-47, p. 45-46.

As mentioned above, full judicial review is a requirement under Article 6 ECHR.²⁰³ Thus, in order for European competition law proceedings, with the Commission acting as investigator, prosecutor and decision making authority, to be compatible with Article 6 ECHR the courts of appeal have to have full jurisdiction to review the law and facts of cases. The GC has unlimited jurisdiction, as explained above.²⁰⁴ However, the GC has been noticed to rarely use the full extent of its unlimited jurisdiction, especially with regards to conducting judicial review.²⁰⁵ With regards to competition law cases, the GC generally affords the Commission a margin of appreciation concerning complex appraisals. Pursuant to the “complex appraisals” formula the GC will limit its review of Commission decisions to controlling the compliance with procedural rules, the statement of reasons, the statement of facts, as well as whether there was any manifest error or misuse of power by the Commission.²⁰⁶ Due to the margin of appreciation afforded to the Commission such reviews are very limited in scope. However, it also has to be noted that cartel cases in itself are extraordinary difficult to prove for the Commission, thus the margin of appreciation is a way to ensure the effective enforcement of EU competition law. Nonetheless, this margin of appreciation has to be balanced against the judicial review of the courts.

The limits of this approach regarding judicial review become apparent considering the case of *AOI*. The GC should have reviewed the Commissions statement of reasons. Throughout such a review the GC should have noted that the Commission apparently applied uncommon criteria, such as “material involvement”. The Commission had argued that *Universal* and *Universal Leaf* shall be exempted from liability for the conduct of their wholly owned subsidiary *Deltafina*, based on the fact that there was no indication of “material involvement” of either parent company.²⁰⁷ However, the GC did not find fault in the fact that the Commission referred to a criterion which had not been established through previous case law. Furthermore, the Commission also did not consider the fact that the legal standard, which had

²⁰³ See e.g. *Janosevic v. Sweden*, ECtHR [2002] 2002-VII, para. 81; *Menarini Diagnostics v. Italy*, ECtHR [2011] Application No. 43509/08, paras. 41-42.

²⁰⁴ See e.g. Articles 261,263 of the Treaty on the Functioning of the European Union [TFEU], Consolidated Version (OJ 2012 C 326/88); Article 31 of Council Regulation 1/2003/EC of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003); *Cimenteries CBR and Others v Commission* (Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95) [2000], ECR II-491, para. 71.

²⁰⁵ Themistoklis K. Giannakopoulos, *Due Process in European Union Law*, in Themistoklis K. Giannakopoulos, *Safeguarding Companies' Rights in Competition and Anti-dumping/Anti-subsidies Proceedings*, International Competition Law Series, Volume 12, (Kluwer Law International 2011), 7 – 27, p. 25.

²⁰⁶ Igor Nikolic, *Full judicial review of antitrust cases after KME: a new formula of review?*, E.C.L.R. 2012, 33(12), 583-588, p. 5.

²⁰⁷ Commission Decision C(2004) 4030 of 20 October 2004 relating to a proceeding under Article 81(1) [EC] (Case COMP/C.38.238/B.2-Raw tobacco-Spain), p. 84, recital 376.

been applied to establish the liability of the parent companies, was not clearly stated problematic. The court did not find any deficiencies, despite the fact that *AOI* in its appeal claimed that the statement of reasons in the Commission’s decision was insufficient. The GC did not find any problem with the statement of reasons, even after the written explanation of the Commission. As mentioned before, the Commission admitted that its statement of reasons should have been phrased in a clearer manner.²⁰⁸ Moreover, the Commission explained that it actually had held *AOI* liable solely on the basis of the *presumption of parental liability*, whereas it had applied the “dual burden test” to the other parent companies.²⁰⁹ Thus, despite the fact that the Commission openly acknowledged deficiencies in its statement of reasons, the GC did not consider the statement of reasons to be insufficient. Thus, the GC did not find fault with the admitted arbitrary application of the presumption of parental liability to *AOI*. Moreover, the GC superseded the Commission’s decision and explanation thereof, with its own interpretation of the decision.²¹⁰ Subsequently, it can be argued that the GC followed its aforementioned tendency and upheld and strengthened a questionable Commission decision. Furthermore, *AOI*’s argument that the GC established the “dual burden test” as the standard applied in the Commission’s decision appears to have some merit, due to the fact that the Commission explained that it had in fact applied different standard. This has to be observed with considerable skepticism due to the fact that the GC disregarded substantial deficiencies with regards to the statement of reasons, which had been acknowledged by the Commission. Based on the fact that the Commission acknowledged the deficiencies of its statement of reasons, the GC should not have needed a full in depth review to find that the statement of reasons was not in accordance with Article 296 TFEU. However, the GC decided to uphold and strengthen the Commission’ decision, and thus holding the Commission to an extremely low standard regarding the duty to state reasons.

Furthermore, the limitations regarding the GC’s review become apparent considering the liability of *Universal*. As mentioned above *Universal* and *Universal Leaf* were found to be not liable for *Deltafina*’s participation in the Spanish raw tobacco cartel, whereas a year later the Commission held them liable for *Deltafina*’s participation in the Italian raw tobacco cartel.²¹¹

²⁰⁸ *Alliance One International Inc. v European Commission* (T-41/05) [2011], E.C.R II-7101 para. 117.

²⁰⁹ *Alliance One International Inc. v European Commission* (C-679/11) [2013], E.C.R I-000 (not yet reported), para. 29.

²¹⁰ *Alliance One International Inc. v European Commission* (C-679/11) [2013], E.C.R I-000 (not yet reported), para. 43-44.

²¹¹ See e.g. Commission Decision C(2004) 4030 of 20 October 2004 relating to a proceeding under Article 81(1) [EC] (Case COMP/C.38.238/B.2-Raw tobacco-Spain), p. 84, recital 376; Commission Decision of 20 October 2005 relating to a proceeding under Article 81(1) of the EC Treaty (Case COMP/C.38.281/B.2 – Raw Tobacco Italy), p. 86, recital 348; Alexander Riesenkauff & Udo Krauthausen, *Liability of parent companies for*

This illustrates an arbitrariness regarding the standards applied by the Commission in separate but almost identical cases, while the Commission's explanation to the GC illustrates the arbitrariness regarding the application standards applied to separate companies within one case. Moreover, it shows that the facts relied on were not applied consistently. In the aforementioned EFTA Court judgment in *Posten Norge* the court had pointed out, that the court reviewing a decision should be convinced that the decision is supported by facts.²¹² It seems unlikely that the GC conducted a full judicial review and was convinced that the same set of facts regarding *Universal* and its subsidiaries supported differing Commission decisions regarding the Spanish and Italian cartel.

Moreover, it is difficult to imagine that the GC could have concluded that the Commission's reasoning was sound and that there was not arbitrary application of legal standards after conducting a full judicial review of the law and the facts of the case. Following *KME* such a review should have been conducted without using the commission's margin of discretion as a basis for dispensing with the conduct of an in depth review of law and facts.²¹³ However, considering the GC's decision it can be argued that the GC did not conduct a full judicial review, due to the fact that it disregarded key factors which supported *AOI's* appeals. Thus, one can argue that the GC in *AOI* did not follow the *KME* ruling, but followed its tendency to hold the Commission to a very low standard and to strengthen the Commission's decisions.

Similarly, in *Elf Aquitaine* the GC rejected the appeal, whereas in *Air Liquide* the Commission decision was annulled based on arguments which were extremely similar to the arguments raised by *Elf Aquitaine*.²¹⁴ However, in *Elf Aquitaine* the ECJ annulled the GC's decision based on the fact that the GC had disregarded deficits in the statement of reasons, whereas in *AOI* the ECJ reaffirmed and endorsed the GC's ruling.²¹⁵ Moreover, the ECJ stated, that the Commission's explanation could not have invalidated the GC's interpretation

antitrust violations of their subsidiaries, E.C.L.R. 2010, 31(1), 38-41, p. 2; Luis Ortiz Blanco, Ángel Givaja Sanz & Alfonso Lamadrid de Pablo, *Fine Arts in Brussels: Punishment and Settlement of Cartel Cases under EC Competition Law*, in Raffaelli (ed) *Antitrust: between EC Law and National Law* (Brussels: Bruylant, 2008).

²¹² [Eric Barbier de la Serre](http://kluwercompetitionlawblog.com/2012/04/27/a-lesson-on-judicial-review-from-the-other-european-court-in-luxembourg/), *A lesson on judicial review from the other European Court in Luxembourg*, Kluwer Competition Law Blog, 27 April 2012, available at <http://kluwercompetitionlawblog.com/2012/04/27/a-lesson-on-judicial-review-from-the-other-european-court-in-luxembourg/> (visited 28 April 2014).

²¹³ *KME v Commission* (C-272/09 P) [2011], E.C.R I-0000, paras. 102-104.

²¹⁴ Julian Joshua, Yves Botteman and Laura Atlee, 'You can't beat the percentage' — *The Parental Liability Presumption in EU Cartel Enforcement*, in (Editor not stated) *The European Antitrust Review 2012 - a Global Competition Review Special Report*, available at http://www.stepto.com/assets/htmldocuments/GCR%20The%20Euro%20Antitrust%20Review%202012_Cartel_s_Joshua-Botteman-Atlee.pdf (visited 26 May 2014), p. 7.

²¹⁵ *Alliance One International Inc. v European Commission* (C-679/11) [2013], E.C.R I-000 (not yet reported), para. 43-47.

thereof.²¹⁶ However, if the Commission by admitting deficits cannot change the GC's interpretation of a decision, one has to wonder what could change the GC's interpretation. Thus, the problem in the *AOI* case is the aforementioned tendency of the ECJ to endorse the GC's decisions, which in turn endorses and strengthens the Commission's decisions, despite considerable deficits and obvious arbitrariness.

Subsequently, the argument can be made that the degree of judicial review conducted in *AOI* should have been found to be insufficient by the ECJ, in the same way as in *Elf Aquitaine*, due to the arbitrary application of the presumption and the overall deficient statement of reasons. As mentioned above these arguments are based on the presumption that competition law could fall under the hard core of criminal law. However, it has been argued that the requirement of full judicial review applies to competition law proceedings regardless of the classification those proceedings as hard core or peripheral criminal law.²¹⁷ Thus, it can be argued that the judicial review conducted by the GC in *AOI* does not fulfill the full judicial review requirement under Article 6 ECHR and the ECtHR's case law.²¹⁸

In the light of *AOI*, one can, therefore, make the argument that even after the *KME* ruling a more comprehensive and stringent approach to judicial review is not adopted consistently by the GC.

4. Conclusion

Throughout this essay it has become clear that following the *Menarini* judgment Article 6 ECHR should apply to competition law with full stringency. Thus, based on the severity of its fines and their deterrent and punitive nature also competition law of the EU has to be considered to fall under Article 6 ECHR.

Moreover, it has become clear that the *presumption of parental liability* is in fact not rebuttable in practice. The fact that the courts gradually broaden the standards makes it virtually impossible for parent companies to adduce "sufficient evidence" to prove those standards, in order to rebut the presumption and avoid being held liable as one "undertaking". Moreover, as was discussed in the analysis of this essay, the ECJ and the GC have developed a tendency to hold the Commission to a very low standard.

²¹⁶ *Alliance One International Inc. v European Commission* (C-679/11) [2013], E.C.R I-000 (not yet reported), para. 47.

²¹⁷ Igor Nikolic, *Full judicial review of antitrust cases after KME: a new formula of review?*, E.C.L.R. 2012, 33(12), 583-588, p. 4.

²¹⁸ See e.g. *Janosevic v. Sweden*, ECtHR [2002] 2002-VII, para. 81; *Menarini Diagnostics v. Italy*, ECtHR [2011] Application No. 43509/08, paras. 41-42.

The standard applied to the Commission by the courts should be higher, considering the fact that the European Commission is the highest competition law authority in Europe. While it is reasonable that the Commission has to be afforded some margin of appreciation in its difficult task to effectively enforce the competition law of the EU, this margin of appreciation must not result in the irrebuttability of the *presumption of parental liability*. Moreover, the margin of appreciation must also not limit the scope of judicial review conducted by the courts, and in particular by the GC. Despite the fact that, after the ECtHR's *Menarini* ruling, the ECJ in *KME* seemingly advocated a new more comprehensive approach towards judicial review, this new approach has not been consistently implemented by the courts after the *KME* ruling.

The case of *AOI* displays the irrebuttability of the presumption of parental liability, as well as the insufficient extent of judicial review afforded by the GC. It illustrates how the GC reaffirms and strengthens Commission decisions, despite the fact that those decisions are based on arbitrary applications of standards as well as flawed reasoning. Moreover, it shows that the ECJ itself has developed a tendencies endorse the GC's judgments and to take cover behind the fact that its review is confined to reviewing only the law of cases. Fundamental rights arguments are subsequently as ineffective as evidence based arguments in attempting to rebut the *presumption of parental liability*.

It is often argued that the workload of the GC does not allow full judicial review to be conducted. However, the workload of the GC must not come at the expense of judicial review and the right to a fair trial. Solutions for the workload problem at the GC have to be implemented. One of those solutions could be the establishment of a competition law court, pursuant to Article 257 TFEU.²¹⁹ Such a competition court could moreover be set up in a way which allowed a closer review of complex economic assessments, which the Commission frequently conducts in their decisions.

The fact that the presumption is practically not rebuttable in conjunction with the fact that the courts do not conduct full judicial review raises the question whether parent companies are afforded their right to an effective appeal under Articles 6 and 13 ECHR. However, this discussion would have led too far with regards to the scope of this essay.

Personally I think that while competition law has to be effectively enforced by the Commission, this has to be done within certain legal confines. If the ECJ repeatedly pronounces the rebuttable nature of the *presumption of parental liability* it should be

²¹⁹ Igor Nikolic, *Full judicial review of antitrust cases after KME: a new formula of review?*, E.C.L.R. 2012, 33(12), 583-588, p. 7.

rebuttable in practice, rather than in theory. Thus, the erosion of notions such as the “exercise of decisive influence” cannot be considered to be compatible with the allegedly rebuttable nature of the presumption. Moreover, the judicial review of Commission decisions has to be more comprehensive and stringent in order to be compatible with the right to a fair trial. Furthermore, such a more stringent and comprehensive approach regarding judicial review will have to be implemented and applied consistently, in the light of the future accession of the EU to the ECHR under Article 6 TEU.

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