

# THE JOINT AND SEVERAL LIABILITY OF THE PARENT COMPANY ON COMPETITION MATTERS, A EUROPEAN APPROACH

## LA RESPONSABILIDAD SOLIDARIA DE LA CASA MATRIZ EN MATERIA DE DEFENSA DE LA COMPETENCIA, UNA VISIÓN EUROPEA

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**Abstract:** The European competition rules set undertakings (and not legal entities) as obligated of the competition provisions, but no definition of such term has been provided. The expansive and functional interpretation of the term undertaking developed by the Commission, the national competition authorities and the European Courts is central to extend the liability over the parent companies for the infringements of their subsidiaries. Therefore, they are allowed to take legal actions directly against the parent companies, increasing the chances of success. On the other hand, it is given a narrow margin to the parent companies to challenge their liability for the conduct of their subsidiaries in competition matters.

**Keywords:** competition law, concept of undertaking as subject of competition rules, joint and several liability, joint venture, parent company.

**Resumen:** La regulación en materia de defensa de la competencia en la Unión Europea establece a las empresas (y no a las personas jurídicas) como sujetos obligados de sus disposiciones, pero no se proporciona definición alguna sobre dicha expresión. La Comisión, las autoridades locales y los Tribunales europeos han desarrollado una interpretación funcional del término que resulta fundamental para extender la responsabilidad sobre las casas matrices por las infracciones de sus filiales. Como consecuencia, la Comisión y las autoridades nacionales pueden llevar a cabo acciones legales directamente contra las matrices, lo que aumenta las posibilidades de éxito. Por otra parte, existe un estrecho margen para que las matrices puedan cuestionar favorablemente su responsabilidad por la conducta de sus filiales.

**Palabras clave:** defensa de la competencia, noción de empresa como sujeto de la regulación de competencia, responsabilidad solidaria, empresa conjunta, empresa matriz.

**Summary:** I. Introduction. II. Undertakings as subject of EU competition rules. III. The undertaking as a single economic unit. IV. Implications of the extensive delineated boundaries of an undertaking. V. Liability of the parent company for infringements of its subsidiary. VI. The case of joint ventures. VII. A rebuttable presumption or a case of objective responsibility? VIII. Conclusion.

### I. Introduction

1. Under the treaties and regulations of the European Union (EU), *undertakings* are subject of the competition rules and such term identifies the addressees of the competition provisions. However,

no definition has been provided for the purpose of the law by the treaties. The aim of this paper is to describe how the relative term ‘undertakings’ is defined by the Courts with an expansive and functional view and how with this notion it is possible to expand the liability over the parent companies for the infringements of their affiliates, although they are located in different countries or they are different legal entities in the light of corporate law.

2. The definition of this concept is crucial to enable the competition authorities to prosecute the parent companies and with them increase the ceiling of the fine and chances of being paid. This paper seeks to provide comprehensive guidance in terms of conceptual and practical aspects on how the European Commission and Courts apply this approach, as well as, the practical and legal consequences of such an approach, highlighting the difficult task that the parent companies have to escape from their liability for the unlawful conduct of their subsidiaries in competition matters.

## II. *Undertakings* as subject of EU competition rules

3. The Treaty on the Functioning of the European Union (TFEU) prohibits restrictive agreements between undertakings<sup>1</sup> and it seeks to prevent the abuse of one or more undertakings with a dominant position.<sup>2</sup> Additionally, the EU regulation on mergers, i.e. Council Regulation No. 139/2004 (Merger Regulation), set that all concentrations of undertakings with a Community dimension as defined therein have to be notified to the European Commission, who has to prohibit those which create, strengthen a dominant position or affect effective competition in the common market or in a significant part of it.<sup>3</sup>

4. In spite of making reference to several places, the term undertaking is neither defined in the EU Treaty nor in the EU Merger Regulation. Consequently, the Commission and the European Courts have to establish the content of the term by its own interpretation. The Courts has held a broad definition of the notion of undertaking, enabling the Commission to maximise its competent powers and the application of the competition regulation as far as possible. As a result of this, with a functional approach, the Commission is able to apply the competition provisions to a very wide variety of persons and entities, consisting of individuals, trade associations, partnerships, clubs, companies, public entities.

5. Traditionally the judicial interpretation to ensure the full effectiveness of the competition provisions adopted a broad and functional approach, applying the term to entities engaged in economics and business activities irrespective of their legal status and the way in which were supported. This practical approach focuses on the commercial nature of activities and not on the type of entities engaged in them. The relativity of the concept ‘undertaking’ is most evident when considering activities carried out by non-profit-making organisations of public bodies. These entities may at times operate in their charitable or public capacity but may be considered as undertakings when they engage in commercial activities. The commercial nature of an activity is often apparent when the entities offer goods and services in the marketplace and when the activity could, potentially, yield profits.<sup>4</sup>

<sup>1</sup> TFEU, Article 101 prohibits ‘as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market’.

<sup>2</sup> TFEU, Article 102 states that: ‘Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States’.

<sup>3</sup> Council Regulation No. 139/2004, Article 3: ‘a concentration shall be deemed to arise where a change of control on a lasting basis results from: (a) the merger of two or more previously independent undertakings or parts of undertakings, or (b) the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings’.

<sup>4</sup> A. EZRACHI, *EU Competition Law – An Analytical Guide to the Leading Case*, Hart Publishing, Portland, USA, Fourth Edition, page 1.

6. Similarly, the Advocate General Roemer proffered a useful early definition of the term in 1966 in *Italy v Council*<sup>5</sup> stating that ‘*apart from legal form or the purpose of gain, undertakings are natural or legal persons which take part actively and independently in business and are not, therefore, engaged in a purely private activity*’. The Court of Justice in *Höfner and Elser*<sup>6</sup> has taken an expansive and functional view of the notion, holding that ‘*encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which is financed*’. Such requirement of participation in commercial activities must be understood in a wide sense as well. It covers not only the production and distribution of goods but also the provision of services in the capacity of coordinate or rule professional or sectorial activities, sports associations, charity events, among others, as long as it involves private or public activities of an economic nature.

### III. The undertaking as a single economic unit

7. The Courts have defined the term ‘undertaking’ focusing on the economic activity that the companies perform irrespective of the legal corporate structure that is applied within a business. For the purpose of EU antitrust law, any entity engaged in an economic activity, that is an activity consisting of providing goods or services in a given market, regardless of its legal status and the way in which it is financed, is considered an ‘undertaking’. To qualify for the application of the competition rules, by definition, no earn-profits intention is required and neither are public entities excluded.

8. A wide notion of the term under analysis was also implemented to bring action to the parent companies when a subsidiary was investigated by the Commission for breaching the competition provisions. The rule was firstly stated by the European Court in 1972 in *Imperial Chemical Industries*<sup>7</sup> where it was pointed out that: ‘*The fact that a subsidiary has separate legal personality is not sufficient to exclude the possibility of imputing its conduct to the parent company. Such may be the case in particular where the subsidiary, although having separate legal personality, does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company. where a subsidiary does not enjoy real autonomy in determining its course of action in the market, the prohibitions set out in article 85 (1) may be considered inapplicable in the relationship between it and the parent company with which it forms one economic unit.*’

9. The boundaries of undertakings were widely expanded in a practical and economic view of the term. The Court of Justice held in *Hydrotherm* that in competition law, the term ‘undertaking’ must be understood as designating an economic unit for the purpose of the subject-matter of the agreement in question even if in law that economic unit consist of several persons, natural or legal. In this case, a natural person and two different companies but completely controlled by the first were considered a single undertaking.<sup>8</sup> In *Shell*, the Court of First Instance held that Article 101 TFEU is aimed at economic units which consist if a unitary organization of personal, tangible and intangible elements which pursue a specific economic aim on a long-term basis and can contribute to the commission of an infringement of

<sup>5</sup> ECJ 13 July 1966, Case C- 32/65 *Italy v Council*.

<sup>6</sup> ECJ 23 April 1991, Case C-41/90 *Höfner and Elser v. Macrotron GmbH*. The case concerned the German Federal Public Employment Agency which the Court classified as an undertaking because it deemed employment procurement to be an economic activity.

<sup>7</sup> ECJ 14 July 1972, Case 48-69 *Imperial Chemical Industries Ltd. v Commission of the European Communities*, paragraphs 132 - 134.

<sup>8</sup> ECJ 12 July 1985, Case 170/83 *Hydroterm v Compact* [1985] ECR 3016, para. 11. This case concerned the block exemption granted by Regulation 67/67 to certain categories of exclusive dealing agreements. The exemption was expressly limited to agreements to which only two undertakings are party. That condition was held to be fulfilled where the parties to a contract were, on distribution side, a German company and on the manufacturing side, an Italian developer of a product and two legally independent legal entities controlled by him.

the kind referred to in that provision.<sup>9</sup> The Court found that Shell and the Shell group operating companies constituted a single undertaking.

10. In other words, for the purpose of competition law, ‘undertakings’ shall be identified with economic units rather than legal units. It is completely irrespective that the undertaking is a single person (legal or natural) or several companies or natural persons as long as they form an economic unit. As the concept of undertaking may comprehend several legal entities or natural persons, the corporate principle of separate legal personality is given way in the area of competition law to the economic concept of undertaking.

#### IV. Implications of the extensive delineated boundaries of an undertaking

11. The main impact of this ‘unit enterprise entity’ doctrine aforementioned can be relevant for two main purposes:

12. In the first place, it may be decisive for the application of the substantive rules, that is to say Article 101 or Article 102 TFEU. Article 101 prohibits restrictive agreements between undertakings and it does not apply to agreements between persons or companies belonging to the same undertaking. In many cases, companies are considered only one undertaking may allow a finding of abuse of a dominant position under the Article 102 TFEU as long as that undertaking has a dominant position. So if a subsidiary is accused to enter in an anti-competitive behaviour with its parent company, in case that it does not have a dominant position in the relevant market, as both are considered to be the same undertaking, the Commission is not allowed to bring a conspiracy case (Article 101 TFEU) and that conduct can stay without punishment.

13. In other words, the practical and extensive notion of ‘undertakings’ exclude the application of the Article 101 TFEU in cases were the parent and subsidiary are accused of the same infringement the competition law as they are not independent companies. In fact, there will be no agreements between undertakings where the subsidiary enjoys no real freedom to determine its course of action on the market.<sup>10</sup>

14. In the second place, the interpretation of the term under analysis determines the group of natural or legal entities to whom infringements of the substantive rules by the undertaking concerned can be imputed for the anti-competitive conduct. A company may thus be held responsible for an infringement which was carried out by another company belonging to the same business structure and in which it did not directly participate.<sup>11</sup>

15. Regarding this last issue, an economical purpose of the competition authorities may be hidden under the interpretation of the term undertaking. As previously stated, the parent company would be jointly and severally liable and directly responsible for an infringement made by its subsidiary as both companies are considered an economic entity, that is to say, a single undertaking. Consequently, the parent company which in many cases is established in a third country and has subsidiaries in different countries may be in a better financial situation to pay the imposed fine than its local subsidiary. It is an undeniable fact that the media exposure of the parent company could add pressure to settle in order to avoid appearing as an infringer, as a precedent and the fine itself.

16. Following the same reasoning, another central interest of the competition authorities to bring the parent companies to action is to apply Article 23 of the Council Regulation No. 1/2003 of 16 December 2002. Under this provision, when the Commission determines that a subsidiary is responsible for

<sup>9</sup> CFI 10 March 1992, Case T-11/89 *Shell v Commission* [1992] ECR II-884, para. 311.

<sup>10</sup> EC Commission Decision 91/50, Case IV/32.732 *Ijsselcentrale and others* [1991].

<sup>11</sup> W. P.J. WILS, *The Optimal Enforcement of EC Antitrust Law*, Kluwer Law International, The Hague, The Netherlands, 2002, page 165.

breaching the competition rules (i.e. Articles 101 or 102 TFEU), and the responsibility for that violation is correspondingly attributed to its parent company, it enables it to increase exponentially the potential fine to the maximum legal of 10% of the total worldwide turnover of the parent company. Otherwise, only the local turnover of the subsidiary shall be considered.

## V. Liability of the parent company for infringements of its subsidiary

17. The foundation of the parental liability is practical and it has a more economical than legal basis. A whole group of companies are considered as one undertaking and the parent company is severally and jointly liable for its affiliates. There is no explanation under the corporate or civil law. The parent company is not fined because of its responsibility as head of a group of companies or for instigate its dependent to breach the competition rules, respectively.

18. An early example of this approach was given in 1972 in *Imperial Chemical Industries*<sup>12</sup> where it was stated that: *'The fact that a subsidiary has separate legal personality is not sufficient to exclude the possibility of imputing its conduct to the parent company. Such may be the case in particular where the subsidiary, although having separate legal personality, does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company. Where a subsidiary does not enjoy real autonomy in determining its course of action in the market, the prohibitions set out in article 85 (1) may be considered inapplicable in the relationship between it and the parent company with which it forms one economic unit.'*

19. There are two main issues to determine the joint and several liability of the parent company and these are closely related, consisting of: (a) the property of the subsidiary's shares or equity; and (b) the influence of the parent company over its subsidiary. Where a parent company owns directly or indirectly the 100 per cent of the shares of its subsidiary and the latest infringed any competition regulation it is understood that the parent company was able to exercise 'decisive influence' over the conduct of its subsidiary; and there is a rebuttable presumption (*iuris tantum*) that the parent company exercised in fact such decisive influence over the conduct of the subsidiary. In that sense, it is sufficient for the Commission to prove that the subsidiary is wholly-owned by the parent company in order to presume that the parent company exercises a decisive influence over the commercial policy of its subsidiary, subject to rebuttal of that presumption (as we will see, it is not a simple job).

20. Consequently, the Commission will be able to hold the parent company as jointly and severally liable for the payment of the fine imposed on its subsidiary, unless the parent company, which has the burden of rebutting that presumption, addresses sufficient evidence to show that its subsidiary acts independently on the market.<sup>13</sup> This is particularly so where the subsidiary, although having separate legal personality, does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company. As it is ruled in many case-laws, there is nothing to prevent the Commission from establishing that a parent company which has the total ownership of the subsidiary equity actually exercises decisive influence over it by means of other evidence or by a combination of such evidence and that presumption.<sup>14</sup>

21. This *iuris tantum* presumption was ruled in *AEG-Telefunken*<sup>15</sup> in 1985 when the Court found superfluous to examine if the parent company had a position to exert a decisive influence on the distribu-

<sup>12</sup> ECJ 14 July 1972, Case 48-69 *Imperial Chemical Industries Ltd. v Commission of the European Communities*, paragraphs 132 - 134.

<sup>13</sup> ECJ 10 September 2009, Case C-97/08 P *Akzo Nobel NV and Others v Commission of the European Communities*, paragraph 60.

<sup>14</sup> ECJ 19 July 2012, Case C-628/10 P *Alliance One International and others vs Commission*, [2012] 5 CMLR14, p. 47.

<sup>15</sup> ECJ 29 March 1982, Case 107/82 *AEG-Telefunken*, [1983] ECR 3151, [1984] 3 CMLR 325, paragraph 50.

tion and pricing policy of its subsidiaries and whether it really made use of such power. In this case, the Court concluded that the parent company necessarily determined the commercial policies to its wholly-owned subsidiary without any additional duty to the Commission to probe it. According to the case-law of the Court of Justice, where the entire capital of the subsidiary is owned, there is no longer any requirement to carry out a check since in those circumstances, there is a presumption of decisive influence on the part of the parent company, which has the burden of rebutting that.<sup>16</sup>

**22.** It may also apply in cases in which the Court ruled that holding of ‘almost entirely of the capital of a subsidiary’ will give rise to a rebuttable presumption that the parent company exercises a decisive influence.<sup>17</sup> Differently, in the case of a minority-ownership of the equity of the subsidiary, in order to be able to impute jointly and severally the conduct performed by the subsidiary to the parent company, the Commission is requested to find that the parent company was in a position to exercise decisive influence over the conduct of its subsidiary and if it such influence was actually exercised by the parent company.<sup>18</sup>

**23.** As it was ruled in *Akzo Nobel NV*, although having a separate legal personality, if the subsidiary has no independence upon its own conduct on the market, it is not allowed to take commercial decision for its own, and it has to obey the instructions given to it by the parent company, in such situation, the parent company and its subsidiary form a single economic unit and therefore form a single undertaking. Thus, this unique undertaking constituted by two or more different legal entities enables the Commission to address a decision imposing fines to the subsidiary and parent company several and jointly liable, without having to establish the personal involvement of the latter in the performance of the infringement.<sup>19</sup>

**24.** As a final word in this regard, it is worth highlighting that the several and joint liability of the parent company also includes recidivism uplift even though the parent company has not been subject of previous legal proceedings giving rise to a statement of objections and decision.<sup>20</sup> This can raise some practical consequence as the parent company may be fined for repeat infringement even without being an addressee of earlier decisions and parent companies may have to produce evidence of their lack of influence or rebut a presumption of influence over those subsidiary years later.

## VI. The case of joint ventures

**25.** Joint ventures’ case can be more complex as they are created by more than one parent company and are generally empowered with independent and autonomous governance. However, in many cases the Courts understood that, if each parent company has the ability to supervise the strategic direction of the joint venture as for example if they have the power to appoint and dismiss officers or to ap-

<sup>16</sup> ECJ 26 September 2013, Case C-172/12P *El du Pont de Nemours and Others v Commission*, paragraph 45.

<sup>17</sup> A. EZRACHI, *op cit.*, page 25, where the author refers to CFI 30 September 2009, Case T-168/05 *Arkema SA v Commission*, paragraph 70.

<sup>18</sup> It has accordingly been held that where the control actually exercised by a parent company over a subsidiary in which it has a 25% holding represents a minority interest, far short of a majority interest, it cannot be concluded that the parent company and its subsidiary belong to a single group, within which they form an economic unit. None the less, a minority interest may enable a parent company actually to exercise a decisive influence on its subsidiary’s market conduct, if it is allied to rights which are greater than those normally granted to minority shareholders in order to protect their financial interests and which, when considered in the light of a set of consistent legal or economic indicia, are such as to show that a decisive influence is exercised over the subsidiary’s market conduct. Proof of the actual exercise of a decisive influence may therefore be adduced by the Commission by relying on a body of indicia, even if each of those indicia taken in isolation does not have sufficient probative value. See ECJ 12 July 2011, Case T-132/07 *Fuji Electric v Commission* [2011] ECR II-4091, paragraphs 182 and 183.

<sup>19</sup> In this case the Court clarified that where a parent company has a 100 per cent shareholding in its subsidiary there is a rebuttable presumption that that parent company exercise a decisive influence over the conduct of its subsidiary. See *op. cit. Akzo Nobel NV and Others v Commission*, paragraphs 58 - 59.

<sup>20</sup> ECJ 5 March 2015, Cases C 93/13 P and C-123/13 P *European Commission v Versalis SpA and Eni SpA and Versalis SpA and Eni SpA v European Commission*.

prove capital expenditure, the parent companies are also severally and jointly liable of the infringement of the joint venture to the competition regulation.

**26.** The fundamental point in a relation to 50-50 partners is the fact that each parent company holds equal quantity of shares and votes in the joint venture and this means that any of each parent companies could block any of the joint venture's strategic decisions. In that sense, it was stated in *El du Pont de Nemours* that: '*Where two parent companies each have a 50% shareholding in the joint venture which committed an infringement of the rules of competition law, it is only for the purposes of establishing liability for participation in the infringement of that law and only in so far as the Commission has demonstrated, on the basis of factual evidence, that both companies did in fact exercise decisive influence over the joint venture that those three entities can be considered to form a single economic unit and therefore forma single undertaking for the purpose of Article 101 TFEU.*'<sup>21</sup>

**27.** This lack of autonomy of the joint venture opposes surely to what the parties indicate under the Merger Regulation proceedings. In this regard, the Court stated that the independence declared to the Commission by the parent companies in the merger procedure does not mean that the joint venture would configure an 'autonomous economic entity' which enjoys autonomy in adopting strategic decisions and would not be under the decisive influence of its parent companies. As we can see the practical approach of the economic unit and the notion of one undertaking irrespective of the companies or entities involved, as mentioned before, is applicable as well to the joint ventures.

**28.** However, a more problematic situation could represent the case of a joint venture with partners with different shareholding and the several and joint liability of the minority parent company. This matter was considered by the General Court in a recent case, *Toshiba* of 9 September 2015.<sup>22</sup> Toshiba was a partner with a minor participation jointly with Panasonic, as the majority shareholder. The joint venture was fined and both companies were several and jointly liable as parent companies, irrespective the percentage of their shareholdings. In its action, Toshiba argued its responsibility on the joint venture as it had a minor participation with no possibility to have a decisive influence over the joint venture management. The Court in this regard resolved to dismiss the appeal on the grounds of a statutory power of veto of both parent companies had with respect to matters of strategic importance which were essential for the pursuit of joint venture's activities.

**29.** In this case, the Court held that under certain circumstances a minority shareholding may enable a parent company to exercise decisive influence and the actual exercise of such influence can be inferred directly from the joint venture provisions or a related agreement between parents. Here, the possibility of exercising decisive influence over the commercial policy of a joint venture does not require proof of an interference in the day-to-day management of that joint venture's operation, nor of influence over the joint venture's commercial policy in the strict sense, such as its distribution or pricing strategy, but rather influence over the general strategy which defines the orientation of the undertaking. It was also ruled that a parent company may exercise decisive influence over its subsidiaries even when it does not make use of any actual rights of codetermination and refrains from giving any specific instructions or guidelines on individual elements of commercial policy. Ultimately, the decisive factor that it was given is whether the parent company exercises an influence that suffices to direct the conduct of its subsidiary to such an extent that the two must be regarded as one economic unit.<sup>23</sup>

<sup>21</sup> ECJ, *op. cit.*, *El du Pont de Nemours and Others v Commission*, paragraph 47.

<sup>22</sup> In this regard, within the context of the action brought by Toshiba, the Court annuls the Commission decision in so far as it imposed it a fine for its direct participation a cartel on the market for cathode ray tubes between 1996 and 2006 because it has not been established to the requisite legal standard that Toshiba was aware or had actually been kept informed of the existence of the overall tubes cartel and that it intended to contribute by its own conduct to all the common objectives pursued by the participants in the cartel or that it could reasonably have foreseen those objectives and was prepared to take the risk. ECJ 9 September 2015, Case T-104/13, *Toshiba Corp. v. European Commission*.

<sup>23</sup> See, *op. cit.*, Case T-104/13, *Toshiba Corp. v. European Commission*, paragraph 121.

## VII. A rebuttable presumption or a case of objective responsibility?

30. The parent company has the burden of rebutting the presumption by proving with evidence that it did not exercise decisive influence over the affiliate's commercial policy for alleged infringement to the competition rules. But the way in which the Commission and the Courts apply the rebuttable presumption for the attribution of liability to parent companies for competition infringements committed by their, wholly-owned or not, affiliates or subsidiaries in practices makes almost impossible to successfully rebut the said presumption.

31. The notion of parent company's influence over its subsidiaries it is so extensive that includes corporate strategy, operational policy, business plans, investment, capacity, provision of finance, human resources and legal matters with indirect effects on the market conduct of the subsidiaries and of the whole group.<sup>24</sup> This approach weakens any chance of the parent company to try to probe the autonomy of the affiliate or subsidiary.

32. In case that a parent company takes the decision to challenge the parental liability should give evidence of the independence of its subsidiary. The first question that they should resolve is what has to be probed: whether the lack of decisive influence over the subsidiary particularly with regard to the anti-competitive conduct carried on by subsidiary or generally to the whole commercial policy of the subsidiary. As the aforementioned, the Courts seem to hold the latest. It would not be considered to exclude the parent liability in the case that the subsidiary has broken the chain of command as the parent could still have power of control or a power of veto over its affiliate.

33. The defences that the parent company are mainly as follows: (a) the parent company is a holding investment company which has no participation on the commercial matters or policies of its affiliates; (b) the lack of command between the board of directors or manager between both companies; (c) both companies act independently in two different markets and they have autonomy enough to take decision by their own; (d) the exchange of information is only limited to financial and it was prohibit the exchange of commercial information; (e) the parent company does not get any benefit from the infringement of its subsidiary, among others.<sup>25</sup>

34. However, the European Courts are reluctant to accept these arguments from the parent companies. The exertion of the decisive influence may be inferred from a decidedly vague set of indirect, circumstantial evidence that is represented by the concept of economic, organisational and legal links favoured by the Courts in their recent judgments. In fact, authors argue that the task of adducing proof of a negative fact, i.e. the lack of control, amounts to *probatio diabolica* and, consequently, renders the presumption de facto irrefutable.<sup>26</sup>

35. Following that reasoning, if the view of the Commission and the Courts in this regard is too inflexible, the parent company may be required for an effective negative proof of their innocence, which could lead to several situations of injustice. The point of departure of the Commission and Courts in any antitrust investigation should be presumption of innocence of all persons involved. Innocent persons, natural or legal entities, should be presumed innocent until proven guilty and they also have the benefit of the doubt in its favour. It is not the duty of the accused to prove its innocence, regardless of whether the law has an administrative nature.<sup>27</sup>

<sup>24</sup> See opinion of advocate general Kokott, ECJ 23 April 2009, Case C97/08 P, *Akzo Nobel NV and Others v Commission of the European Communities*.

<sup>25</sup> A. GUERRA y E. PEINADO, *Foro de Actualidad Unión Europea, La responsabilidad de las sociedades matrices por las infracciones de las normas de Defensa de la Competencia por sus filiales*, Uría Menéndez Abogados, [www.uria.com/documentos/publicaciones/3361/documento/foro01.pdf?id=3876](http://www.uria.com/documentos/publicaciones/3361/documento/foro01.pdf?id=3876).

<sup>26</sup> ECJ 29 September 2011, Case C520/09 P *Arkema SA v Commission*, paragraph 38.

<sup>27</sup> A. MICKONYTĖ, *Joint Liability of Parent Companies in EU Competition Law*, Vol. 1, 2012, pages 33-69.



36. The Commission is able to use a rebuttable presumption of the decisive influence of the parent but it should not be presented in the facts as an absolute non-rebuttable presumption (*iuris et de iure*). The Commission and Courts should be opened to study deeply the defences that the parent companies present since the *iuris tantum* presumption that the Commission and the Court use to fine the parent companies for the infringements of their subsidiaries should not be taken as an objective responsibility, since it would be contrary to the principle of personal responsibility which EU competition rules are based.

37. In this sense, it should be pointed out the *General Química* Court decision which rules rightly that the rebuttable presumption does not lead to the automatic attribution of liability to the parent company holding 100% of the capital of its subsidiary, which would be contrary to the principle of personal responsibility on which EU competition law is based. In this case the Court of Justice found that the General Court had committed an error of law by reducing the possibilities, for a parent company, of rebutting the presumption of decisive influence over the conduct of a subsidiary of which it holds 100% of the capital.<sup>28</sup>

### VIII. Conclusion

38. The EU competition rules sanction undertakings and not persons since the first ones are subject of the European competition rules. As the term *undertakings* is not defined in the TFEU and from a legal perspective it could result imprecise, the Commission and Courts have made a functional and broad interpretation to apply the term to entities engaged in economics and business activities irrespective of their legal status and the way in which are financed.

39. It is essential to the analysis of Articles 101, 102 TFEU and the Merger Regulation to know the extension of such a term as only ‘undertakings’ may be subject to these regulatory instruments. Therefore, it would depend on the definition of such a term if it would apply the policy of conspiracy between two different undertakings set in the Article 101 TFEU or the dominant position prevention established in the Article 102 TFEU.

40. The practical approach is also used in relation to parental liability in order to circumvent restrictions based on the ‘legal personality’ perspective. The analysis that the Commission and European Courts make is whether the parent company and its affiliates constitute one single economic unit. The corporate structure performed by the company is released to a secondary aspect. It is common that international companies currently do business with very complex corporate structures with multiple companies making one undertaking worldwide and these companies have very low independence from the head office.

41. Hence irrespective of the number of companies formed, if there is an undertaking as one economic unit, the parent company is liable severally and jointly with the subsidiary which has committed the infringement to the competition rules, without having to establish the personal involvement of the parent company in the infringement.<sup>29</sup> With this approach the Commission and the Courts are able to go further on the legal personality, accuse and fine directly to the company owner of the shares and control of the subsidiary which has committed the alleged infringement if it is understood that they are a single undertaking.

42. As we mentioned, in fact the principal reasons that the Commission and the national authorities go against the parent company is to elevate many times over the possible fine as the turnover of the parent company is clearly higher than its affiliate and also to increase the chances to be paid in case the parent company settles or receives a fine.

<sup>28</sup> ECJ 20 January 2011, Case C90/09 P *General Química SA and others v EC*, paragraph 52.

<sup>29</sup> ECJ, *op. cit.*, *El du Pont de Nemours and Others v Commission*, paragraph 41.

43. In order to consider the unity of the undertaking, the parent company has to exercise sufficient and decisive control over its affiliates and subsidiaries. In the case of a wholly-owned affiliate, the Commission and the European Courts apply an automatic rebuttable presumption that the parent company is in a position to exercise decisive influence and the parent actually exercises such influence. The presumption that the parent company exercises a decisive influence also applies in cases in which the parent holds ‘almost entirely of the capital of a subsidiary’ or a high proportion of the shares.<sup>30</sup>

44. The parent company bears burden of proof for rebuttal. But, rebutting the presumption is very difficult to do in practice, if not impossible. Many companies have argued to the Court that the approach taken by the Commission involves what is ‘practically no-fault liability’, that is to say, objective responsibility. This point is incompatible with the principle of personal liability. The frequent rejection of the arguments used by the parent companies to rebut the presumption that they do not in fact exercise decisive influence is turning the presumption into *irrebuttable*.

45. It must be pointed out from a legislative technique that it would have been more appropriate to address the competition rules to *persons* and not to *undertakings*. The latest is an abstract notion imported from the economy, more related to be *object* (a very complex object indeed) than subject of rights and obligations. In this sense, natural or artificial persons are invested of sufficient capacity to enjoy rights and be subject to obligations in accordance with the law.

46. Nevertheless, the use of a functional approach has helped the Commission in the public enforcement of the competition law and the joint and several liability of the parent company has been used as a tool by the Commission to take action to antitrust conducts or to dismantle the infrastructure of cartels. Also the media impact over the parent companies is a strong pressure measuring instruments which the Commission and national authorities often use.

47. However, the parental liability should be built from the allocation of its responsibility over the subsidiary and the performance of the anti-competitive conduct since the subsidiary does not decide independently upon its own conduct on the market, and it carries out, in all material respects, the instructions given to it by the parent company. The principle of “piercing the corporate veil” could be used to pursue the parent company in case of breaking the corporate rules.

48. In cases of a wholly-owned subsidiary, the presumption of the parental decisive influence over the wholly-owned subsidiary could be applied by the Commission and national authorities. But, in other cases, when the subsidiary is partly owned, the Commission should probe the dependence of the subsidiary to the parent company to invoke its several and joint liability. So it would be a better practice that something more than the extent of the shareholding must be shown. Also, a real possibility to rebut that presumption should be given to the parent company to demonstrate that although it is wholly-owned or not, the affiliate has autonomy to do business by itself without the parental interfering.

49. As a final thought, in order to avoid falling in an injustice situation, in a first instance, the Commission should not limit itself to just implementing the rebuttable presumption over the liability of the parent companies for the infringements of their subsidiaries. The existence of the presumption of decisive influence does not in any way release the Commission from the obligation to provide a reasoned account of evidence to prove the lack of autonomy of their subsidiaries.

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<sup>30</sup> A parent company which holds almost all the capital of its subsidiary is, as a general rule, in a similar situation to that of a sole owner as regards its power to exercise a decisive influence over the conduct of its subsidiary, having regard to the economic, organisational and legal links which join it to that subsidiary. Consequently, the Commission is entitled to apply to that situation the same evidential regime, namely to rely on the presumption that that parent company makes effective use of its power to exercise a decisive influence over the conduct of its subsidiary. ECJ 11 July 2014, Case T-543/08 *RWE and RWE Dea v Commission*, paragraph 38.

**50.** In that sense, it should assure that the subsidiary and its parent company are in fact an economic entity, they comprise of personal and physical elements (staff and assets), that is pursuing a single economic goal and that the parent is capable of contribution to the infringement.<sup>31</sup> And, in the second place, it should show its openness to review different evidences and arguments submitted by the parent companies in effort to rebut the presumption and its viability in the appeal procedures.

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<sup>31</sup> ECJ 17 December 1991, Case T-6/89 *Enichem Anic SpA v Commission of the European Communities*, paragraph 235 and 236.