



## *Cartels: Latest Developments on Key Issues*

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# I. Parental Liability

- **Presumed liability for 100% subsidiaries**
  - rebuttable in theory
  - virtually irrebuttable in practice
  - extends to near 100% owned subsidiaries
- **Absent presumption Commission must show**
  - ability to exercise decisive influence
  - actual exercise of decisive influence

- **Underlying rationale for parental liability**
  - economic theory?
  - actual complicity?
  - duty to supervise?
- **Circs in which presumption for 100% subsidiaries can be rebutted**
- **Circs in which liability applies for <100% owned subsidiaries**

# A. Rebutting the presumption (or not)

- **Commission appeal from GC judgment (T-208/08)**
- **GC had rejected parental liability finding as**
  - parent entity not an undertaking
  - parent entity inactive
- **AG recommends overturning GC guilty of**
  - “fundamental misunderstanding” of concept of an undertaking
  - “fundamental misunderstanding of 100% presumption”
  - “formalism” and “regretabl[e]” lack of analysis
    - GC focused on company law actions
    - did not examine actual effects of personnel links

- **GC wrong to distinguish between**
  - the concept of undertaking; and
  - parental liability for conduct of a subsidiary (§ 30)
- **It is sufficient for liability that the parent and subsidiary form an economic unit (§ 30)**
- **The CJEU has**

“always been intent on an absolutely uniform interpretation of the concept of an undertaking in all areas of competition law” (§ 50)

- **Argument that 100% presumption *de facto* irrebuttable rejected**
  - minimum supervisory requirements imposed on parent under national law no shield from EU rules (§ 38)
- **Delegation by parent to one subsidiary of supervisory powers over a sister company is evidence of the exercise of control (§ 52)**



- **CJEU upholds GC annulment of fine on intermediate parent company**
- **Commission had**
  - chosen not to rely on presumption of liability for 100% parents (§§ 49 and 50)
  - failed to produce evidence of actual exercise of decisive influence (§§ 53 to 55)

- **Fine on intermediate parent company set aside as no reference made to 100% presumption in SO**
  - company deprived of opportunity to submit evidence rebutting presumption (§ 30)

## B. Partially owned subsidiaries

- **Shell group structure**
  - pre-2005: dual ultimate parent companies
    - 60% Dutch parent; 40% English parent
    - operational subsids managed through joint holding cos
  - 2005: merger of dual parents
- **GC upholds application of presumption of liability to dual parents**
  - position “analogous” to single 100% parent (§ 45)

- **Justifications for the analogy with a single parent**
  - dual structure exists for “historical reasons” (§ 47)
  - dual parents
    - merged in 2005 (§ 47)
    - declared identical consolidated turnover (§ 47)
    - jointly owned and appointed directors of intermediate holding companies (§ 47)
    - met monthly with such directors (§ 47)
    - had representatives on boards of intermediate holding companies (§ 48)
    - used a structure of committees on which members of the boards of both parents sat to manage the group (§§ 48 and 49)

- **Shell ran a ‘rogue employee’ defense**
- **GC rejected it**
  - 2000 note of in-house lawyer recorded sales manager drawing attention to the cartelized market following compliance training
  - note circulated outside infringing subsidiary
  - infringement continued to 2002
  - market had been internally scrutinized in 1992/3 (cartel started 1994) and employee of infringing subsidiary had recommended withdrawal from cartel market in 1995 (§§ 62 and 63)

- **GC upholds imposition of liability on parent for infringement by a 50:50 joint venture**
- **Actual exercise of decisive influence**
  - JV senior management
    - included individuals from “high management level” in parent group
    - who were “systematically” involved in infringement (§ 85)
  - jointly controlled JV Management Committee
    - approved JV plant closure in cartel market (§ 86)
    - had “significant powers relating to the management of the joint venture” (§ 87)

- **JV Management Committee powers**
  - setting of overall policy and vision
  - appointment of board and senior management
  - approval of business, strategic and operational plans
  - banking policy
  - major capital expenditure and borrowing
  - amendment of business scope
  - dissolution of business or merger (§§ 40 and 81)



- **Infringing subsidiary acquired in stages**
  - 60% shareholding in 1991
  - 100% shareholding thereafter
- **GC annuls liability re 1991 period of ownership**
  - only evidence of exercise of control was appointment of two FLS group directors to board of subsidiary (§ 41)
    - no evidence that this gave control of board (§ 43)
  - day-to-day management in hands of MD appointed by 40% minority shareholder (§ 45)
  - no evidence of knowledge of infringement (§ 44)
  - sole control assumed (§ 38)

## II. Single and Continuous Infringement

- ***Coats Holdings (T-439/07)***
  - absence of evidence during long period (13 to 21 yrs) not sufficient to prevent finding of continuous infringement in context of documented market sharing agreement (§§ 151 to 154)
- ***ICI (T-214/06)***
  - sufficient that ICI knew or ought to have known that cartel covered three product markets (§ 92)

# III. Access To Documents

- ***National Grid v ABB* (4 April 2012)**
  - limited disclosure of EU procedure documents granted
  - no disclosure of voluntarily submitted leniency material
- **AG Jaaskinen in *Donau Chemie* (C-536/11)**
  - absolute national law prohibition on disclosure of leniency documents by FCA, absent consent of parties, is contrary to EU law unless alternative mechanisms for securing proof of breach are provided (§ 71)

- ***Schenker (E-14/11)***
  - EFTA SA decision refusing to disclose non-leniency materials annulled
  - an infringing company has no legitimate or commercial interest in avoiding private damages actions (§ 189)
  - presumption that disclosure will prejudice enforcement will not apply where
    - a final decision has been adopted and is not subject to appeal; and
    - the information was not submitted voluntarily (§ 224)

**Thank you**

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