Parental Liability – An Issue That Won’t Go Away

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Overview

• The issue and why it matters
• What we thought we knew
• What we learned in the last year
• What does this mean?
The Issue

- **Two battling concepts:**
  - an undertaking is a single economic entity for competition law purposes
  - each corporate entity has separate legal personality and limited liability for corporate law purposes

- **Human rights law issues arise in consequence**
Why it matters

• Parental involvement may lead to higher fines
  • increased turnover
  • application of recidivism rules

• Risk of private enforcement

• Liability stays with parent if subsidiary sold
What we thought we knew
• “where a parent company has a 100% shareholding in a subsidiary … first, the parent company can exercise a decisive influence over the conduct of the subsidiary and, second, there is a rebuttable presumption that the parent company does in fact exercise a decisive influence”

• “it is for the parent company to put before the Court any evidence … apt to demonstrate that they do not constitute a single entity”
A hard presumption to rebut

- Compliance training
- Subsidiary ignoring instructions
- Independent day-to-day operations
- Limited reporting obligations
- Marginal or unrelated activities
- Intention to sell
• “this presumption rests on the realization that, absent wholly exceptional circumstances, a company holding the entire share capital of a subsidiary can, as a result of that holding, exercise a decisive influence on the behavior of the subsidiary and, in addition, that the non-exercise of this influence in practice can generally most effectively be established by the entities subject to the presumption”

*Elf Aquitaine (C-521/09)*
What we learned last year
• The presumption really is rebuttable – it can be rebutted

• It is still really hard to rebut – control of group strategic direction is enough

• The Commission (and GC) must not rely on it too easily – they must fully reason their decisions if the presumption is challenged

• The presumption applies below 100%
– The presumption is rebuttable; but it’s still really hard
• Gosselin participated in the Removal Services cartel from 1984 to 2003

• Porteilje owned 99.9% of the shares in Gosselin

• Fine on Porteilje overturned as
  • it was not an undertaking
  • it was formed only in June 2001 and its Board did not meet until Nov 2004
  • it could only vote in Gosseline shareholders’ meetings and none occurred during the relevant period
  • overlapping Board memberships predated the formation of Porteilje
Arkema, a direct subsid of Elf and through Elf Total, participated in the Methacrylates cartel

Elf and Total challenged the Akzo presumption
- Elf functioned as a non-operational holding company
- did not define or intervene in commercial strategy for cartel products
- obtained very limited information on Arkema
- Arkema was a chemicals subsid in a petroleum group and the cartel products were a minor part of group TO
- had contractual and financial autonomy
- no common brand or perception of commonality
- Arkema later spun-off
• GC rejects arguments
  • none are supported by concrete evidence
  • factors relied on are not sufficient to rebut presumption
  • certain of them support a finding of decisive influence

• Of particular relevance
  • Elf’s role as a holding company
  • intervention in decisions capable of having an impact at group level – industrial investments, major commitments and acquisitions – despite this never having been relevant in relation to cartel products

• see also T-190/06
– Full reasoning is required
• Chemoxal 100% subsid of Air Liquide

• Commission failed to reason its rejection of the following rebuttal arguments
  • no overlap in directors or personnel
  • Chemoxal CEO had maximal powers
  • Chemoxal was autonomous in key resources and services
  • its activities were distinct from those of rest of group
  • its management had control of pricing, client relations and major commercial projects
  • it shared the AL trade mark but for ‘legitimate reasons’
• Commission not obliged to take account of all arguments, esp if manifestly irrelevant

• However, the arguments advanced were not completely without significance, in particular
  • there was no overlap in directors or personnel
  • Chemoxal’s activities within the group were very distinct
  • it was autonomous in terms of services/resources
  • the powers of its management were broadly defined
  • it was autonomous in relation to the elaboration of strategic projects
• Edison 100% indirect parent of Ausimont

• Commission failed to reason its rejection of the following arguments against presumption
  • Edison was a non-operation holding company in a highly diversified group
  • its role was limited to the verification of financial results
  • it had a disengagement plan for non-strategic activities
  • Ausimont’s Board had maximal powers for ordinary and extraordinary management
  • it was autonomous in services and resources
Commission not obliged to take account of all arguments, esp if manifestly irrelevant

However, the arguments advanced were not completely without significance, in particular
  - they went beyond simply arguing that Edison’s role as a holding company was limited to acting as a financial investor
  - Edison had actively adopted measures giving the subsidiary autonomy
• Another Arkema case (Monochloracetic Acid)

• Elf challenged the Akzo presumption
  • Elf functioned as a non-operational holding company
  • obtained very limited information on Arkema
  • management of Arkema’s activities not subordinated to orders from Elf
  • Arkema had contractual and financial autonomy
  • No perception of commonality by third parties

• Commission found to have failed to reason its rejection of these arguments
• GQ parent of Repsol subsids involved in Rubber Chemicals cartel

• ECJ holds General Court erred in finding
  • rebuttals of Akzo presumption could be dismissed on basis of prior case law
  • an order from GQ to Repsol to cease infringing activity demonstrated its decisive influence

• Cites Akzo (C-97/08)
  • “The set of relevant factors enabling the appellants to rebut the presumption … may vary depending on the specific characteristics of each case”
– The presumption applies below 100%
Total, Elf Aquitaine and Arkema

- **Total Elf Aquitaine** (T-206/06) (also T-189/06, T-190/06, T-217/06)
- Arkema only 96.5% owned by Elf and Elf only 99.4% owned by Total
  - Elf nominated entire Board of Arkema
  - applicability of presumption not challenged
- GC finds Akzo presumption applies
  - “a parent that holds the quasi-totality of the capital in its subsidiary is, in principle, in a similar situation to a 100% owner as regards its power to exercise a decisive influence”
• “it cannot be excluded that, in certain cases, minority shareholders may hold, in relation to the subsidiary, rights that call into question the similarity [to a 100% owner]. However, aside from the fact that such rights are not generally associated with minimal shareholdings, as is the case here, no such situation has been alleged in this case.”

*Total Elf Acquitaine (T-206/06)*
What does this mean?
• Agency – subsid following orders
  • but autonomy in cartel market not sufficient
  • and control of group strategy is

• Unity – undertaking/single economic unit
  • but it’s a rebuttable presumption

• Bears in the garden – responsibility to control a dangerous situation
  • but delegation seems relevant
  • and caution/rogue action by subsid does not
Does it matter?

- The undertaking concepts is a key one – it defines
  - the scope of infringement under Art 101
  - the dividing line between Arts 101 and 102
  - the scope of the Merger Regulation (potentially)

- Do we want/can we have
  - two separate concepts of undertaking, and/or
  - a blurred jurisdictional line in the above cases
Thank you!

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