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Parental Liability – An Issue That Wont 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

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Akzo Nobel (C-97/08), 1 Sept '09

- "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

Rationale

- **"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

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Summary

- 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 (T-208/08)

- **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 Porteije

Total Elf Aquitaine (T-206/06)

- **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

Total Elf Aquitaine (T-206/06) (cont)

- **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

Air Liquide (T-185/06)

- **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'

Air Liquide (T-185/06)(cont)

- **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 (T-196/06)

- **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

Edison (T-196/06)(cont)

- **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

Elf Aquitaine (C-521/09)

- **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**

General Quimica (C-90/09)

- **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 Acquitaine* (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"

Rationale

- **"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?

What is going on?

- **Agency – subsid following orders**
  - but autonomy in cartel market not sufficient
  - and control of group strategy is
- **Unity – undertaking/single economic unit**
  - but its 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

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Thank you!

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