

THE SINGLE ECONOMIC ENTITY DOCTRINE IN EU COMPETITION LAW

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Abstract

Articles 101 and 102 TFEU apply to the activities of undertakings. An undertaking may comprise several natural or legal persons, together referred to as a “single economic entity.” The grouping of several natural or legal persons into a single economic entity raises the questions of whether persons that form part of a single economic entity are able to enter into agreements amongst themselves that are contrary to Article 101; and also which of the constituent legal entities may be held liable for an infringement of EU competition law committed by the economic entity. In light of case law concerning these questions we offer a reconceptualization of the single economic entity doctrine and its role within competition law.

1. Introduction

Articles 101 and 102 TFEU are addressed to *undertakings*. An undertaking has been defined as an economic unit.¹ An economic unit may comprise several natural or legal persons, together referred to as a “single economic entity”.² It is commonly thought that the grouping of several natural or legal persons into a single economic entity can have both favourable and unfavourable consequences for those persons.³ Three particular consequences

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We would like to thank Wouter Wils and two anonymous referees for a number of thought-providing comments on an earlier draft of this paper. The views expressed in this paper and responsibility for them remain ours alone.

1. Case T-352/94, *Mo Och Domsjö AB v. Commission*, [1998] ECR II-1989, para 87; Case C-90/09 P, *General Química v. Commission*, [2011] ECR I-1, paras. 34–36 and case law cited.

2. Case 170/83, *Hydrotherm Gerätebau v. Compact*, [1984] ECR 2999, para 11.

3. Case 48/69, *Imperial Chemical Industries (ICI) v. Commission*, [1972] ECR 622; Case C-440/11 P, *Commission v. Stichting Administratiekantoor Portielje*, judgment of 11 July 2013, nyr, Opinion at para 32. The ECJ has also held that the concept of an “undertaking participating

should be noted. First, finding that several persons form part of a single economic entity is often taken to mean that those persons are incapable of infringing Article 101 among themselves.⁴ Secondly, it is thought that each person forming part of a single economic entity may be held liable for an infringement of EU competition law committed by that economic entity⁵ – though there is a critical commentary that challenges the role played by the single economic entity doctrine in the attribution of liability for transgressions of EU competition law.⁶ A third consequence is that the EU may assert subject-matter and enforcement jurisdiction over legal entities domiciled outside the EU when those legal entities form part of the same economic

in the infringement” for the purposes of fining under Art. 23(2) of Reg. 1/2003 is necessarily the same as for the application of Art. 101 TFEU: Case C-408/12 P, *YKK Corporation v. Commission*, judgment of 4 Sept. 2014, para 59. See also Geradin, Layne-Farrar and Petit, *EU Competition Law and Economics* (OUP, 2012), para 6.56 (referring to the *Akzo* presumption as being “[i]n full congruence with the *Viho* ruling”); Bellamy and Child, *European Union Competition Law*, 7th ed. (OUP, 2013, Eds. Rose and Bailey), para 2.24 (“it appears, however, that the principles established by the case law apply without distinction to intra-enterprise agreements and attribution of liability”); Whish and Bailey, *Competition Law*, 7th ed. (OUP, 2012), pp. 93–96; Jones and Sufrin, *EU Competition Law*, 5th ed. (OUP, 2014), pp. 143–146.

4. Communication from the Commission – Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements, O.J. 2011, C 11/1, para 11; Bellamy and Child, *ibid.*, para 2.025; O’Donoghue and Padilla, *The Law and Economics of Article 102 TFEU*, 2nd ed. (Hart, 2013), p. 27; Faull and Nikpay, *The EU Law of Competition*, 3rd ed. (OUP, 2014), para 3.49; Whish and Bailey, *op. cit. supra* note 3, p. 93. A contrary view seems to be expressed in Gleiss, *Common Market Cartel Law*, 3rd ed. (Bureau of National Affairs, 1981), p. 45.

5. Case C-279/98 P, *Cascades v. Commission*, [2000] ECR I-9693, para 78; Case C-286/98 P, *Stora Kopparbergs Bergslags v. Commission*, [2000] ECR I-9925, para 37; Case C-248/98 P, *KNP BT v. Commission*, [2000] ECR I-9641, para 71; Case C-297/98 P, *SCA Holding v. Commission*, [2000] ECR I-10101, para 27. Faull and Nikpay, *ibid.*, para 3.51; Ritter and Braun, *European Competition Law: A Practitioner’s Guide*, 3rd ed. (Kluwer, 2005), p 48.

6. The following articles are representative of recent writing on this subject: Kinsella and Meier, “Why shareholders should not share the blame in the EU”, in GCP, Antitrust chronicle, Nov. 2009, available at <www.competitionpolicyinternational.com>; Scordamaglia, “Cartel proof, imputation, and sanctioning in European competition law: Reconciling effective enforcement and adequate protection of procedural guarantees”, 7 *Competition Law Review* (2010), 39–42; Hofstetter and Ludescher, “Fines against parent companies in EU antitrust law: Setting incentives for ‘best practice compliance’”, 33 *World Comp.* (2010), 55; Burnley, “Group liability for antitrust infringements: Responsibility and accountability”, 33 *World Comp.* (2010), 595; Jones, “The boundaries of an undertaking in EU competition law”, 8 *European Competition Journal* (2012), 301; Leupold, “Effective enforcement of EU competition law gone too far? Recent case law on the presumption of parental liability”, 34 *ECLR* (2013), 570; Burden and Townsend, “Whose fault is it anyway? Undertakings and the imputation of liability”, 3 *Competition Law Journal* (2013), 294.

entity as other legal entities domiciled within the EU.⁷ This consequence has also been controversial.⁸

This paper has two aims. The first is to determine when two or more natural or legal persons are to be treated as a single economic entity and to articulate the reasons for treating them as such. Section 2 of this paper re-examines the principles used to determine whether separate legal entities are to be treated as a single economic entity. We explain that the concept of an economic entity is best understood as the minimum combination of natural and legal persons able to exert a single competitive force on the market. This is shown by considering whether the following relationships constitute a single economic entity: an employer and its employees; a principal and its agents; a parent company and its subsidiaries; corporate legal entities with common owners (commonly referred to as “siblings” or “sister companies”); and owners and investors and the corporate legal person that is owned or which has received an investment. The circumstances in which a single economic entity exists and the underlying rationale for treating the separate (corporate or natural) legal entities as a single economic entity are also explored.

The second aim of this paper is to consider the perceived implications of treating several natural or corporate persons as a single economic entity. We address two implications the single economic entity doctrine is commonly thought to have, and argue that the concept of a single economic entity cannot be used (and is not used) by the Court of Justice to address the range of issues commonly ascribed to the doctrine. Instead, sets of principles, different from those used to determine the existence of a single economic entity, can be seen to determine the application of Article 101 TFEU to agreements between separate legal entities within the same economic entity and to attribute liability for infringements of competition law.

The relevance of the single economic entity doctrine to “intra-enterprise” or internal agreements is considered in section 4. The prohibition in Article 101(1) TFEU applies only if the relationship between separate legal entities is governed by agreement and/or concerted practice. A number of cases that are frequently associated with the single economic entity doctrine, notably the

7. *ICI v. Commission*, cited *supra* note 3, paras. 131–142. Whish and Bailey, *op. cit. supra* note 3, p. 492. See e.g. *Roche Products Ltd & Ors v. Provimi Ltd*, [2003] EWHC 961 (Comm), paras. 25–36; cf. *Cooper Tire & Rubber Company Europe Ltd v. Dow Deutschland Inc*, [2010] EWCA Civ 864, paras. 45–46.

8. For critical comment on the use of the economic entity doctrine in the *Dyestuffs* case see Acevedo, “The EC Dyestuffs case: Territorial jurisdiction”, 36 *MLR* (1973), 317. On the much-debated use of that doctrine to establish jurisdiction in private actions for damages in the courts of England and Wales, see e.g. Kennelly, “Anti-trust forum-shopping in England: Is *Provimi Ltd v Aventis* correct?”, (May 2010) *CPI Anti-Trust Journal*, 46. We do not consider the extra-territorial application of Arts. 101 and 102 further in this article.

judgments in *Viho v. Commission*, should be understood as cases determining whether the relationship between separate legal entities is governed by “an agreement” within the meaning of Article 101.⁹ The relationship between separate legal entities is immune from scrutiny under Article 101 when the notion of *agreement* does not control the relationship.¹⁰ Agreement does not control the relationship between the separate legal entities when one legal entity is able to exercise decisive influence over the strategic decisions of another.

Section 5 considers which legal entity (or entities) can be held accountable for an infringement committed by an undertaking. How an infringement arises and who should bear legal responsibility for that infringement are separate questions under EU competition law.¹¹ Articles 101 and 102 TFEU apply only to undertakings.¹² The Court of Justice in *Höfner* defined the activity of an undertaking as “economic activity, regardless of the legal status of the entity and the way in which it is financed”.¹³ Economic activity exists, for the purpose of Articles 101 and 102, when an entity offers goods or services to meet a customer or consumer demand.¹⁴ Economic activity involves the interaction of supply and demand in a manner that enables the producer to profit from the interaction.¹⁵ However, a decision that the competition rules have been infringed must be addressed to one or more natural or legal persons in order that the decision may be enforced.¹⁶ On reviewing the jurisprudence of the EU Courts we conclude that the single economic entity doctrine plays *no* role in determining the legal entities

9. Case T-102/92, *Viho v. Commission*, [1995] ECR II-17, para 47, citing Joined Cases T-68, 77 & 78/89, *Società Italiana Vetro SpA v. Commission*, [1992] ECR II-1403, para 357; Case C-73/95 P, *Viho v. Commission*, [1996] ECR I-5457, para 14.

10. Separate legal entities may collectively hold a single dominant position under Art. 102 TFEU, see e.g. Joined Cases C-395 & 396/96 P, *Compagnie Maritime Belge SA v. Commission*, [2000] ECR I-1365, para 36.

11. This point was recognized by A.G. Kokott in Case C-280/06, *Autorità Garante della Concorrenza e del Mercato v. Ente tabacchi italiani – ETI SpA*, [2007] ECR I-10893, paras. 68–69 of her Opinion.

12. See e.g. Case C-309/99, *Wouters*, [2002] ECR I-1577, para 57; Green Paper on services of general interest, COM(2003)270 final, para 43; and Communication from the Commission – Services of general interest in Europe, O.J. 2001, C 17/4, para 28.

13. Case C-41/90, *Klaus Höfner and Fritz Elser v. Macrotron GmbH*, [1991] ECR I-1979, para 21.

14. See e.g. Joined Cases C-180–184/98, *Pavel Pavlov v. Stichting Pensioenfonds Medische Specialisten*, [2000] ECR I-6451, para 75.

15. On the market activity aspect of the “undertaking problem” see Odudu, “The meaning of undertaking within Article 81 EC”, 7 *Cambridge Yearbook of European Legal Studies* (2006), 211–241.

16. Art. 299(1) TFEU provides that decisions of (*inter alia*) the Commission that impose a pecuniary obligation on persons (other than States) shall be enforceable. On this point see Commission Decision (2003/2/EC) *Vitamins*, O.J. 2003, L 6/1, recital 637.

responsible for a competition law infringement. It is well established that the principle of personal responsibility governs the attribution of infringements of competition law, a principle that is founded in both the rule of law and the principle of fault.¹⁷ A person is held responsible for an infringement on one of two alternative bases; either: (i) the person in question has directly participated in the infringement; (ii) or there is an inference that the person so participated.¹⁸ The important point is that these two bases of attribution of liability are distinct from the single economic entity doctrine. Section 6 concludes the paper.

2. The single economic entity doctrine

2.1. *The idea of an economic entity*

The EU Courts have held that the concept of undertaking *must* be understood as an “economic entity”.¹⁹ The first task is to explain why EU competition law is not simply applied to legal entities but instead requires the concept of an economic entity. The need arises because not all economic interactions between separate legal entities are capable of having competitive significance. At the same time it is possible that economic interactions within a legal entity are capable of having competitive significance.²⁰ The concept of an economic entity ensures that EU competition law is focused on the types of interactions that matter. To make this point clear it is necessary to recall the conception of competition in which: “each economic operator must determine independently the policy which it intends to adopt on the common market including the choice of persons and undertakings to which he makes offers or sells”.²¹

17. Case C-49/92 P, *Commission v. Anic Partecipazioni*, [1999] ECR I-4125, para 145.

18. We are concerned only with the imposition of fines by a competition authority for infringements of EU competition law and not liability for a private law damages claim. As Sales J noted in *Nokia Corporation v. AU Optronics Corporation*, [2012] EWHC 731 (Ch), para 81, “the issues of policy and legal principle are potentially very different” in the two situations.

19. See e.g. *General Química v. Commission*, cited *supra* note 1, paras. 34–36 and case law cited.

20. Wils, “The undertaking as subject of EC Competition law and the imputation of infringements to natural or legal persons”, 25 *EL Rev* (2000), 101–102, is of the view that the converse is not true, so that multiple unincorporated units within a single legal entity may not constitute multiple economic units for the purpose of competition law, rejecting the position taken in Garzaniti and Scassellati-Sforzolini, “Liability of successor undertakings for infringements of EC competition law committed prior to corporate reorganizations”, 6 *ECLR* (1995), 348.

21. Joined Cases 40–48, 50, 54–56, 111, 113 & 114/73, *Coöperatieve Vereniging Suiker Unie v. Commission*, [1975] ECR 1663, para 173. The ECJ has frequently repeated this idea as, e.g., in Case C-8/08, *T-Mobile*, [2009] ECR I-4529, para 32.

This conception of competition requires two or more entities capable of acting independently on the market.²² The clash between the autonomous strategies each entity adopts is competition and each entity is at this stage able to “contribute to the commission of an infringement of the kind referred to in that provision”.²³

2.2. *The inability to exert separate competitive force on the market*

An entity capable of autonomous action on the market may be a natural person, a legal person, or without legal personality. Each *legal* entity – whether a natural or corporate person – has rights and duties that are distinct from those enjoyed or endured by other separate legal entities. However, legal personality does not necessarily entail the ability to exert a competitive force on the market. The central characteristic of an “economic entity” is that no lesser combination of “personal, tangible and intangible elements” is able to exert a single competitive force on the market. For this reason, undertakings have been defined by the EU Courts as: “economic units which consist of 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”.²⁴

It follows that it may be necessary to combine the actions of several natural persons, corporate legal persons, and entities without legal personality in order for those entities and persons to exert a single competitive force on the market.²⁵ Since the constituent elements of an economic entity are the *minimum* necessary to exert a single competitive force on the market, even when the economic entity is composed of several natural and corporate legal persons, competition *inter se* is impossible. The impossibility of competition is the criterion used to determine which separate *legal* entities are to be treated as a single *economic* entity.

22. In Case C-194/99 P, *Thyssen-Stahl AG v. Commission*, [2003] ECR I-10821, para 118 of the Opinion of A.G. Stix-Hackl referred to independent decision-making as an “attribute of competition in its ideal form”.

23. Case T-11/89, *Shell v. Commission*, [1992] ECR II-884, para 311 (emphasis added).

24. *Ibid.* See Case 19/61, *Mannesman AG v. High Authority of the ECSC*, [1962] ECR 357, para 371; and Joined Cases 17 & 20/61, *Klöckner-Werke AG and Hoesch AG v. High Authority of the ECSC*, [1962] ECR 325, para 341: “an undertaking is constituted by a single organization of personal, tangible and intangible elements, attached to an autonomous legal entity and pursuing a given long term economic aim”.

25. *Hydrotherm*, cited *supra* note 2, para 11; Case T-9/99, *HFB Holding für Fernwärmetechnik Beteiligungsgesellschaft mbH & Co. KG v. Commission*, [2002] ECR II-1487, para 54 and case law cited; see also Case C-97/08 P, *Akzo Nobel v. Commission*, [2009] ECR I-8237, para 55.

The ability of separate *legal* entities to exert an autonomous *economic* impact on the market is in part dependent on the relationship between the legal entities and how that relationship is governed.²⁶ The Court of Justice has recognized that separate *legal* entities are unable to exert an autonomous *economic* impact in a number of circumstances, with an ownership relationship often explaining their inability to compete. But ownership is not the only or necessary reason for the impossibility of competition between separate legal entities. An obvious example is a natural person who may be an officer of or be employed by the corporate legal person. The ECJ has held that employees form an economic unit with their employing undertaking since they are not independent economic entities when acting within the scope of their employment relationship.²⁷ A different example is where a person that has a contractual (e.g. agency), structural, or economic link with a second and separate person.²⁸ What unifies the situations in which competition is recognized as being impossible is that one entity is able to influence or determine the policy that the other intends to adopt on the market.²⁹ The circumstances in which the Court has recognized separate legal persons as being incapable of the autonomous exertion of competitive force on the market are considered below.

2.2.1. *Parent/subsidiary relationships*

When one corporate legal person is wholly owned by a second, and separate, corporate legal person the relationship between the two legal persons is described as a parent/subsidiary relationship, with the parent being the owner of the subsidiary. These separate legal entities may enter into legally binding contracts *inter se*. However, legal entities in the parent/subsidiary relationship are unable to compete *inter se*. This position was recognized by the ECJ in *Consten and Grundig*, in which it was found that Article 101 TFEU would not be applied to the relationship between one legal entity and a second and separate legal entity when the second legal entity is wholly owned by the first. The rationale for this position is more fully articulated in *Viho v. Commission*.³⁰ Parker Pen, a company incorporated under English law, sold a

26. Deringer, *The Competition Law of the European Economic Community: A Commentary on the EEC Rules of Competition (Articles 85 to 90) Including the Implementing Regulations and Directives* (New York, Commerce Clearing House, 1968), paras. 111–114.

27. *Suiker Unie*, cited *supra* note 21, para 539.

28. Case C-9/93, *IHT Internationale Heiztechnik v. Ideal Standard*, [1994] ECR I-2789, paras. 30, 40–43.

29. Case 107/82, *Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunken AG v. Commission*, [1983] ECR 3151, para 49.

30. *Viho v. Commission* (T-102/92), cited *supra* note 9, para 47; *Viho v. Commission* (C-73/95 P), cited *supra* note 9, para 14; and *SIV v. Commission*, cited *supra* note 9, para 357.

range of writing utensils throughout Europe through separate corporate legal entities that it wholly owned. Each corporate legal entity would supply customers only if the customer were based in the same Member State and would refer customers seeking exports to the Parker-owned company established in the Member State of the customer.³¹ Viho Europe considered that each Parker-owned company had agreed with Parker not to export goods, contrary to Article 101(1) TFEU, and lodged a complaint with the Commission.³² In upholding the Commission decision to reject the complaint, the General Court explained that Article 101(1): “refers only to relations between economic entities which are *capable of competing with one another* and does not cover agreements or concerted practices between undertakings belonging to the same group if the undertakings form an economic unit”.³³

Viho appealed against the General Court’s judgment to the Court of Justice. The Advocate General advised the Court of Justice that Article 101(1) TFEU was not applicable to agreements between a parent and its wholly-owned subsidiaries because:

*“there can be no competition between the parent company and its subsidiaries. Independent, economic competitive measures by the subsidiaries are inconceivable where the parent company determines and controls their conduct completely, as it does here. Consequently, [Article 101] is not applicable because there is no competition between the group companies which needs to be protected”.*³⁴

The Court of Justice upheld the General Court’s judgment, holding that “Parker and its subsidiaries thus form a single economic unit within which the subsidiaries do not enjoy real autonomy in determining their course of action in the market”.³⁵ Thus it is the inability of separate legal entities to engage in competition *inter se* that results in the parent and its wholly-owned subsidiaries being treated as a single economic entity.³⁶ We offer two explanations as to why competition between the parent and the subsidiary is not possible. The first is that the parent and its subsidiary have an identity of

31. *Viho v. Commission* (T-102/92), cited *supra* note 9, para 9.

32. *Ibid.*, para 7.

33. *Ibid.*, para 47 (emphasis added). In *Viho v. Commission* (C-73/95 P), cited *supra* note 9, para 14, A.G. Lenz recognized the inability to compete as a separate basis of the (now) General Court’s judgment.

34. Opinion in *Viho v. Commission* (C-73/95 P), cited *supra* note 9, para 67 (emphasis added).

35. *Viho v. Commission* (C-73/95 P), cited *supra* note 9, para 16.

36. Opinion in *Viho v. Commission* (C-73/95 P), cited *supra* note 9, paras. 59 and 68 and *Viho v. Commission* (T-102/92), cited *supra* note 9, para 50.

interests. The second is that the parent has legal power of control over the subsidiary. These two explanations are set out in turn.

2.2.1.1. *Identity of Interests*

One reason why ownership precludes the possibility of competition between a parent company and its wholly-owned subsidiary is that those companies have an identity of interests. In the words of the US Supreme Court, “the parent and subsidiary always have a ‘unity of purpose or a common design’”.³⁷ The identity of interests arises because any profit ultimately accrues to the same person – the owner is entitled to transfer all of the subsidiary’s profits to itself. For this reason there is a “complete coincidence of interests between the parent company and its wholly-owned subsidiary”.³⁸ While US antitrust law and EU competition law are materially different in certain respects,³⁹ it is interesting and instructive to consider the way in which US law treats a parent and its wholly-owned subsidiary. The US Supreme Court has articulated the need for an identity of interests in *American Needle, Inc. v. National Football League*. The Court noted that it generally treats agreements between entities within a single firm as independent (i.e. non-coordinated) behaviour on the presumption that those entities will act to maximize the firm’s profits.⁴⁰ In rare cases, however, that presumption does not hold and instead: “[a]greements made within a firm can constitute concerted action covered by [section 1 of the Sherman Act] when the parties to the agreement act on interests separate from those of the firm itself, and the intrafirm agreements may simply be a formalistic shell for ongoing concerted action”.⁴¹

An identity of interests between the parent and the subsidiary is clear when the parent owns all or the vast majority of the issued share capital of the subsidiary.⁴² As one would expect, the identity of interest diminishes as the

37. *Copperweld v. Independence Tube*, 467 US 771 (1984).

38. *Akzo v. Commission*, cited *supra* note 25, para 73 of the A.G. Opinion.

39. Most obviously, the US antitrust rules impose liability on any “person” defined “to include corporations and associations existing under or authorized by the laws of ... the United States”: para 7 of the Sherman Act, 15 US Code para 7, whereas the EU competition rules are addressed to “undertakings”.

40. 560 US 183 (2010); however, the Court referred to the intra-enterprise conspiracy doctrine as a “defunct doctrine” to the extent it “once treated cooperation between legally separate entities as necessarily covered by [section 1 of the Sherman Act]”: *ibid.*, 192.

41. 560 US 200 (2010).

42. See e.g. *Viho v. Commission* (C-73/95 P), cited *supra* note 9, para 15; *Viho v. Commission* (T-102/92), cited *supra* note 9, para 48; Joined Cases T-299 & 343/08, *Elf Aquitaine v. Commission*, [2011] ECR II-163*, paras. 53–56; and Case C-508/11 P, *Eni v. Commission*, judgment of 8 May 2013, nyr, para 47. Para 171 of the Canadian Licensing Framework for Mobile Broadband Services (MBS) – 700 MHz Band (available at <www.ic.gc.ca/eic/site/smt-gst.nsf/eng/sf10574.html#p5>) takes the position that a 20%

nature and extent of ownership is reduced. There will then come a point where it becomes necessary to identify the legal entity to which profits accrue. At a point when indifference as to which legal entity retains profits is overcome, competition becomes possible and the separate legal entities no longer constitute a single economic entity.⁴³

Even when ownership is not diluted there are circumstances in which it may be accepted that the parent and its subsidiary may not have an identity of interests. One example is when a subsidiary transacts with competitors of the parent, as in when it acts as a distributor for products or brands that do not belong to the parent company.⁴⁴ Another example is when the first legal entity owns a second legal entity that is subject to a non-distribution constraint – the second legal entity is “barred from distributing its net earnings, if any, to individuals who exercise control over it, such as members, officers, directors, or trustees”.⁴⁵ In this second situation it is clear that there is no indifference as to which legal entity makes profits as the second legal entity is legally prohibited from making transfers to the first. These examples show that the parent and the subsidiary do not always have an identity of interests and when such an identity is absent the prospect of competition exists.

2.2.1.2. *Legal control*

A second and separate reason why a parent and its subsidiary are not able to compete is that the subsidiary does “not enjoy real autonomy in determining their course of action in the market”.⁴⁶ By virtue of ownership the parent has legal rights by which it is able to control strategic decisions made by the subsidiary.⁴⁷ As Wils has noted, it is not necessary that these legal powers be

beneficial ownership or voting shares give rise to a presumption that the competitive vigour between two separate legal entities is diminished to the point that they exert a single economic impact on the market.

43. Commission Decision (91/50/EEC), *IJsselcentrale*, O.J. 1991, L 28/32, para 24. This may explain why para 11 of the *draft* version of the Commission’s Guidelines on Horizontal Cooperation Agreements, which suggested that a joint venture forms part of one undertaking with each of the parent companies that jointly exercise decisive influence over it, has been omitted from the final version: <ec.europa.eu/competition/consultations/2010_horizontals/index.html>.

44. Commission Decision (91/335/EEC), *Gosme/Martell – DMP*, O.J. 1991, L 185/23, para 30. See also Case 32/78, *BMW Belgium SA v. Commission*, [1979] ECR 2435, para 24.

45. Hansmann, “The role of nonprofit enterprise”, 89 *Yale Law Journal* (1980), 835–901.

46. *Viho v. Commission* (T-102/92), cited *supra* note 9, para 49, upheld on appeal (Opinion, *Viho v. Commission* (C-73/95 P), cited *supra* note 9, para 6916). This was also the reasoning of the Commission in this case, as can be seen in *Viho v. Commission* (T-102/92), cited *supra* note 9, paras. 10 and 13.

47. Wils, *op. cit. supra* note 20, 102; Case C-340/04, *Carbotermo SpA v. Comune di Busto Arsizio*, [2006] ECR I-4137, para 37.

exercised in a positive sense since they need only be positively exercised when the parent company disapproves of the subsidiary's actions. The fact that a parent company does not wield its powers may simply constitute approval or at least acquiescence in the actions of the subsidiary.⁴⁸

2.2.2. Siblings

A sibling relationship exists when two distinct legal entities have a common owner. Whether competition between corporate legal persons in such a position is possible has been the subject of some discussion. *Hydrotherm v. Compact* is often treated as the leading case on competition between separate legal entities with a common owner.⁴⁹ However, the case actually concerned the impossibility of competition between the owner and the separate legal entities he/she/it owns.⁵⁰ The case involved the lawfulness of a distribution agreement for radiators entered into by Hydrotherm and three different persons. The three persons were a natural person, Mr Andreoli, who had developed the radiators to be distributed, and two corporate legal entities, Compact and Officine Sant'Andrea. Mr Andreoli had "complete control" over the two corporate legal entities.⁵¹ The question considered was whether Mr Andreoli and the corporate legal entities he controlled were a single economic entity. This was important for the purpose of Regulation 67/67 (a block exemption at the time), which could be applied to agreements to which only two economic entities are party. Whilst the ownership relationship did not prevent the separate legal entities from entering into legally binding contracts *inter se*, the ECJ was concerned with whether "competition between the persons participating together, as a single party, in the agreement in question is impossible".⁵²

In *Hydrotherm* the Court found that there was no possibility of competition between Mr Andreoli and the corporate legal persons that he owned and therefore controlled.⁵³ However, what was not addressed was whether competition between corporate legal entities with a common owner is possible (rather than with the owner). The suggestion that competition *is* possible was pressed upon the EU Courts in *Viho v. Commission*, with Viho arguing that separate corporate legal entities with a common owner were competing, as demonstrated by the fact that the separate corporate legal entities: "charge

48. Wils, *ibid.* 104–105. At 106–107, Wils also notes that under the EU Merger Regulation decisive influence need never be exercised – it is the mere possibility of "control" that matters: see Art. 3(1)(b) and (3) of the Merger Regulation 139/2004, O.J. 2004, L 24/1.

49. *Hydrotherm*, cited *supra* note 25, para 11.

50. Opinion of A.G. Lenz, in *Hydrotherm*, *ibid.*, 3025.

51. *Hydrotherm*, cited *supra* note 25, para 10.

52. *Ibid.*, para 11.

53. *Ibid.*, 3009, setting out the Commission's submissions to the Court of Justice.

different sales prices, apply different terms of warranty, undertake different sales promotions at different times and in respect of different products, sell identical products in different forms, in different packaging and selections, using different distribution methods and following different delivery criteria”.⁵⁴

The argument *Viho* pressed on the Court is similar to that initially adopted under US antitrust law, when it was accepted that the common ownership of separate legal entities did not “liberate them from the impact of the antitrust laws”.⁵⁵ At one time the US Supreme Court felt that competition between separate legal entities under common ownership was possible, especially since they held “themselves out as competitors”.⁵⁶

The current position adopted in both the US and the EU is that separate legal entities with a common owner are *presumed* not to be capable of competing. In the US the Supreme Court set out this position in *Copperweld v. Independence Tube*.⁵⁷ The Court established a presumption because it explicitly recognized that the mere fact that the same person holds the capital of two companies is not an absolute bar to competition and thus the application of competition law.⁵⁸ In the EU, the General Court’s rejection of *Viho*’s appeal has a greater degree of ambiguity than the US position since it is not clear whether a presumption or a conclusive position is being set out.⁵⁹ However, in the *Viho* appeal, Advocate General Lenz recognized that: “there is much in favour of the view that the Court wished to keep open the possibility of

54. *Viho v. Commission* (T-102/92), cited *supra* note 9, para 34. The Commission did not accept that these were examples of competition between the separate legal entities as the differences between the conditions of sale of each subsidiary could be explained by differences between the national markets or between consumer habits: *Viho*, *ibid.* para 39.

55. *Kiefer-Stewart v. Joseph E. Seagram & Sons*, 340 U. S. 215 (1951); see also *Cromar Co. v. Nticlear Materials & Equip. Corp.*, 543 F.2d 511–12 (3rd Cir. 1976); *Battle v. Liberty National Life Ins Co*, 493 F.2d 44 (5th Cir. 1974).

56. 340 U. S. 215 (1951).

57. 467 U.S. 764 (1984). Also *Advanced Health-Care Services, Inc. v. Radford Community Hosp.*, 910 F.2d 139 (4th Cir. 1990). *Greenwood Utilities Com’n v. Mississippi Power Co.*, 751 F.2d 1484, 1985-1 Trade Cas. (CCH) ¶66404, 17 Fed. R. Evid. Serv. 790 (5th Cir. 1985). *Total Benefits Planning Agency, Inc. v. Anthem Blue Cross and Blue Shield*, 552 F.3d 430, 435, 2008-2 Trade Cas. (CCH) ¶76435 (6th Cir. 2008).

58. *Copperweld v. Independence Tube*, cited *supra* note 37, 759.

59. *Viho v. Commission* (T-102/92), cited *supra* note 9, para 50. Note however para 11 of the Commission’s Guidelines on Horizontal Cooperation Agreements, cited *supra* note 4, “When a company exercises decisive influence over another company they form a single economic entity and, hence, are part of the same undertaking. *The same is true for sister companies*, that is to say, companies over which decisive influence is exercised by the same parent company. *They are consequently not considered to be competitors* even if they are both active on the same relevant product and geographic markets” (emphasis added).

applying Article [101], subject to certain conditions, also to agreements between group undertakings forming a single economic unit”⁶⁰.

The inability of separate legal entities to compete *inter se* when they have a common owner is presumed or assumed in a variety of contexts outside the field of EU competition law. Thus, for example, under rules allocating the right to provide third generation telephony services in the United Kingdom a telecoms licence may not be awarded to any persons connected or associated with any person that also holds a telecoms licence.⁶¹ The Canadian rules for allocating fourth generation telecommunications spectrum make similar provision in relation to affiliated or associated entities.⁶² These rules have been adopted to foster the development of competition in the provision of telecommunication services and are underpinned by a presumption that certain relationships, particularly ownership or common ownership, will preclude competition *inter se*.⁶³

A second example of separate legal entities that have a common owner being presumed unable to compete is taken from the sporting context. In *AEK Athens and Slavia Prague v. UEFA* both AEK Athens and Slavia Prague qualified to participate in the 1998/1999 UEFA Cup competition. However, as both clubs were owned by the same company (ENIC, based in the United Kingdom) the UEFA decided, on account of their common ownership, that the clubs were incapable of competing. As a consequence it was decided not to admit AEK Athens to the UEFA Cup, unless ENIC relinquished control of one of the clubs. The Court of Arbitration for Sport found that competition between clubs with a common owner was not possible, since it was possible for the common owner to affect the vigour with which they could compete *inter se* by, for example, allocating or refusing to allocate resources to a particular entity.⁶⁴

60. Opinion in *Viho v. Commission* (C-73/95 P), cited *supra* note 9, para 50.

61. See para 3.3.2(c) of the Wireless telegraphy (third generation licences) Notice 1999, issued pursuant to the Wireless telegraphy (third generation licences) Regulations 1999, which themselves were made pursuant to the Wireless Telegraphy Act 1998. This is qualified by para 1.1.6 of the Wireless Telegraphy (third generation licences) Notice 1999.

62. See paras. 170 and 186 of the Licensing framework for mobile broadband services (MBS) – 700 MHz Band available at <www.ic.gc.ca/eic/site/smt-gst.nsf/eng/sf10574.html#p5>.

63. *BT3G Ltd v. Secretary of State for Trade and Industry*, [2001] EWCA Civ 1448, paras. 49 and 61.

64. The impact of decisions taken by the common owner on the competition between the separate legal entities that it owns has been considered in a United Kingdom case involving bid-rigging in the construction industry: *Durkan Holdings Ltd v. Office of Fair Trading*, [2011] CAT 6, para 38.

2.2.3. Agency agreements

An agent is a self-employed person who has continuing authority to negotiate the sale or the purchase of goods on behalf of another, often called the “principal”, or to negotiate and conclude such transactions on behalf of and in the name of that principal.⁶⁵ These separate persons may enter into legally binding contracts between themselves. However, the Court of Justice recognized, in *Bundeskartellamt v. Volkswagen and VAG Leasing*, that the principal and its agent are unable to compete when, firstly, the principal bears the commercial and financial risks related to the agent’s trading of the principal’s goods or services.⁶⁶ A second condition that precludes competition is when, in addition to the first, the agent is integrated into the principal’s organization for the purposes of transactions with third parties.⁶⁷ As long ago as 1973, in *Suiker Unie*, the Court of Justice held that an agent meeting these two criteria is to be regarded as “an auxiliary organ forming an integral part of the [principal’s] undertaking bound to carry out the principal’s instructions”.⁶⁸ As such they exert a single competitive force on the market and so form one economic entity.⁶⁹

The agent acts at the behest of the principal and is incapable of competing with its principal. In *Suiker Unie*, the Court of Justice said:

“if . . . an agent works for the benefit of his principal he may in principle be treated as an auxiliary organ forming an integral part of the latter’s undertaking, who must carry out his principal’s instructions and thus, like a commercial employee, forms an economic unit with this undertaking”.⁷⁰

65. Council Directive 86/653/EEC of 18 Dec. 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents, O.J. 1986, L 382/17, Art 1(2).

66. Case C-266/93, *Bundeskartellamt v. Volkswagen AG and VAG Leasing GmbH*, [1995] I-ECR 3477, para 19. Case C-217/05, *Confederación Española de Empresarios de Estaciones de Servicio v. Compañía Española de Petróleos SA*, [2006] ECR I-11987 and Case C-279/06, *CEPSA Estaciones de Servicio SA v. LV Tobar e Hijos SL*, [2008] ECR I-6681. Para 13 of the Commission’s Guidelines on Vertical Restraints, O.J. 2010, C 130/1 makes the same point. Note the failed argument about agents in *Topps*, Commission decision of 26 May 2004 (COMP/C-3/37.980 *Souris- Topps*) paras. 97–104. As A.G. Kokott has pointed out, it remains necessary to distinguish between the position of an agent in the market for agency services and the position of an agent once appointed by the principal: *Empresarios de Estaciones de Servicio* (C-217/05) *ibid.*, Opinion at para 43.

67. See e.g. Case T-56/99, *Marlines v. Commission*, [2003] ECR II-5225, para 60, and Case T-325/01, *DaimlerChrysler v. Commission*, [2005] ECR II-3319, para 86.

68. *Suiker Unie v. Commission*, cited *supra* note 21, para 539.

69. See the Commission’s first notice on Agency Agreements, O.J. 1962, 139, p. 2921/62; see now Guidelines on Vertical Restraints, cited *supra* note 66, para 18.

70. *Suiker Unie v. Commission*, cited *supra* note 21, para 480.

The General Court made a similar point about the agent's lack of independence from his or her principal and their inability to compete with one another in *DaimlerChrysler*:

“Accordingly, where an agent, although having separate legal personality, does not independently determine his own conduct on the market, but carries out the instructions given to him by his principal, the prohibitions laid down under Article [101(1) TFEU] do not apply to the relationship between the agent and the principal with which he forms an economic unit”.⁷¹

When the agent carries out the instructions given to him or her, all obligations imposed on the agent in relation to the contracts concluded and/or negotiated on behalf of the principal fall outside Article 101(1).⁷² This is the case as long as the agent bears no financial or commercial risk in relation to the activities for which it has been appointed as an agent by the principal.⁷³ The absence of risk shows that the agent has no presence on the market that is independent from the principal.⁷⁴

2.2.4. *Employees and officers*

When a natural person provides services for and under the direction of a corporate legal person the relationship between the two legal persons is described as an employer/employee relationship, with the employer directing the employee.⁷⁵ It has been recognized that the employee does not exert an economic force on the market that is separate from that of the employing organization.⁷⁶ As such the employee and the employing organization are part of the same economic entity.

71. *DaimlerChrysler*, cited *supra* note 67, para 88; see to the same effect, *Marlines*, cited *supra* note 67, para 60.

72. Guidelines on Vertical Restraints, cited *supra* note 66, para 18; similarly see the previous version of the Guidelines on Vertical Restraints, O.J. 2000, C 291/1, para 18.

73. *Ibid.*, para 13.

74. Case C-22/98, *Criminal proceedings against Jean Claude Becu, Annie Verweire, Smeg NV and Adia Interim NV*, [1999] ECR I-5665, para 53 of the A.G. Opinion.

75. Coase, “The nature of the firm”, 4 *Economica* (1937), 404; Wils, *op. cit.* *supra* note 20, 102; and Case 66/85, *Lawrie-Blum v. Land Baden-Wurttemberg*, [1986] ECR 2121, para 17. On distinguishing employed from self-employed, and the significance of the distinction in the competition law context, see *Pavel Pavlov*, cited *supra* note 14, para 112 and Case C-67/96, *Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie*, [1999] ECR I-5751, para 215 of the A.G. Opinion.

76. *Suiker Unie v. Commission*, cited *supra* note 21, para 539. *Jean Claude Becu*, cited *supra* note 74, A.G. Opinion, paras. 53–54. *Albany International*, *ibid.*, A.G. Opinion, para 215. See also the critique in Nihoul, “Do workers constitute undertakings for the purpose of the competition rules?”, 25 *EL Rev.* (2002), 408–414.

In *Suiker Unie*, the ECJ developed the view that employees form an economic unit with their employing organization. The Court treated employees as “auxiliary organs” that form “an integral part” of a single undertaking.⁷⁷ An employee is part of the same “entity” as their employer because they are connected to their employer (typically by way of a contract of employment) and they are integrated into the employer’s “unitary organization”.⁷⁸ The criterion of integration may be taken to imply that the employee does not have separate economic or competitive significance in any contracts or transactions entered into by their employer.⁷⁹ In *Jean Claude Becu*, the Advocate General further explained that to be a separate economic entity the employee must be capable of exerting separate competitive significance from their employer; that is, the individual ostensibly employed must retain “a certain degree of – essentially economic – autonomy”.⁸⁰ The ability arises only in relation to the entity that has taken “on financial risks” for a particular transaction.⁸¹ This is not the case of someone with the status of an employee, as it is the employer that owns the assets necessary to participate on the market. An essential element of ownership of an asset is the right to exclude others from using it.⁸² Hart and Moore consider that the employer’s ownership of assets “translates into authority over people” as the employer controls the assets the employee intends to work with.⁸³

The Court explained in *Jean Claude Becu* that employees are “incorporated” into the same undertaking as their employer *for the duration of their employment* only.⁸⁴ Thus a former employee is an undertaking in his or her own right to the extent that he or she engages in economic activity.⁸⁵ It also follows that an agreement between an employer and an employee may be subject to competition law where the latter is capable of exerting his or her competitive force on a market. This is the case when an “employee” acts autonomously, for example when negotiating their own contractual

77. *Suiker Unie v. Commission*, *ibid.*, para 539.

78. *Shell v. Commission*, cited *supra* note 23, para 311. (Art. 101 TFEU “is aimed at economic units which consist of a unitary organization of personal, tangible and intangible elements which pursue a specific economic aim on a long-term basis ...” (emphasis added).

79. *Suiker Unie v. Commission*, cited *supra* note 21, para 480.

80. *Jean Claude Becu*, cited *supra* note 74, para 47.

81. *Ibid.*

82. Penner, *The Idea of Property in Law* (OUP, 1997), ch. 4.

83. Hart and Moore, “Property rights and the nature of the firm”, 98 *Journal of Political Economy* (1990), 1150.

84. *Jean Claude Becu*, cited *supra* note 74, para 26.

85. See Commission Decision of 26 July 1976 relating to a proceeding under Article 85 of the EEC Treaty (IV/28.996 – *Reuter/BASF*), O.J. 1976, L 254/40 (Dr. Reuter sold a group of companies to BASF, of which he used to be the managing director).

arrangements with their future employer. In that situation, the individual is acting independently on the market for the provision of labour.⁸⁶

2.2.5. Vertical agreements

A vertical agreement exists where two or more firms that operate at different levels of the supply chain enter into an agreement. The parties to a vertical agreement are not competitors for the purpose of the agreement.⁸⁷ If it is clear that Article 101 TFEU does not apply to relations between persons that are incapable of having competitive significance, it is not unreasonable to ask why Article 101 TFEU applies to vertical agreements between non-competing entities that operate at different levels of trade. This issue was explored in *Consten and Grundig*.⁸⁸ The ECJ considered the applicants' argument that the substantive scope of Article 101(1) TFEU is limited to horizontal agreements between actual and potential competing undertakings. The Court rejected the argument since "Article [101 TFEU] refers in a general way to all agreements which distort competition within the [internal market]" and therefore does not distinguish between horizontal and vertical agreements.⁸⁹ Vertical relationships are subject to scrutiny under Article 101 TFEU as each entity has the option to produce goods or offer services themselves rather than entering into a vertical agreement for the supply of those goods or services.⁹⁰ They are thus *capable* of competing and therefore constitute separate economic entities. Unlike relations between legal entities belonging to a single economic entity, competition is not impossible in vertical relationships between economic entities.

3. Implications of the single economic entity doctrine

As set out in section 2 above, the economic entity doctrine identifies the smallest combination of natural and legal persons able to exert a single competitive force on the market. The separate *legal* entities, unable to compete *inter se*, constitute a single *economic* entity. The single economic entity doctrine has proven uncontroversial when the origin of a competitive force or

86. See section 5.4 *infra*.

87. See to that effect the definition of "vertical agreement" in Art. 1(1)(a) of Commission Regulation (EU) 330/2010 of 20 Apr. 2010 on the application of Art. 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, O.J. 2010, L 102/1.

88. Cases 56 & 58/64, *Établissements Consten SàRL and Grundigverkaufs-GmbH v. Commission*, [1966] ECR 299.

89. *Ibid.*, 339.

90. See Ritter and Braun, *op. cit. supra* note 5, p. 265.

the intensity of that competitive force on a particular market is at issue.⁹¹ However, the fact that separate legal entities may exert a single economic impact has been thought to have a number of significant implications in other competition law contexts. Some of the most prominent are the implications the single economic entity doctrine is commonly thought to have for: (i) agreements between separate legal entities within the same economic entity (“internal agreements”) and (ii) the attribution of liability for infringements of competition law.⁹² It is our view that the single economic entity concept cannot be relied on to resolve competition law questions unrelated to the identity or intensity of a competitive force exerted on the market. Whilst the language of a “single economic entity” may be used, the application of Article 101 TFEU to internal agreements and the problem of attribution are separate competition law questions and distinct principles for resolving those questions are required and have been developed.

4. Internal agreements

When separate legal entities form part of the same economic entity a question that arises is the legal status of contracts, agreements and other collusive practices between those legal entities. In *Consten and Grundig* the ECJ held that Article 101 TFEU was intended to “leave untouched the internal organization of an undertaking”.⁹³ Commentators have relied on the single economic entity doctrine to explain why Article 101 does not apply to agreements between certain separate legal entities.⁹⁴ However, though a single economic entity exists when competition between the constituent assets and entities is impossible, and the impossibility of competition in certain circumstances has been recognized, the fact that competition between the separate legal entities is impossible, and the test for determining the impossibility of competition, is not used to determine the inapplicability of Article 101 TFEU between the separate legal entities.⁹⁵ Instead of a concern

91. This is the case, in particular, when identifying undertakings whose turnover is taken into account when determining the application of the EU Merger Regulation: see para 175 of the Commission’s Consolidated Jurisdictional Notice, O.J. 2008, C 95/1. It is also the case with regard to connected undertakings under Art 1(2) of Regulation 330/2010, O.J. 2010, L 102/1.

92. The single economic entity doctrine is also considered in the context of Art. 102 TFEU and the EU Merger Regulation. Lack of space prevents a detailed discussion of the possible relevance of the doctrine to those provisions here.

93. *Consten and Grundig*, cited *supra* note 88, 340.

94. See the literature cited *supra* note 4.

95. The test used to determine the existence of a single economic entity would only be useful if the impossibility of competition were always and necessarily coterminous with the impossibility of agreement. This is not the case, since, from example, in Bayer, competition was

with the possibility of competition between the separate legal entities it can be seen that the focus of the Court's enquiry is into the possibility of "agreement" between the separate legal entities.⁹⁶ The impossibility of agreement has been recognized in a number of circumstances, each of which is considered below.

4.1. *Parent/subsidiary relationship*

When one corporate legal person is wholly owned by a second, and separate, corporate legal person the relationship between the two legal persons is described as a parent/subsidiary relationship, with the parent being the owner of the subsidiary. These separate legal entities may enter into *contracts* that are legally binding *inter se*. However, the ECJ has recognized that legal entities in a parent/subsidiary relationship are unable to enter into *agreements inter se* for the purpose of Article 101 TEFU. This finding is most clearly expressed in *Viho*. Here the Advocate General explained that the relationship between the parent and its wholly owned subsidiary "basically *does not concern an agreement* between two or more participants. Instead, one undertaking – the parent company – determines the distribution policy to be followed by the group".⁹⁷ The General Court was also of the view that the relationship between the two separate legal entities was not one governed by agreement, finding no "*agreement between undertakings*".⁹⁸ Advocate General Mischo observes in *Stora*, "there could be no question of an agreement or concerted practice between Parker Pen Limited and its subsidiaries".⁹⁹

The second legal entity does not agree, as it does not have the legal capacity to do other than carry out instructions issued to it by the owner.¹⁰⁰ Rather than

possible, but an agreement was impossible, whilst under the State action defence, competition is impossible, but agreement may be possible.

96. On the distinction between the possibility of competition and the possibility of agreement in US antitrust law see: *Copperweld Corp v. Independence Tube Corp*, 467 U.S. 769 (1984) describing the duality requirement necessary for s. 1 of the Sherman Act to apply: (i) "independent centers of decision making that competition assumes and demands" or (ii) entities capable of pursuing their own interests separately.

97. Opinion in *Viho v. Commission* (C-73/95 P), cited *supra* note 9, para 66 (emphasis added). Cf. Case T-41/96, *Bayer v. Commission*, [2000] ECR II-3383, para 176.

98. *Viho v. Commission* (T-102/92), cited *supra* note 9, para 51 (emphasis added).

99. *Stora Kopparbergs Bergslags*, cited *supra* note 5, paras. 35–36; the A.G. also observed at para 30 that in *Viho* "it was not a question, for the Court, of verifying whether the actions of the subsidiaries could be attributed to the parent company, but of deciding whether there was an agreement or concerted practice between the parent company and its subsidiaries which could fall within the scope of Article [101(1)] of the Treaty" (emphasis added).

100. *Viho v. Commission* (C-73/95 P), cited *supra* note 9, para 16. Also *ICI*, cited *supra* note 3, paras. 133, 135; Case 15/74, *Centrafarm BV and Adriaan De Peijper v. Sterling Drug Inc.*, [1974] ECR 1147, para 41. Case 6/72, *Europemballage Corporation and Continental Can Company v. Commission*, [1973] ECR 219, para 15; Joined Cases 6 & 7/73, *Istituto*

governed by agreement the relationship between the parent and the subsidiary is governed by “actual control”.¹⁰¹ Hierarchical power, rather than agreement, describes the situation in which the owner has the power to compel action undertaken by the second legal entity. For the purpose of the internal agreement the applicability of Article 101 TFEU is determined by asking whether one legal entity has the power to compel a second legal entity to take certain actions. When such powers exist, the first legal entity is able to control the strategic direction of the second and separate corporate legal entity without recourse to *agreement*, instead using hierarchical power. Both the General Court and Court of Justice recognize that such hierarchical power was in fact exercised in *Viho*, noting:

“that the sales and marketing activities of the subsidiaries are *directed* by an area team which is appointed by the parent company and which *controls*, in particular, sales targets, gross margins, sales costs, cash flow and stocks. That area team also lays down the range of products to be sold, monitors advertising and *issues directives* concerning prices and discounts”.¹⁰²

4.2. *Siblings*

More open is the question of whether legal entities with a common owner, absent intervention on the part of the owner, are capable of entering into agreements *inter se* that would be subject to Article 101. A view expressed by Advocate General Lenz is that “a parent company and its subsidiaries undoubtedly constitute undertakings”.¹⁰³ It may be the case therefore that siblings have a capacity to disagree between themselves, so that absent parental intervention in the exercise of hierarchical power, they would be subject to Article 101. However, the view expressed by the Commission is that sibling organizations are incapable of entering into agreements for the purpose of Article 101.¹⁰⁴

Chemioterapico Italiano SpA v. Commission, [1974] ECR 254. See also Areeda, “Intraenterprise conspiracy in decline”, 97 *Harvard Law Review* (1983), 453.

101. *Viho v. Commission* (T-102/92), cited *supra* note 9, para 39.

102. *Ibid.*, para 48 (emphasis added); *Viho v. Commission* (C-73/95 P), cited *supra* note 9, para 15. The Commission took a similar view: *Viho v. Commission* (T-102/92), cited *supra* note 9, para 40, see also para 44.

103. Opinion in *Viho v. Commission* (C-73/95 P), cited *supra* note 9, para 59.

104. See Commission’s Guidelines on horizontal cooperation agreements, cited *supra* note 4, para 11.

4.3. *Employees*

When a natural person provides services for and under the direction of a corporate legal person the relationship between the two legal persons is described as an employer/employee relationship, with the employer directing the employee.¹⁰⁵ It has been seen that the employee is incapable of competing with the employer and so they both form part of the same economic entity.¹⁰⁶ Does the fact that they form part of the same economic entity mean that agreements between the employer and the employee cannot be assessed for their competitive significance under Article 101 TFEU? A negative answer has been suggested, so that an agreement between an employer and an employee may be subject to competition law where the latter acts in his or her own right. This is the case when an “employee” acts autonomously, for example when negotiating their own contractual arrangements with their future employer. In that situation, the individual is acting independently on the market for the provision of labour.¹⁰⁷ This gives a clear indication that the question of how to analyse internal agreements is separate from the problem of the possibility of separate legal entities being unable to compete.

4.4. *Agency*

As already noted, an agent is a self-employed person who has continuing authority to negotiate the sale or the purchase of goods on behalf of another, often called the “principal”, or to negotiate and conclude such transactions on behalf of and in the name of that principal.¹⁰⁸ As with employees, the ECJ has recognized that the principal and its agent are unable to compete *inter se*, so that the principal and agent form part of the same economic entity.¹⁰⁹ It is clear that a principal and its agent are separate legal entities that may enter into legally binding contracts *inter se*. And again, as with employees, it is also recognized the agreement between the principal and the agent can be scrutinized under Article 101 TFEU.¹¹⁰ To make this distinction we suggest that it is necessary to consider whether, in relation to the agreement in question it is possible for the legal entity acting as the agent to disagree with the legal entity acting as the principal.

As Advocate General Kokott has pointed out it is necessary to distinguish between the position of an agent in the market for agency services and in the

105. *Lawrie-Blum*, cited *supra* note 75, para 17.

106. See section 2.2.4 *supra*.

107. See section 5.4 *infra*.

108. See section 5.4 *infra*.

109. *Suiker Unie v. Commission*, cited *supra* note 21, para 480.

110. *CEPSA Estaciones de Servicio v. Tobar e Hijos*, cited *supra* note 66, para 41.

market for the sale of the principal's products (once appointed by the principal).¹¹¹ In the market for agency services the principal and the agent have independent interests.¹¹² It is therefore possible, pre-appointment, for the legal entity in the position of the prospective agent, to disagree with the principal. The agent is therefore capable of agreeing with the principal and the internal agreement between the agent and principal is subject to scrutiny under Article 101 TFEU.¹¹³

5. The attribution of liability

Market activity involves the interaction of supply and demand in a manner that enables the producer to profit from that interaction and, within the EU, is subject to competition law. EU competition law applies to *undertakings*, that is to say, any entity engaged in economic activity, regardless of the legal status of the entity engaged in that activity.¹¹⁴ Decisions by the Commission penalizing infringements of EU competition law are addressed to *persons* so that decisions can be enforced. Article 299 TFEU provides that acts of the Commission imposing "pecuniary obligations on persons other than States" are enforceable and governed by Member State rules of civil procedure, which are addressed to persons.¹¹⁵ The question arising is which natural or legal persons may be held responsible, and thus subject to sanctions, for an infringement committed by an undertaking. Even though the behaviour of an economic unit is analysed under competition law, a finding of infringement must be addressed to a legal entity. The Commission has discretion as to which legal persons within the economic unit to address the decision.¹¹⁶

The remainder of this section is structured as follows: we discuss the attribution of liability to associations of undertakings, employees and officers, parents and subsidiaries, and principals and agents. In each case we seek to

111. *Confederación Española*, cited *supra* note 66, para 43 of the A.G. Opinion.

112. In the US this has been used in the employer-employee and principal-agent situations: *Yurko v. Carteret County Hosp. Corp.*, No. 82-2068 (4th Cir. 9-23-83); *Robinson v. Magovern*, 521 F. Supp. 842 (W.D. Pa. 1981), decision *aff'd*, 688 F.2d 824 (3rd Cir. 1982); *Smith v. Underwood Memorial Hosp.*, 1987-1 Trade Cas. (CCH) _ 67538, 1987 WL 12812 (D.N.J. 1987).

113. Guidelines on Vertical Restraints, cited *supra* note 66, para 19.

114. *Höfner and Elser v. Macrotron*, cited *supra* note 13, para 21.

115. The enforceability of decisions made against natural or legal persons is supported by the other language versions of Art. 299 TFEU, e.g. "personnes" in French; "persone" in Italian, and "personas" in Spanish.

116. *Istituto Chemioterapico*, cited *supra* note 100, para 41; Case T-65/89, *BPB Industries v. Commission*, [1993] ECR II-442, para 154; *Akzo v. Commission*, cited *supra* note 25, A.G.'s Opinion at para 36.

identify and articulate the basis on which a person (or persons) is held liable for the infringement of Article 101(1) TFEU committed by an undertaking.

5.1. *Associations of undertakings*

In *MasterCard v. Commission* the Court of Justice reiterated that Article 101 TFEU catches *all* forms of coordination, including “by means of a collective structure or a common body, such as an association, which are calculated to produce the results which [Article 101] aims to suppress”.¹¹⁷ The Court continued that the concept of “decisions by associations of undertakings” ensures the form of undertakings’ conduct cannot be used to shield prohibited conduct from the application of competition rules.¹¹⁸ Thus, even after the various legal and governance changes effected by its Initial Public Offering, the Court held that MasterCard remained an association of undertakings since it continued to be “an institutionalized form of coordination of the conduct of the banks”.¹¹⁹

Like cases before it,¹²⁰ the *MasterCard* case makes clear that associations of undertakings are addressed by Article 101(1) TFEU separately from undertakings so that they may be held responsible for their own activities (or those of their members) that restrict competition.

5.2. *Employees and officers*

The corporate legal person, its officers, and its employees form a single economic entity *vis-à-vis* third parties. It is commonly assumed that any legal entity within the undertaking may be held jointly liable for any infringement committed by any other entity forming part of the same economic entity. To test this assumption we consider whether officers or employees may be held personally liable when they engage in anti-competitive conduct; and whether and when the corporate legal person may be held responsible for conduct engaged in by its officers and employees.

117. Case C-382/12 P, *MasterCard Inc v. Commission*, judgment of 11 Sept. 2014, nyr, para 62 and case law cited.

118. *Ibid.*, para 63. The same logic had been put forward by A.G. Léger at para 62 of his Opinion in *Wouters*, cited *supra* note 11.

119. *MasterCard Inc v. Commission*, cited *supra* note 117, para 69.

120. See e.g. Case 71/74, *Frubo v. Commission*, [1975] ECR 563, para 30; Joined Cases 209–215 & 218/78, *Van Landewyck v. Commission*, [1980] ECR 3125, paras. 87–88; Joined Cases 96–102, 104, 105, 108 & 110/82, *IAZ v. Commission*, [1983] ECR 3369, para 20; Commission decision (2003/778/EC), *Joint selling of the commercial rights of the UEFA Champions League*, O.J. 2003, L 291/25, recital 108.

5.2.1. *Personal liability of the officers and employees*

Under Articles 101 and 102 TFEU, officers and employees cannot commit infringements, only undertakings can. Officers and employees can and do engage in anti-competitive conduct within the scope of their employment. But any such conduct is and remains the acts of the undertaking. It follows that undertakings – and not its officers and employees – are personally liable for infringements of EU competition law. It also follows that officers and employees may not be the addressee of an infringement decision.¹²¹

5.2.2. *Liability of the employer*

The Court of Justice has ruled that that officers and employees acting within the scope of their employment relationship are (part of) the undertaking.¹²² It is not necessary to demonstrate that the employer authorized the infringement committed by the undertaking through the employee.¹²³ Nor is it necessary to show that the employer knew of the offending conduct.¹²⁴ Undertakings cannot escape liability for infringements by arguing that their employees had not been instructed to infringe, or acted against instructions, or failed to inform their board. However, the liability of the employer is not a simple consequence of the corporate legal entity, and its officers and employees, forming a single economic entity.¹²⁵ As already noted, an employee operating within the scope of his or her employment *is* the undertaking and therefore anti-competitive acts by an employee are the acts of the legal person who operates the undertaking (the employer).¹²⁶ The liability of the employer is personal and primary rather than vicarious and secondary.

This explanation does not reveal why the employer ought to be held personally liable for breaches of Articles 101 and 102 TFEU. The reason for holding the employer exclusively responsible for infringements committed by its officers and employees is an assumption that there are effective mechanisms preventing those individuals from acting against the interests of

121. See e.g. the Irish Competition (Amendment) Act 1996 s.3(4)(a), a company officer may be prosecuted for authorizing or consenting to the company's act in entering into an anti-competitive agreement; see *DPP v. Hegarty*, [2011] IESC 32 (Sup Ct (Irl)).

122. *Suiker Unie v. Commission*, cited *supra* note 21, para 539. This position is also adopted in the United Kingdom: *Director General of Fair Trading v. Pioneer Concrete (UK) Ltd* (also known as *Re supply of ready mixed concrete (No.2)*), [1995] 1 AC 456.

123. Case C-68/12, *Protimonopolny urad Slovenskej republiky v. Slovenska sporitel' na a.s.*, judgment of 7 Feb. 2013, nyr, para 28.

124. Joined Cases 100–103/80, *Musique Diffusion française v. Commission*, [1983] ECR 1825, para 97.

125. Townley, in Amato, Ehlermann, and Komminos (Eds.), *EC Competition Law: A Critical Assessment* (Hart, 2007), pp. 6–7.

126. *Safeway Stores Ltd v. Twigger*, [2010] EWCA Civ 1472, paras. 19–23 *per* Longmore LJ and para 37 *per* Lloyd LJ.

the employer.¹²⁷ As already noted, the employer is able to give orders to its employees and direct their conduct. Of course, the idea of control is central to the single economic entity. The explanation fails when it is not possible for the employer to control properly or at all the conduct of its officers or employees; or when all reasonable steps have been taken to control officers and employees and they nevertheless transgress the competition rules. The case law emphasizes the need for effective enforcement of competition law and to deter undertakings from committing infringements,¹²⁸ and this may disregard those situations in which an employer is unable to do anything more to prevent its officers and employees from breaching competition law.

5.3. Owners: Parent/subsidiary

As a matter of principle there are several ways to determine who should be held responsible for an infringement committed by an undertaking. One way – favoured by many systems of national company law – is that the separate legal status of the two corporate entities implies limited liability.¹²⁹ Provided the rules relating to company formation are complied with, a parent company is not generally liable for actions engaged in by the distinct legal entity of the subsidiary, which must bear responsibility for its actions alone.¹³⁰ This form-based approach has never been embraced by the decisional practice of the Commission or case law of the EU Courts.

A different way of resolving the issue of responsibility for the undertaking's wrongdoing is to invoke the single economic entity doctrine. It

127. Posner, *Antitrust Law: An Economic Perspective* (University of Chicago Press, 1976), p. 226. This approach was questioned in Polinsky and Shavell, "Should employees be subject to fines and imprisonment given the existence of corporate liability?", 13 *International Review of Law and Economics* (1993), 239.

128. See generally on the importance of the effective enforcement of the EU competition rules: Opinion of A.G. Kokott in *AGCM v. Ente tabacchi italiani*, cited *supra* note 11, para 72; Case C-429/07, *Inspecteur van de Belastingdienst v. X BV*, [2009] ECR I-4833, paras. 33–39 (in relation to the tax deductibility of fines imposed by the Commission); Case C-439/08, *VEBIC*, [2010] ECR I-12471, paras. 56–63 (in relation to the powers of national competition authorities to defend decisions applying Arts. 101 and 102 TFEU).

129. *ICI*, cited *supra* note 3, p. 632, where the Commission notes German, French, and Belgian legislation which makes parents jointly and severally liable for conduct engaged in by subsidiaries. In some circumstances the English courts will ignore the separate identities of the members of the group and treat them as one entity. This may be the case when the subsidiaries are wholly owned: e.g. *DHN Food Distributors Ltd v. London Borough of Tower Hamlets*, [1976] 1 WLR 852. In *Prest v. Petrodel Resources Ltd*, [2013] UKSC 34 Lord Sumption of the UK Supreme Court referred at para 16 to competition law as an example of one company's legal responsibility being engaged by the acts or business of an associated company.

130. See e.g. Davies, Gower, Worthington, and Micheler, *Gower and Davies' Principles of Modern Company Law*, 8th ed. (Sweet & Maxwell, 2008), pp. 33–40.

may first be asked whether two corporate legal entities, though separate legal persons, may constitute a single economic entity. If it is established that a single economic entity exists, it is then assumed or presumed that all legal entities forming part of a single economic entity may be held jointly and severally liable for an infringement of competition law committed by any other legal entity forming part of the undertaking.¹³¹

There has been a (very) strong reaction against the perceived role played by the single economic entity doctrine in resolving the issue of attributing liability, not least due to the increasing level of fines now being imposed.¹³² The number of cases questioning the relevance and role of the single economic entity doctrine in the attribution of liability shows that it is not universally accepted that the doctrine's scope and purpose have been correctly identified. It has been suggested that the principles used to attribute liability are "obscure and confused" and give rise to "a shadowy area" in EU law.¹³³ The European Parliament has called for "the Commission to define specific criteria pursuant to which parent companies should be made jointly and severally liable for cartel-like behaviour on the part of their subsidiaries".¹³⁴

We consider that insufficient attention has been paid to articulating whether; when; and why one legal entity may be held responsible for anti-competitive activity engaged in by a second and separate legal entity. In section 3 above we explained that an employer and its employees; a principal and its agent; and a parent and its subsidiary, all form single economic entities. The logical application of the single economic entity doctrine to the resolve the issue of liability for infringement would result in:

- the employer being liable for infringements committed by the employees, and vice versa;
- a principal being liable for infringements committed by its agent and vice versa;
- a parent being liable for infringements committed by the subsidiary, the subsidiary being liable for infringements committed by other subsidiaries, and the subsidiary being liable for infringements committed by the parent.

131. *Cascades*, cited *supra* note 5, para 78; *Stora Kopparbergs Bergslags*, cited *supra* note 5, para 37; *KNP BT*, cited *supra* note 5, para 71; *SCA Holding*, cited *supra* note 5, para 27. See A.G. Kokott in *Stichting Administratiekantoor Portielje*, cited *supra* note 3, Opinion, para 32.

132. See the literature cited *supra* note 6.

133. Briggs and Jordan, "Presumed guilty: Shareholder liability for a subsidiary's infringements of Article 81 of the EC Treaty", 8 *Business Law International* (2007), 1. See also Wils, *op. cit. supra* note 20, 101–102.

134. European Parliament Resolution of 9 March 2010 on the Report on competition policy 2008 (2009/2173(INI)), para 50.

The analysis that follows seeks to show that liability is *not* attributed in the manner that would be expected if the single economic entity doctrine were being used to determine the attribution of liability. We also seek to identify and articulate a separate set of principles that are used to determine the appropriate addressee of a decision finding an infringement committed by the undertaking.

When a parent company exercises decisive influence over a subsidiary company they form a single economic entity. Whilst use of the single economic doctrine to determine liability would entail that any legal entity within the undertaking may be held liable for any infringement committed by any other entity forming part of the same economic entity, it is clear that liability is not attributed in this manner.¹³⁵ Instead liability is attributed either on the basis that (i) the legal entity directly participated in the infringement committed by the undertaking or (ii) a presumption of participation in the undertaking's infringement by that legal entity. These two bases of attribution are explained more fully, below. Thereafter, we briefly discuss a possible third base of attribution that, regardless of participation, focuses on the fact that a legal entity is the beneficiary of an infringement.

5.3.1. *Direct participation*

Each legal entity that participates in an undertaking's infringement of Article 101 TFEU may be held jointly liable for that infringement. Joint liability will most obviously arise when, first, corporate legal entities, A and B, are part of that undertaking and, secondly, A directly participates in an infringement perpetrated by B.¹³⁶ The fact that one legal entity directly participating in the infringement is owned by a second legal entity also directly participating in the infringement does not alter the analysis.

135. See Opinion in *Portielje*, para 32, cited *supra* note 3, stating that “the concept of an undertaking and the imputation of responsibility under competition law are two sides of the same coin”. For the reasons set out, we argue that this is not in fact the case.

136. *ICI*, cited *supra* note 3, para 137; *AEG-Telefunken*, cited *supra* note 29, para 50; Case 30/87, *Bodson v. Pompes funèbres des régions libérées*, [1988] ECR 2513, para 20; and *Chloroprene Rubber*, in which the Commission, upheld by the GC and the ECJ, found that both Dow and du Pont, the parents of a joint venture, had actively participated in an infringement committed by their joint venture, DuPont Dow Elastomers LLC (DDE): Case C-179/12 P, *The Dow Chemical Company v. Commission*, judgment of 26 Sept. 2013, nyr, para 58. Direct participation is acknowledged as a basis of liability in Joshua, Botteman and Atlee, “‘You can’t beat the percentage’ – The parental liability presumption in EU cartel enforcement” in *The European Antitrust Review 2012 – A Global Competition Review Special Report*, 3. In Joined Cases C-628/10 & 14/11 P, *Alliance One International Inc v. Commission*, judgment of 19 July 2012, nyr, paras. 42–67 (dismissing an appeal against Case T-24/05, *Alliance One International v. Commission*, [2010] ECR II-5329, paras. 195–197 and 218–219). Trans-Continental Leaf Tobacco (TCLT) was not seen to participate in conduct engaged in by World Wide Tobacco España, the infringer, even though they formed part of a single economic entity.

In *ICI* (also known as *Dyestuffs*), the Court of Justice held a non-EU parent company jointly liable for a breach of Article 101(1) TFEU that had been committed by its wholly-owned subsidiaries in the EU upon finding the parent company had issued instructions to the subsidiaries to increase their prices.¹³⁷ The offending subsidiaries simply “carried out in all material respects the instructions given to it by the parent company”.¹³⁸

The next question is how participation is established. The Commission’s decisional practice frequently sets out evidence of how each legal entity within the single economic entity has participated in the competition law infringement.¹³⁹ But in *Spanish Raw Tobacco*¹⁴⁰ the Commission said that it had not held certain parent companies liable for the conduct of their subsidiaries as they had not been “materially involved” in the cartel. In *Centrafarm*¹⁴¹ the Court of Justice seemed to open the door to this asymmetry. Rather than the ability to exercise control being sufficient, it is suggested that control must actually be exercised, so that when the entity has “no *real* freedom to determine its course of action on the market” the rules on agreements between entities would not be applied. By “real freedom”, the Court is referring to genuine autonomy over strategic business decisions as opposed to latitude that may exist depending on the benevolence of the owner. In *ICI* the Commission relied on the fact of ICI giving “orders to its subsidiaries established within the Community to increase prices, as appears from two Telex messages”.¹⁴² In the words of the Commission in the *ICI* case: “What really matters here is the fact that as regards the practices at issue the subsidiaries of the applicant simply carried out the latter’s orders, so that

137. *ICI*, cited *supra* note 3, pp. 631 and 622.

138. *Hydrotherm*, cited *supra* note 2, A.G. Opinion at p. 3024. See also Case 22/71, *Beguelin Import Co v. GL Import-Export SA*, [1971] ECR 949 (a subsidiary was not economically independent); and *Istituto Chemioterapico*, cited *supra* note 116; *ICI*, cited *supra* note 3, paras. 130 et seq.; *AEG-Telefunken*, cited *supra* note 29, paras. 47 et seq.; and *Stora Kopparbergs Bergslags*, cited *supra* note 5, paras. 26–29; *Akzo v. Commission*, cited *supra* note 25, para 58; Case C-521/09 P, *Elf Aquitaine v. Commission*, [2011] ECR I-8947, para 54, and Case C-520/09 P, *Arkema v. Commission*, [2011] ECR I-8901, para 38; *Alliance One International*, cited *supra* note 136, para 43.

139. See e.g. Commission Decision of 24 Jan. 2007, *Gas Insulated Switchgear*, recitals 333 et seq.

140. Commission decision of 20 Oct. 2004, *Raw tobacco-Spain*, at recital 376. Intabex, Universal and Universal Leaf were not held jointly and severally liable for the fines imposed on their respective subsidiaries: Agroexpansión; Taes and Deltafina. On the proper interpretation of this recital see *Alliance One International*, cited *supra* note 136, para 133.

141. *Centrafarm v. Sterling Drug*, cited *supra* note 100, para 41.

142. *ICI*, cited *supra* note 3, p. 621. The same theory was used to justify imposing liability for infringements in relation to dyestuffs on Geigy, a legal entity domiciled in Switzerland: Case 52/69, *J R Geigy Ag v. Commission*, [1972] ECR 787, 795, p. 792.

when one considers their competitive situation in respect of third parties they appear as mere extensions of ICI in the Common Market”.¹⁴³

5.3.2. *Presumption of participation*

In *Akzo v. Commission*¹⁴⁴ the Court of Justice established a presumption of participation in an infringement of EU competition law. We consider three issues in relation to the presumption of participation. The first is when the presumption of participation applies; the second is whether, and when, the presumption is justified in the circumstances in which it arises; the third is whether, when, and how the presumption may be rebutted.

5.3.2.1. *Recognition of the presumption*

The presumption of participation exists in relation to a legal entity that exercises “decisive influence” or “control” over the conduct of the infringing legal entity. It is recognized that whether the power to control, or to exercise decisive influence, exists can be a difficult question of fact.¹⁴⁵ When answering that question it is necessary to consider “all the relevant factors relating to economic, organizational and legal links”.¹⁴⁶ There is no exhaustive list of factors that may be relevant to existence of the power to control or exercise decisive influence.¹⁴⁷ This power commonly exists when one legal entity owns a separate corporate legal entity engaged in anti-competitive action.¹⁴⁸ The presumption of participation certainly exists when it can be said that the “parent company holds all or almost all of the capital in a subsidiary which has committed an infringement of the European Union competition rules”.¹⁴⁹ The presumption arises because ownership gives

143. *ICI*, cited *supra* note 3, p. 622.

144. *Akzo v. Commission*, cited *supra* note 25, paras. 60–61. See also *Stora Kopparbergs Bergslags*, cited *supra* note 5, para 29; and Case T-314/01, *Avebe v. Commission*, [2006] ECR-II-3085, para 136; Case T-69/04, *Schunk v. Commission*, [2008] ECR II-2567, paras. 56–58; Joined Cases C-201 & 216/09 P, *ArcelorMittal Luxembourg v. Commission*, [2011] ECR I-2239, para 97, and *Elf Aquitaine*, cited *supra* note 138, para 56.

145. Faull and Nikpay, *op. cit. supra* note 4, paras. 2.37–2.40.

146. *Akzo v. Commission*, cited *supra* note 25, para 74.

147. *Elf Aquitaine*, cited *supra* note 138, para 58.

148. *ICI*, cited *supra* note 3, p. 631. Also see e.g. *AEG-Telefunken*, cited *supra* note 29, paras. 47–53. For a case in which the Commission established the exercise of actual control by a majority shareholder, see Case T-399/09, *Holding Slovenske elektrarne d.o.o. v. Commission*, judgment of 13 Dec. 2013, nyr, paras. 11–102. Cf. Case T-64/06, *FLS Plast A/S v. Commission*, judgment of 6 March 2012, nyr, paras. 40–46.

149. *Eni SpA v. Commission*, cited *supra* note 42, para 47.

the parent organization legal rights to intervene in the conduct of the subsidiary, and the presumption is that these rights are exercised.¹⁵⁰

A presumption of participation does not arise simply because separate legal entities have a common owner (and therefore form a single economic entity).¹⁵¹ In the *Steel beams* case, the Court of Justice held that liability could not be attributed to Siderúrgica Aristrain Madrid for the unlawful activities of Aristrain Olaberria simply because the share capital of two companies was held by the members of the same Aristrain family.¹⁵²

5.3.2.2. *Rationale for the presumption*

As ownership gives the parent organization legal rights to intervene in the conduct of the subsidiary, Advocate General Kokott has argued that the presumption of participation reflects “the obvious conclusion that the subsidiary does not determine its own market conduct independently, but in accordance with the wishes of its parent company”.¹⁵³ A second reason for the

150. A.G. Opinion in *Akzo v. Commission*, cited *supra* note 25, para 73. The idea that a natural legal person may not be held liable for actions of a corporate legal person seems to be accepted. Davies, Gower, Worthington, and Micheler, op. cit. *supra* note 130, p. 196 and *ICI*, cited *supra* note 3, p. 632 (emphasis added). We note an interesting difference in emphasis in *Portielje* (cited *supra* note 3) between the A.G. who referred to legal and natural persons in paras. 36–37 and the ECJ which referred to individual legal entities at paras. 42–44. In *HFB*, cited *supra* note 25, paras. 62–63, 66, it appears that all legal entities owned and controlled by the natural person may be held jointly and severally liable.

151. *Corinne Bodson*, cited *supra* note 136, para 20. However, in England and Wales it has been suggested that a presumption of participation arises so that a subsidiary may be held liable for what its parent company has done: See *Provimi v. Roche Products*, [2003] EWHC 961 (Comm), para 31. This interpretation has been followed in a number of rulings at first instance: *Cooper Tire & Rubber Company Europe Ltd v. Shell Chemicals*, cited *supra* note 7, para 56; *Toshiba Carrier UK Ltd v. KME Yorkshire Ltd*, [2011] EWHC 2665 (Ch), para 42; *Nokia Corporation v. AU Optronics Corporation*, cited *supra* note 18, paras. 82–84.

152. Case C-196/99 P, *Siderurgica Aristrain Madrid SL v. Commission*, [2003] ECR I-11005, paras. 96–99; this was considered to be settled law by the English Court of Appeal in *KME Yorkshire Ltd v. Toshiba Carrier UK Ltd*, [2012] EWCA Civ 1190, para 39. In *Copper fittings*, separate corporate legal entities with a common owner were not held jointly liable for each others conduct, even though they form a single economic entity: *Copper Fittings*, Commission Decision, O.J. 2007, L 283/63, Art. 2(a) and (b). The subsidiaries were originally members of the IMI group of companies from 31 Jan. 1991 to 22 March 2001, but were became part of the Aalberts group from 25 June 2003 to 1 Apr. 2004. The only exception to this was Art. 2(c) of the Commission Decision, *ibid.*, in which the subsidiaries were held jointly and severally liable for an additional amount of €2.04 million for which neither the former nor current parent company was liable. The EU Courts did not question this approach, but annulled the fines because the Commission had not proved the participation of either subsidiary in the cartel: Case T-385/06, *Aalberts Industries NV v. Commission*, [2011] ECR II-1223, upheld on appeal, Case C-287/11 P, *Commission v. Aalberts Industries NV*, judgment of 4 July 2013, nyr.

153. *Akzo v. Commission*, cited *supra* note 25, A.G. Opinion at para 73. Also Opinion of A.G. Warner in *Commercial Solvents*, cited *supra* note 116; *AEG-Telefunken*, cited *supra* note

presumption is that it “creates legal certainty and is straightforward to implement in practice”.¹⁵⁴ Rather than examine the extent to which each legal entity participated in the infringing conduct, it is for each legal entity within a single economic entity to show that it did not participate.

5.3.2.3. *Rebutting the presumption*

It is expressly acknowledged that the presumption of participation is rebuttable.¹⁵⁵ According to the Court of Justice, the fact that it is difficult to rebut the presumption does not mean that it is irrebuttable.¹⁵⁶ To rebut the presumption of participation it is necessary to show that the subsidiary in question acted with “complete autonomy” on the market. Such a standard is required as, in the opinion of the Court, if “it were sufficient for a party concerned to put forward mere unsubstantiated assertions, the presumption would be largely robbed of its usefulness”.¹⁵⁷

One of the main challenges is to distinguish corporate legal entities that do not participate in an infringement from those that tacitly acquiesce or approve of anti-competitive conduct. For example, the Commission has expressed the view that: “Although, in normal circumstances, a subsidiary may decide upon its sales prices in a relatively independent way, it remains a fact nevertheless that the parent company may at any time restrict this independent power of decision”.¹⁵⁸

It has thus been argued that it is unnecessary that the legal power to control or influence is exercised in a positive sense since the decision not to intervene in the actions of the subsidiary simply amounts to acquiescence.¹⁵⁹ In *Dyestuffs*, on behalf of Imperial Chemical Industries, Professor Jennings pressed the Court to reject this idea and instead to accept that “unless it can be shown that the subsidiary is an automaton operated by the parent, the distinct legal personality of the subsidiary should be respected”.¹⁶⁰ The view that

29, paras. 47–53; similarly see Opinion of A.G. Jacobs in Case C-222/04, *Ministero dell'Economia e delle Finanze v. Cassa di Risparmio di Firenze SpA*, [2006] ECR I-289, para 90.

154. Opinion of A.G. Kokott in *Akzo v. Commission*, cited *supra* note 25, para 71.

155. *Ibid.*, paras. 51–54.

156. *Elf Aquitaine*, cited *supra* note 138, para 70. Similarly: *Eni SpA v. Commission*, cited *supra* note 42, para 69.

157. *Elf Aquitaine*, *ibid.*, para 61.

158. *ICI*, cited *supra* note 3, p. 631.

159. Wils *op. cit.* *supra* note 20, 104, 106–107, also notes that under the EUMR control need never be exercised – it is the possibility of legal control that matters. Art. 3(1)(b) and (3) of the Merger Regulation.

160. *ICI*, cited *supra* note 3, p. 622. The Commission sought to defend an infringement decision it had adopted against (*inter alia*) Imperial Chemical Industries (ICI), a legal entity domiciled in the United Kingdom, at a time when the United Kingdom was then not a Member

acquiescence amounts to participation seems to conflate the single economic entity doctrine with the principles of attribution. It is clear that the rights of control are sufficient for a single economic entity to exist. However, it is not clear why the existence of such right should be used to attribute liability. Unless non-participation can be distinguished from acquiescence the main criticism of the presumption of participation remains that the presumption is *de facto* irrefutable.¹⁶¹ As such, both Advocates General Bot and Wahl (the latter in extra-curial writing) have objected to the presumption on the basis of it being incompatible with the presumption of innocence enshrined in Article 6(2) ECHR.¹⁶²

In *Akzo v. Commission*, the Commission suggested that the presumption of participation may be rebutted if: (a) the owner is a pure financial investor; (b) the parent company holds all of the shares in the subsidiary only temporarily and for a short period; and when (c) ownership does not confer legal rights of control over the subsidiary.¹⁶³ The issue may arise before the General Court soon. In *Power Cables*, the Commission found that Goldman Sachs exercised decisive influence over Prysmian SpA, one of the core members of the high voltage power cables cartel.¹⁶⁴ Goldman Sachs claims, however, that it was a pure financial investor and was only involved in high-level, non-operational matters. Goldman Sachs has appealed to the General Court, contending that the Commission failed to demonstrate to the requisite legal standard that Goldman Sachs Group actually exercised decisive influence over Prysmian.¹⁶⁵ The appeal may shed light on the evidential burden borne by a corporate shareholder seeking to rebut the presumption of participation.

of the EEC. In the Commission's view, ICI was the appropriate legal entity to be addressed because it had acted within the territory of the Community through its subsidiary. The case is really about whether a subsidiary has implemented (directly participated) in an infringement. Also *ICI*, cited *supra* note 3, A.G. Opinion, pp. 692, 693, objecting to the failure to recognize separate legal personality.

161. Wahl, "Parent company liability – A question of facts or presumption?", (2012) 19th St.Gallen International Competition Law Forum ICF, available at <www.ssrn.com>. See e.g. Thomas, "Guilty of a fault that one has not committed. The limits of the group-based sanction policy carried out by the Commission and the European Courts in EU-antitrust law", (2012) *Journal of European Competition Law & Practice*, 19 (describing the *Akzo* presumption "a 'fiction' which is effectively irrebuttable").

162. *ArcelorMittal Luxembourg*, cited *supra* note 144, A.G. Opinion, para 206 and Wahl, "EU Court must decide view on 'single, continuous cartels'", MLex, 30 Sept. 2013, available at <www.law.fordham.edu/newsroom/30900.htm>. In *Elf Aquitaine*, cited *supra* note 138, paras. 69–70, the ECJ rejects the claim that the presumption of participation is irrebuttable and consequently criticism based on this view.

163. Opinion of A.G. Kokott in *Akzo v. Commission*, cited *supra* note 25, fn. 62.

164. Commission decision of 2 Apr. 2014.

165. Case T-419/14, *Goldman Sachs Group Inc v. Commission*, pending; see also Bloomberg Report, "Goldman Sachs Says EU accuses firm in cable price-fixing", 9 Aug. 2011; and "Goldman Sachs case tests EU will to fine private equity investor", 18 Dec. 2013.

5.3.3. Beneficiary

It is possible that liability *may* be attributed to a legal entity for the infringement committed by an undertaking even in the absence of any participation in that infringement (whether actual or presumed participation).¹⁶⁶ This is because the imposition of fines on the first legal entity (parent) for infringements committed by the second legal entity (subsidiary) might be justified when the benefit of the subsidiary's anti-competitive conduct accrues to the parent. This proposition is one way of explaining the attribution of liability in *Dow Chemical v. Commission*,¹⁶⁷ one of the appeals in the *Chloroprene Rubber* cartel. In addition to finding that the Commission had demonstrated that both parent companies had exercised decisive influence over their joint venture, the General Court specifically noted that: “*since any gains resulting from illegal activities accrue to the shareholders it is only fair that those who have the power of supervision should assume liability for the illegal business activities of their subsidiaries*”.¹⁶⁸ It appears that the first legal entity has rights to the benefits of a competition law infringement by virtue of owning the separate legal entity engaged in the infringement. Ownership would be central to this potential basis for the attribution of liability.¹⁶⁹ Liability might be imputed to the first legal entity in order to recover the benefits accrued, rather than to punish wrongdoing. The EU Courts have not explicitly stated the law in these terms, but this would seem to offer an explanation for imputing liability to parents of joint ventures or certain minority shareholders.¹⁷⁰ It would also enable liability to be attributed for infringements of competition law in a manner that is consistent with the principle of personal responsibility.¹⁷¹ It remains to be

166. The ECJ has rejected the idea that separate legal personality entails limited liability in EU competition law: *ICI*, cited *supra* note 3, para 132. The idea that separate legal personality should entail limited liability is, according to Davies, Gower, Worthington, and Micheler, *op. cit. supra* note 130, p. 196, one that “courts have arrived at without any deep consideration of the matter as an inevitable consequence of the doctrine of separate legal personality”.

167. Case T-77/08, *Dow Chemical v. Commission*, judgment of 2 Feb. 2012, nyr.

168. *Ibid.*, para 101 (emphasis added); the Court of Justice did not pronounce on the merits of this finding because it had only been included for the sake of completeness, *The Dow Chemical Company*, cited *supra* note 136, para 62.

169. *ICI*, cited *supra* note 3, p. 631. Also see e.g. *AEG-Telefunken*, cited *supra* note 29, paras. 47–53.

170. For an example of a case involving a parent company holding a minority interest in the subsidiary's share capital see Case T-132/07, *Fuji Electric Co Ltd v. Commission*, [2011] ECR II-4091, paras. 181–184.

171. On personal responsibility see *Commission v. Anic Partecipazioni*, cited *supra* note 17, para 145. For the argument, and its rejection, that the attribution of liability is incompatible with the principle of personal responsibility see *Akzo v. Commission*, cited *supra* note 25, paras. 77–78; see e.g. *Eni SpA v. Commission*, cited *supra* note 42, para 50.

seen whether future decisions and cases will invoke the fact that a legal entity is the beneficiary of an infringement.

5.4. *Agency agreements*

The Court of Justice has held that the principal and agent are unable to compete *inter se* with regard to the resale of a principal's goods or services.¹⁷² This reflects the role of the single economic entity doctrine responding to the need to remove collusive practices that can have no impact on competition from the scope of Article 101 TFEU.

When the selling or purchasing function of the agent forms part of the principal's activities, an agent does not acquire rights or liabilities *vis-à-vis* third parties. It seems to be accepted that all the conduct of an agent may be attributed to the principal.¹⁷³ As such, the principal is the proper addressee of a decision that finds a third party contract concluded by the agent on behalf of the principal infringes competition law.

In *Willis v. Office of Fair Trading*¹⁷⁴ the UK Competition Appeal Tribunal considered the EU concept of an "undertaking" in the context of bid-rigging in the construction industry in England. An individual provided estimation services for one company (Willis) for the purposes of a tender and provided confidential pricing information to another (Mansell) for the purposes of cover pricing. The OFT found Willis and Mansell guilty of collusive tendering. Willis denied the infringement, challenging the OFT's finding that the individual in question was acting as its agent when he provided Willis' pricing information to one of its competitors. The Competition Appeal Tribunal agreed: either the individual was acting on this own account when providing the cover price or, alternatively, he formed part of the Mansell undertaking.¹⁷⁵ What is of particular interest is that the CAT held the individual to be part of the Willis undertaking for the purposes of preparing the tender¹⁷⁶ but not for the purposes of providing the cover price to Willis' competitor. This suggests a functional approach to the question of attributing liability for something that the agent has done on behalf of a principal.

172. See *supra* note 66 for A.G. Kokott's distinction between the position of an agent in the market for agency services and after appointment by the principal, in *Confederación Española*, para 43.

173. *ICI*, cited *supra* note 3, p. 621.

174. *AH Willis & Sons Ltd v. Office of Fair Trading*, [2011] CAT 13.

175. *Ibid.*, para 37.

176. *Ibid.*, para 35.

5.5. Calculating the fine

Liability for the conduct of a separate legal entity may be imposed when there is direct participation; when participation is presumed (and the presumption not rebutted); and, when there is no participation, but the legal entity benefits from the infringement. It is necessary for the Commission or national competition authority clearly to identify and distinguish these different bases for the attribution of liability.¹⁷⁷

When liability is based on participation that liability is joint. The purpose of any fine is then to deter both legal entities and the turnover of both legal entities may be taken into account.

If liability were to be based solely on the benefit obtained *without* any form of participation (actual or presumed), then the purpose of any fine is to disgorge the non-participating legal entity of any benefit obtained. In those circumstances it would follow that liability is several and the fine must therefore be calculated on the basis only of the conducted engaged in by the participating legal entities.

A finding that the legal entity has previously participated in a competition law infringement allows the sanction to be significantly increased on the grounds that the legal entity is a repeat offender.¹⁷⁸ The fines imposed on recidivists are increased in order to achieve the effective enforcement of competition law.¹⁷⁹ The recidivist uplift is naturally justified in relation to those legal entities that participated (or are deemed to have participated) in an infringement.¹⁸⁰ It is questionable, however, whether the fine should be increased for recidivism when a legal entity did *not* participate and could not be presumed to participate in an infringement.¹⁸¹ It is not obvious that an increase in the fine for being a recidivist is necessary or appropriate in cases where a particular legal entity has not participated in an infringement and is held liable solely because it benefited from an infringement.

177. *Alliance One*, op. cit. *supra* note 136, paras. 49 and 53.

178. Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, O.J. 2006, C 210/2, para 28, first indent; Case T-38/07, *Shell v. Commission*, [2011] ECR II-4383, para 98.

179. On the way in which the legal treatment of recidivism can, ideally, encourage undertakings to establish effective competition compliance programmes, see Wils, "Recidivism in EU antitrust enforcement: A legal and economic analysis", 35 *World Comp.* (2012), 23.

180. Commission's Report on Competition Policy 2008, COM(2009)374 final, para 9 ("[t]hrough its fining policy, the Commission encourages a culture of compliance with competition law at the level of the entire company group").

181. Bourke, "Parental liability for cartel infringements", (2009) *GCP: The Antitrust Chronicle*, 7.

6. Conclusion

An ever-present risk is that a legal principle may “expand itself to the limit of its logic”.¹⁸² It might be asked whether the single economic entity doctrine has exemplified this risk. The doctrine is often invoked to determine the scope of Article 101 TFEU and also to determine which legal entity (or entities) may be held responsible for an infringement committed by an undertaking. As the single economic entity doctrine has evolved in one area, the concern that is often expressed is whether that development has unintended consequences in another area.¹⁸³ In recent cases, however, the Court of Justice has been careful to point out that it has been solely dealing with the specific question of attribution of liability (and not, for example, the separate issue of internal agreements).¹⁸⁴ It is thus necessary to separate three of the problems that the single economic entity doctrine is often called upon to address.

The first problem is to identify the origin of a competitive force on the market. Separate legal entities may be grouped together to form a single economic entity only where, as combined, those legal entities are capable only of exerting a single force on the market. The language of the case law and the commentary is heavily infused with the concept of “decisive influence”. It is this kind of influence that one may exercise over the other that prevents the two from being able to compete.

The second problem is whether separate legal entities are capable of entering into anti-competitive agreements *inter se*, contrary to Article 101(1) TFEU. Again, the language of the cases and the commentary is permeated with the idea of decisive influence. Decisive influence is said to prevent one member of a single economic entity from being able to agree or disagree with another.

The third problem is which of the legal entities within a single economic entity must bear responsibility for an infringement of EU competition law. A common criticism is that “the Commission’s invariable policy today is to hold a group parent automatically responsible for cartel infringements committed down the line by its wholly owned subsidiaries. The parent’s awareness of, still less its participation in, the subsidiaries’ wrongdoing has nothing to do with it. *The acid test is whether together they compose one and the same undertaking*”.¹⁸⁵ From this point, the language of decisive influence again pervades. Responsibility for an infringement committed by an undertaking is

182. Cardozo, *The Nature of the Judicial Process*, (Yale University Press, 1921), p. 51 (Lecture II. The methods of history, tradition and sociology).

183. Jones, *op. cit. supra* note 6, 301.

184. *Commission v. Stichting Administratiekantoort Portielje*, cited *supra* note 3, paras. 43–44; *The Dow Chemical Company*, cited *supra* note 136, para 58.

185. Joshua, Botteman and Atlee, *op. cit. supra* note 136, 3 (emphasis added).

determined by participation in that infringement, either direct or presumed. The language of decisive influence is prevalent in discussion over whether to presume participation in an infringement and whether participation is properly presumed. Yet, as the language of decisive influence is used in all three contexts it seems to have fused the three separate problems that are being addressed. We hope that we have shown that these are distinct problems which, despite the use of common language, call for distinct solutions.

We are of the view that the sole purpose of the single economic entity doctrine is to identify separate legal entities that exert a single competitive force on the market – the constituent elements are unable to compete *inter se*. Legal entities are unable to compete when one exercises decisive influence over another such that the latter is incapable of determining independently its conduct on the market.

In relation to the second problem, we consider that agreements between separate legal entities are not agreements within the meaning of Article 101 TFEU when the concurrence of independent wills is absent. This is the case when hierarchical power or decisive influence, rather than agreement within the meaning of Article 101, determines the arrangements between legal entities. Recourse to the single economic entity doctrine is unnecessary to resolve the second problem.

The third problem relating to attribution of liability is often examined by reference to whether or not legal entities are part of the same infringing undertaking. We have argued to the contrary, that liability under Article 101 TFEU is *not* attributed in the manner that would be expected if the single economic entity doctrine were determinative. Instead, in our view, liability is attributed on the basis either (a) that a legal entity directly participated in the infringement committed by an undertaking or (b) a presumption that the legal entity participated in that infringement. The presumption may be based on the likelihood of a legal entity actually exercising decisive influence over another. It is apparent that the exercise of decisive influence is relevant in addressing all three issues: the existence of a single economic entity; the application of Article 101 TFEU to internal agreements; and to the attribution of liability under Article 101. It is crucial to note, however, that the concept of decisive influence is being used to address different issues and its relevance or significance may vary according to the issue at hand.