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Joint and several liability of parent companies for infringements of competition rules by their subsidiaries

A parent company owning (directly or indirectly) 100% of its subsidiary’s capital is presumed to exercise a “decisive influence” on such subsidiary. This makes the parent company directly liable for any infringement of competition rules by its subsidiary because both entities are considered as a “single economic entity” pursuant to competition and antitrust law[1].

A judgment rendered in September 2009[2] by the Court of Justice of the European Communities (the “Court”) further consolidated the strength of this presumption since the Court held that Akzo Nobel NV was jointly and severally liable for the payment of a EUR 20.99 million fine imposed upon four of its subsidiaries that implemented a cartel in the choline chloride industry.

Pursuant to the aforementioned judgment, it appears virtually impossible for a parent company owning 100% of the capital of its subsidiary to rebut the “decisive influence” presumption[3].

French competition authorities seem to apply this presumption in a more moderate and less systematic manner, seeking most of the time other evidence, beyond shareholding control, establishing the lack of the subsidiary’s legal autonomy before imputing the latter’s infringements to its parent company.

When the above-mentioned presumption does not come into play (in particular because the parent company does not own 100% of the capital of its subsidiary), French and Community authorities look for other indicia that could establish the subsidiary’s lack of autonomy, e.g. instructions given by the parent company, managerial positions held by the parent company within the subsidiary, obligation for the subsidiary to present its accounts to the parent company, manner in which the subsidiary’s commercial strategy is designed and concretely implemented, the subsidiary's level of economic and financial dependence on the parent company, etc.; such factors and criteria are assessed on a case by case basis and may not be set out in an exhaustive list[4].

Once the lack of legal autonomy is established (whether it is presumed or, as the case may be, demonstrated by conclusive elements), the parent company is considered jointly liable for any infringement of competition rules by its subsidiary. There is, however, one procedural condition: the objections against the parent company must be made independently through the communication of a statement of objections and such statement of objections must precisely indicate why the parent company is being sued (infringing conduct of its subsidiary, personal involvement in the infringement or both)[5].

This dual imputation of infringements – to the parent company and to the subsidiary – is specific to Community law. The *Autorité de la concurrence* (French Competition Authority) has always refused to sanction both entities because of the subsidiary's lack of autonomy (unless the parent company and the subsidiary both participated in the infringement).

The imputation of infringements of competition rules between a parent company and its subsidiary is an important financial issue: pursuant to French law (Article L.464-2 I §4 of the French Commercial Code) and Community law (Article 23§2 of EC Regulation 1/2003 dated December 16, 2002), the fine imposed for anti-competitive practices can reach up to 10% of the total/global turnover of the company(ies) that participated in the infringement, it being specified that the turnover used as the basis of calculation is the consolidated turnover of all companies belonging to the relevant group..

To conclude, it must be said that it may not always be in the parent company's best interest to demonstrate that its subsidiary has legal autonomy. It all depends on the perspective adopted.

As explained above, the proof establishing the subsidiary's legal autonomy in its dealings with third parties can be used by the parent company as a means to escape liability for its subsidiary's infringement of competition rules.

Yet, establishing the subsidiary's legal autonomy in its dealings with its parent company can lead to the application of antitrust legislation: indeed, if the subsidiary has no legal autonomy, the agreements and covenants between the parent company and its subsidiary (forming a single economic unit) fall logically outside the scope of application of the anti-competitive practices legislation which applies only to agreements and covenants made between two independent entities.

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[1] Pursuant to Community competition & antitrust law, companies belonging to the same group make up an economic entity, and, therefore, an undertaking as defined in Articles 81 and 82 of the EC Treaty, insofar as

the relevant companies do not determine their conduct on the market independently (Court of First Instance of the European Communities (CFI) September 30, 2003, Michelin / Commission, T-203/01).

[2] CJEC September 10, 2009, case C-97/08 P Akzo Nobel / Commission.

[3] "*It is sufficient for the Commission to show that the entire share capital of a subsidiary is held by the parent company in order to conclude that the parent company exercises decisive influence over its commercial policy*" (CJEC case C-97/08).

[4] CJEC, case C-97/08 Akzo Nobel / Commission: "*in order to ascertain whether a subsidiary determines its conduct on the market independently, account must be taken (….) of all the relevant factors (….) which may vary from case to case and cannot therefore be set out in an exhaustive list*".

[5] CJEC September 3, 2009, case C-322/07 P, C-327/07P, C-338/07 P, Papierfabrik August Koehler.