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Why Shareholders Should Not Share the Blame in the EU

Stephen Kinsella & Anouck Meier
Sidley Austin

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Should an independent shareholder which is not itself a party to an antitrust infringement be held liable for the misconduct of a company it jointly owns?

The question might raise eyebrows of practitioners in other jurisdictions, such as the United States, where corporate separateness prevails as a general rule and the proverbial corporate veil can be pierced only as an “extreme remedy.”² For European counsel and their clients, however, the question has become highly relevant and any nervousness on their part seems justified. The European Commission (“Commission”) seems to have adopted an ever-expanding theory of “liability by association.” In addition to parents of wholly-owned subsidiaries and partners in general partnerships, shareholders in jointly-owned companies increasingly find themselves in the line of fire.

A quick recap of the existing EU rules on the imputation of liability in the case of wholly-owned subsidiaries and general partnerships may be useful. The Commission’s enforcement measures against alleged cartels target “undertakings,” a concept that covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed. The concept must be understood as designating a single economic entity even if it consists of several natural or legal persons. When such an economic entity has infringed competition rules, it should answer for the infringement —this is the most basic application of the principle of personal responsibility. It is in this context that a parent company can be held liable for the conduct of its subsidiary, or—by extension—a partner for the activities of a general partnership.

Where a wholly owned subsidiary is under investigation the issue centers on whether or not that subsidiary is part of a broader economic unit—an “undertaking”—with its parent, and whether therefore they can be held liable together.³ The test that has developed in this regard focuses on the following question: Does the subsidiary determine autonomously its own market

¹ Partner Stephen Kinsella is the head of Sidley Austin LLP’s European competition team and a global coordinator of Sidley’s global antitrust group and Anouck Meier is an associate in Sidley’s Brussels office, focusing on EU competition law. The views expressed in this article are exclusively those of the authors and do not necessarily reflect those of Sidley Austin LLP, its partners, or its clients.

² *Sonora Diamond Corp. v. Superior Court*, 83 Cal. App. 4th 523, 539 (2000).

³ See the helpful recap of existing case-law the European Court of Justice (“ECJ”) recently made in case C-97/08 *P Akzo Nobel and Others v Commission* [2009] ECR I-0000.

conduct or, rather, does it carry out the instructions of its parent?⁴ The rationale behind this test is that, if the latter is the case, the parent and the subsidiary are part of a single economic unit and therefore form a single undertaking. The fact that the parent and the subsidiary form a single undertaking then allows the Commission to hold them jointly liable, without having also to prove the personal involvement of the parent company in the infringement.

In this specific case of a subsidiary that is wholly owned by a single shareholder, it is clear as a matter of company law that the parent company can exercise a decisive influence on its subsidiary, and the European Courts have allowed the Commission to presume that the parent company in fact does exercise such an influence. This allows the Commission to hold the parent company liable for the subsidiary's conduct merely by proving that the subsidiary is wholly owned by the parent company—unless the parent company is able to rebut the presumption and show that the subsidiary acted independently on the market.

The Court of First Instance in *Avebe*⁵ applied this presumption (hereafter the “Parent-Subsidiary Presumption”) to the case of a general partnership, in which two 50/50 partners jointly made all decisions for and assumed all the commitments of a purely contractual entity. The two partners clearly had the ability to exercise a decisive influence over all aspects of the general partnership's affairs, including its market conduct, because under the partnership agreement all of those affairs and all aspects of that conduct had to be decided jointly by the partners, who by Dutch law were jointly liable for the partnership's behavior. Under those specific circumstances, the joint entity had no autonomy at all and could be considered as one economic whole with the partners. Therefore, applying the Parent-Subsidiary presumption might have seemed unnecessary but was certainly not a great stretch.

Where does all of this leave regular shareholders? The Court's ruling in *Avebe* was limited specifically to the facts in that case involving a 50/50 general partnership and does not, therefore, stand for the proposition that the Parent-Subsidiary Presumption applies to all companies. Indeed, the *Avebe* ruling simply cannot be transposed to the typical set-up of a corporation with two or more independent shareholders. This is because the Parent-Subsidiary Presumption is based on the fundamental premise that a wholly-owned subsidiary will receive instructions from its parent company and will follow those instructions so that the market conduct of both the parent company and the wholly-owned subsidiary is “unified.” It is self-evident that in the case of a wholly-owned subsidiary, the parent company has the ability to control all aspects of the wholly-owned subsidiary's business, including its operational decisions and its conduct on the market.

In contrast, the veto powers of minority shareholders are normally limited to only a small number of high-level decisions. All other decisions, including the day-to-day operational management of the business and control of its employees, are left to the chief executive and the management team working under him. No minority shareholder has the ability to issue instructions to the company's management or to control the corporation's policies and activities

⁴ See judgment of the Court of Justice in case 48/69 ICI v Commission [1972] ECR 619, ¶. 133.

⁵ Case T-314/01 *Avebe v Commission* [2006] ECR II-3085.

at operational level. The fact that there are two (or more) independent shareholders therefore establishes the inapplicability of the Parent-Subsidiary Presumption.

The Commission's decisional practice acknowledges the distinct situation of a corporation that is owned by two independent shareholders. Notably, the Commission recognized in the 2005 *Rubber Chemicals* Decision⁶ that having two shareholders with blocking rights over certain strategic decisions establishes a presumption that the company is a separate undertaking from its shareholders:

In the case of a joint venture, jointly owned by its parents (and over which none of the parents has de facto or de jure sole control) the joint venture can be presumed to be autonomous from its parent companies, i.e., can be presumed to constitute a separate undertaking for the purpose of Article 81 of the Treaty." (emphasis added)

That presumption is even stronger where the creation of a corporation by two or more independent shareholders is cleared under the Merger Regulation, which provides that: "The creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity shall constitute a concentration... ." ⁷ It is clear from the Regulation, the Commission's Consolidated Jurisdictional Notice,⁸ the case-law,⁹ and the Commission's Notice on restrictions directly related to concentrations¹⁰ that the creation of such an entity has a number of legal consequences. First, it becomes an undertaking in its own right, and is therefore economically autonomous in relation to its shareholders from an operational standpoint. Second, economic autonomy from an operational perspective is distinct from and not affected by the sole fact that two or more shareholders have blocking rights over certain strategic decisions. Finally, agreements between that entity and the shareholders that are not ancillary to formation will be assessed separately under Article 81.

In sum, the recent attempts of the Commission to widen the net of cartel liability and extend it to companies whose only connection with the alleged cartel is their ownership of shares in the alleged cartel are unfounded. There is no legal basis for the Commission to hold such a shareholder liable, unless the Commission establishes, on the basis of facts other than the share ownership and the existence of blocking rights, that the shareholder and the company formed a single economic entity and therefore a single undertaking.

⁶ Commission Decision of 21 December 2005 (Case COMP/F/38.443 - Rubber Chemicals), published on DG Comp website.

⁷ Council Regulation No 139/2004, OJ 2004 L 24/1, Art. 3(4).

⁸ Commission Consolidated Jurisdictional Notice under Council Regulation No 139/2004 on the control of concentrations between undertakings, OJ 2008 C 95.1, ¶¶ 91 to 93, 143.

⁹ Case T-282/02 *Cementbouw v Commission* [2006] ECR II-319, ¶ 62.

¹⁰ Commission's Notice on restrictions directly related to concentrations, OJ L 24, 29.1.2004, p. 1, ¶¶ 7, 36-44).