Revisiting Parental Liability in EU Competition Law

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Keywords: parental liability; competition law; single economic unit; decisive influence; failure to exercise vigilance; enterprise

Abstract

*Why parent companies are held liable for the infringements committed by their subsidiaries under EU competition law? This article examines the jurisprudence of the EU Courts with a view to illuminating the rationale underpinning parental liability. Taking a closer look at the "single economic unit/undertaking" explanation endorsed by the Courts post-*Akzo*, it demonstrates that this doctrine lacks the exegetical power assigned to it, insofar as it is based on a fallacious reasoning. With this in mind, two alternative justifications for parental liability are then discussed: the "failure to exercise vigilance" theory and the "enterprise" rationale. As the article illustrates, both justifications have their advantages and limitations. Ultimately, the final choice lies with the EU Courts, but it is submitted that, all things considered, the 'failure to exercise vigilance' argument offers a better – or at least more realistic – solution to the problem of developing a coherent explanation for parental liability in EU competition law.*

Introduction

Why parent companies are held liable for infringements committed by their subsidiaries under EU competition law? Simple as this question might be, the answer remains elusive, if not controversial. In brief, the problem may be synopsised as follows. European Union (EU) competition law consists of two core rules in the Treaty on the Functioning of the European Union (TFEU):[1] Article 101 TFEU, which forbids anticompetitive coordination; and Article 102 TFEU, which prohibits abuses of a dominant position in the market. Both provisions are addressed against "undertakings". This term has been defined by the EU Courts as referring to an "economic" – rather than a legal – "unit". Accordingly, an undertaking may consist of one or several legal persons – as in the case of corporate groups, which are typically structured around parent companies and subsidiaries.

Fines, however, may only be imposed on entities with legal personality. Indeed, as the EU Courts have explained,[2] "although (…) an undertaking (…) is not necessarily the same as a company having a legal personality, it is necessary for the purposes of applying and enforcing decisions to identify an entity possessing legal personality to be the addressee of the measure".[3] Therefore, when the European Commission adopts a decision pursuant to the competition rules, "it must identify the natural or legal person or persons who can be held responsible for the conduct of the relevant

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[1] Consolidated Version of the Treaty on the Functioning of the European Union (TFEU) [2008] OJ C115/47.

[2] References to the "EU Courts" should be understood as reference to the General Court of the European Union (General Court) and the Court of Justice of the European Union (ECJ).

[3] *Limburgse Vinyl Maatschappij and Others v Commission* (T-305/94, T-306/94, T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94) ECLI:EU:T:1999:80, at [978].

undertaking and can be penalized for that conduct".[4] Where an undertaking encompasses a group of companies and the unlawful practice has been committed by a subsidiary, one would be excused to think that any liability would burden the latter only. Nevertheless, over the past decade the EU Courts have favoured a different approach to the attribution of liability in these circumstances. According to now settled jurisprudence, where the parent company exercises decisive influence over the conduct of its subsidiary, the two entities constitute a "single undertaking" and may thus be held jointly and severally liable for the antitrust violation in question and the imposed fine. Such decisive influence is presumed to have been exercised in the case of wholly-owned subsidiaries, unless the parent company provides evidence that the subsidiary has "decided independently upon its own conduct on the market".

Unsurprisingly, corporate groups have not taken the rules on parental liability in stride. In cartel cases in particular, parent companies have fiercely fought back by persistently challenging Commission decisions before the EU Courts. In a nutshell, most complaints revolve around three arguments: first, that the rules governing parental liability are incompatible with the principle that responsibility for a competition violation is personal; second, that they pierce the corporate veil, thereby violating the principle of limited liability of company shareholders; and third, that they contravene the principle of effective judicial protection, insofar as the presumption of decisive influence with respect to wholly-owned subsidiaries is practically impossible to rebut. These criticisms, however, have been met with little sympathy by European judges, who have time and again dismissed them as unfounded. Indeed, the standard judicial response to all objections against parental liability over the past ten years has been twofold: first, that parent companies are held responsible for the antitrust violations of their subsidiaries because they form a single economic unit with them and *thus the same undertaking*; and second, that, albeit difficult to reverse, the presumption of decisive influence in the case of wholly-owned subsidiaries remains "within acceptable limits" and hence "fair".

Nevertheless, parental liability is not as straightforward as the EU Courts claim; on the contrary, it raises difficult questions of policy and law, which have not been adequately addressed. The problem stems from the fact that, for all its apparent consistency, the case-law does not allow one to deduce a coherent theory for ascribing to parent companies responsibility for the antitrust transgressions of their subsidiaries. Indeed, despite the wealth of jurisprudence on the matter, the reason why parent companies are held liable remains unclear. Even worse, the EU Courts' reluctance to engage with the criticisms raised by parent companies and their dry adherence to earlier judicial statements have had an unfortunate straightjacket effect, resulting in the creation of a convoluted web of precedents from which it is nearly impossible to escape. Parental liability, however, is not an issue to take lightly. On a doctrinal level, the question whether parent companies should be held responsible for the conduct of their subsidiaries has proved extremely contentious. On the one hand, the structuring of corporate groups around parent companies and subsidiaries is an intrinsic feature of the modern economy. On the other hand, legal fictions may sometimes result in objectionable outcomes, insofar as they may enable corporate groups to shield themselves from liability by externalising the risks of their activities.[5] These issues become even more complicated in the context of competition enforcement. Competition violations are akin to regulatory offences and have criminal connotations due to the

[4] *Areva and Others v Commission* (T-117/07 and T-121/07) ECLI:EU:T:2011:69, at [64]; *Uralita v Commission* (T-349/08) ECLI:EU:T:2011:622, at [36].
[5] W.Douglas and C.Shanks, "Insulation from Liability through Subsidiary Corporations" (1929) 39 Yale Law Journal 193.

severe financial penalties that the Commission may inflict on undertakings.[6] At the same time, antitrust infringements may cause harm to a large number of stakeholders, thereby giving rise to actions for damages.

Against this backdrop, the justification for parental liability in EU competition enforcement is a question one may no longer ignore. In fact, the issue has become more pressing since the coming into force of the Damages Actions Directive which is expected to increase the levels of private enforcement,[7] and in light of the Commission's recent proposal for the adoption of a Directive aiming at empowering national competition authorities, among others, by requiring Member States to ensure that "the notion of undertaking is applied for the purpose of imposing fines on parent companies".[8] With this in mind, the aim of the present article is to examine the rationale behind the attribution of liability to parent companies for the antitrust transgressions of their subsidiaries based on the jurisprudence of the EU Courts. As the analysis will demonstrate, the current foundation of parental liability – i.e. the "single undertaking" argument – lacks the exegetical power assigned to it by the EU Courts, insofar as it is based on a fallacious reasoning, whereas its application suffers from serious shortcomings. Consequently, it is imperative to consider alternative explanations for holding parent companies accountable for the competition infringements perpetrated by their subsidiaries. In investigating these issues, the article is structured as follows. First, it outlines the evolution of the rules governing parental liability and identifies two distinct phases in the judicial approach: pre- and post-*Akzo*. Then, the attention is shifted to the "single economic unit/undertaking" rationale which permeates the EU Courts' post-*Akzo* jurisprudence on parental liability. As the analysis illustrates, this explanation is inherently unsatisfactory on several grounds and should be abandoned. With this in mind, two different potential justifications for holding parent companies accountable for the anticompetitive acts of their subsidiaries are contemplated, namely the "failure to exercise vigilance" argument and the "enterprise liability" theory. The article discusses both their advantages and their limitations, and concludes that, although the final choice lies with the EU Courts, the "failure to exercise vigilance" justification offers a better – or at least more realistic – solution to the problem of articulating a coherent theory of parental liability in EU competition law.

The evolution of parental liability in EU competition law

Although parental liability in EU competition law has attracted academic attention only in the past ten years or so, it is hardly a recent phenomenon. In fact, parent companies have been held responsible for anticompetitive acts perpetrated by their subsidiaries since the first days of competition enforcement. In a sense, the EU Courts have capitalised on the history of parental liability by tenaciously grounding their current approach in their early jurisprudence. A more careful look, however, reveals that the impression of continuity is misleading. The contemporary rules governing parental liability bear little

[6] The criminal dimension of EU competition enforcement has been predominantly associated with cartels due to the high fines involved and their perceived inherent wrongfulness. See P.Whelan, *The Criminalisation of European Cartel Enforcement: Theoretical, Legal and Practical Challenges* (Oxford University Press, 2014).

[7] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L349/1.

[8] Commission Proposal for a Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, COM(2017) 142 final, p.17 and proposed Article 12(3) at p.36. The present article does *not* take issue with the "economic continuity" doctrine which aims at preventing undertakings from evading liability by means of merging or through corporate restructuring.

resemblance to their predecessors. Although the change occurred in an incremental manner, the tipping point may be traced back to the seminal *Akzo* judgment. Accordingly, this section describes the evolution of the rules governing parental liability by identifying two distinct phases: pre- and post-*Akzo*.

*The pre-*Akzo *approach*

The first instance where a parent company was held liable for the anticompetitive behaviour of its subsidiaries occurred almost fifty years ago. In the *Dyestuffs* case in 1969 the Commission held ICI responsible for having participated in a cartel by giving its subsidiaries explicit directions to raise prices.[9] Hearing the case on appeal a few years later, the ECJ confirmed that the parent company may be found liable, where the anticompetitive behaviour is due to orders that it has given to its subsidiaries.[10] As the Court explained, the existence of separate legal personalities is immaterial; where the subsidiary "does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company", its actions "may in certain circumstances be attributed to the parent company".[11] A similar approach was taken in *AEG*. There, the Commission decided that AEG should "bear the blame" for the unlawful selective distribution system in question, notwithstanding the fact the infringements had been "largely committed by its subsidiaries".[12] The authority noted that the parent company had used its subsidiaries to conclude the distribution contracts and that the latter had merely acted "on behalf and for the account of AEG".[13] On appeal, the ECJ sided with the Commission and confirmed that the subsidiaries" conduct should be indeed "ascribed to the parent company".[14]

In line with this thinking, the authority explained in *Cartonboard* that it would impute liability to parent companies, "where more than one company in a group participated in the infringement"; or where there was "express evidence implicating the parent company of the group in the participation of the subsidiary" in the violation.[15] This approach was of course sensible. Where the parent company employs its subsidiaries as a vehicle for implementing an anticompetitive plan, it is essentially the "mastermind" of the antitrust violation and thus its real perpetrator. The legal test reflected that rationale, requiring that the Commission establish the existence of a connection between the control exercised by the parent company over the subsidiary and the transgression in question before imputing the latter's acts to the former. The authority would infer such a connection where more than one subsidiary had taken part in the same infringement, since in that case their involvement in the violation could be legitimately deemed as the result of the implementation of a group-wide policy designed by the parent company. In this respect, the existence of a "single economic unit" was a necessary, but *not* sufficient condition; for its liability to arise, the parent company should be shown to have itself contributed to the infringement, even if only indirectly through its subsidiaries. From this perspective, the "mastermind" theory has a strong deterrent appeal. It communicates that any

[9] *Dyestuffs* (IV/26.267) Commission Decision 69/243/EEC [1969] OJ L195/11.
[10] *Imperial Chemical Industries (ICI) v Commission* (48/69) ECLI:EU:C:1972:70, at [129]-[137].
[11] *ICI v Commission* (ECLI:EU:C:1972:70) at [133, 135]. See also *Europemballage Corporation* (IV/26.811) Commission Decision 72/21/EEC [1972] OJ L7/25, Article 1; *Europemballage Corporation and Continental Can Company v Commission* (6/72) ECLI:EU:C:1973:22, at [15]-[16] (although the issue was discussed from a jurisdictional perspective).
[12] *AEG-Telefunken* (IV/28.748) Commission Decision 82/267/EEC [1982] OJ L117/15, at [74].
[13] *AEG v Commission* (107/82) ECLI:EU:C:1983:293, p.3157.
[14] *AEG v Commission* (ECLI:EU:C:1983:293) at [53].
[15] *Cartonboard* (IV/33.833) Commission Decision 94/601/EC [1994] OJ L243/1, at [143].

attempts to exploit the parent-subsidiary model with a view to minimising legal responsibility for an antitrust infringement will not be tolerated.

Despite its advantages, however, the use of the "mastermind" theory was soon to dwindle. Somewhat ironically, the beginning of its "demise" may be identified with the arguments submitted by a parent company in its attempt to challenge a liability finding against it. Specifically, in its *Cartonboard* decision the Commission held, among others, Stora – the parent company of the group – responsible for the involvement of its subsidiaries in the infringement.[16] Stora did not deny its subsidiaries" participation in the cartel, but contested the Commission decision before the EU Courts claiming that the authority had not applied the correct criteria for establishing the existence of a "single economic unit".[17] It then identified the conditions that should – in its opinion – be demonstrated "before responsibility for the unlawful conduct of its subsidiaries may be attributed to the parent company *by virtue of their constituting a single economic unit*".[18] Dismissing Stora's plea, the General Court reiterated that the only relevant test is whether "the subsidiary does not independently decide its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company".[19] It then went on noting that Stora "had not disputed that *it was in a position to exert a decisive influence*" on its subsidiaries" commercial policy.[20] As a result, it was "unnecessary to establish whether it *actually* exercised that power" in view of the fact that wholly-owned subsidiaries "necessarily follow a policy laid down by the bodies which determine the parent company's policy under its statutes".[21] The General Court also took account of the fact that Stora had submitted no evidence suggesting that its subsidiaries had acted autonomously and that it had represented them in the administrative proceedings before the Commission.[22] Contesting the judgment on appeal, Stora complained that the General Court had reversed the burden of proof and had required the parent company to demonstrate that its subsidiary had acted independently, insofar as a 100% shareholding was held to be in itself sufficient for a finding of liability.[23] The ECJ, however, rejected the complaint as inaccurate, highlighting that the General Court had taken additional considerations into account beyond the size of the shareholding.[24]

Although nobody probably realised it at the time, the *Stora* judgements laid the groundwork for the transformation of the rules governing parental liability in EU competition law. Because the applicant misperceived its responsibility as stemming from the existence of a "single economic unit" between itself and its subsidiaries, it challenged the Commission decision based on this assumption. Examining then Stora's pleas, the EU Courts focused on the legal and evidential requirements for establishing a "single economic unit" without explicitly clarifying that parental liability in reality derived from the existence of a connection between the control exercised by the parent company over its subsidiaries and the antitrust transgression at hand, which was in that case inferred from the participation of several subsidiaries of the same group in the same infringement.[25] As a result, the judgments did little to correct the misimpression that the justification for parental liability was that the parent company and its subsidiaries form a "single economic unit".

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[16] *Cartonboard* (IV/33.833), at [158].
[17] *Stora Kopparbergs Bergslags v Commission* (T-354/94) ECLI:EU:T:1998:104, at [69]-[70].
[18] *Stora Kopparbergs Bergslags v Commission* (ECLI:EU:T:1998:104) at [69-70] (emphasis added).
[19] *Stora Kopparbergs Bergslags v Commission* (ECLI:EU:T:1998:104) at [79].
[20] *Stora Kopparbergs Bergslags v Commission* (ECLI:EU:T:1998:104) at [80] (emphasis added).
[21] *Stora Kopparbergs Bergslags v Commission* (ECLI:EU:T:1998:104) at [80] (emphasis added).
[22] *Stora Kopparbergs Bergslags v Commission* (ECLI:EU:T:1998:104), at [80]-[81].
[23] *Stora Kopparbergs Bergslags v Commission* (C-286/98 P) ECLI:EU:C:2000:630, at [25].
[24] *Stora Kopparbergs Bergslags v Commission* (ECLI:EU:C:2000:630), at [26-60].
[25] See, in particular, *Stora Kopparbergs Bergslags v Commission* (ECLI:EU:T:1998:104)) at [56]-[61], [78]-[81].

Admittedly, the *Bolloré and Others* judgment rectified this misunderstanding – at least partially. In 2004 the Commission held Bolloré and its subsidiary, Copigraph, jointly responsible for the latter's participation in the cartel. As the authority explained, not only was Copigraph a wholly-owned subsidiary of Bolloré, but it also belonged to the latter's special papers division, while the same individuals held key managerial positions in both companies. On this basis, the Commission concluded that the parent company "was necessarily informed of its subsidiary's participation in the cartel".[26] Challenging this finding before the General Court, Bolloré stressed that the evidence in question was not sufficient to warrant the conclusion that it was necessarily aware of the anticompetitive acts of its subsidiary.[27] Examining this plea, the Court acknowledged that a 100% shareholding "is not in itself sufficient to attribute liability to the parent for the conduct of its subsidiary" and noted that 'something more than the extent of the shareholding must be shown" in order to establish the parent company's awareness of its subsidiaries" anticompetitive behaviour.[28] It stressed, however, that evidence of the latter "may be in the form of indicia" and need not necessarily consist in direct evidence of instructions having been given by the parent company to its subsidiary to participate in the cartel.[29] On this basis and in light of the facts of the case, the General Court concluded that the Commission had been correct to attribute liability to the parent company.[30]

Although the General Court's judgment was eventually set aside by the ECJ,[31] two aspects of the judicial reasoning are noteworthy with respect to parental liability. On the one hand, it is clear that the Court did not perceive the existence of a "single economic unit" to be the justification for the attribution to parent companies of responsibility for the anticompetitive acts of their subsidiaries. Rather, some sort of link between the parent company and the infringement in question had to be established, even if only indirectly by means of indicia. On the other hand though, the nature and intensity of the necessary connection between the parent company and the antitrust violation in *Bolloré* differs from that in the pre-*Stora* jurisprudence. The mere fact that the parent company was *aware* of the anticompetitive acts of its subsidiaries appears to have sufficed for its liability to be triggered.[32]

*The post-*Akzo *approach*

In any event, the full extent of the implications of *Stora* became apparent in *Akzo Nobel*. In 2004 the Commission held, among others, Akzo Nobel – the parent company of the group – responsible

[26] *Carbonless Paper* (Case COMP/E-1/36.212) Commission Decision 2004/337/EC [2004] OJ L115/1, at [353]-[356].
[27] *Bolloré v Commission* (T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02 and T-136/02) ECLI:EU:T:2007:115, at [127].
[28] *Bolloré v Commission* (ECLI:EU:T:2007:115) at [132].
[29] *Bolloré v Commission* (ECLI:EU:T:2007:115) at [132].
[30] *Bolloré v Commission* (ECLI:EU:T:2007:115) at [133]-[150].
[31] *Papierfabrik August Koehler and Others v Commission* (C-322/07 P, C-327/07 P and C-338/07 P) ECLI:EU:C:2009:500. The ECJ found that the General Court had made an error of law "in failing to draw any legal conclusion from its finding that Bolloré's rights of defence had not been observed" (at [46]-[48]).
[32] This "awareness" test is ambiguous, insofar as it is open to multiple interpretations and does not allow one unequivocally to detect the rationale underpinning the imputation of parental liability. One possible construction is to argue that the parent company's awareness of the anticompetitive conduct of its subsidiary is *in itself* a manifestation of unlawful behaviour caught by the prohibitive scope of Articles 101 and 102 TFEU. This approach does not explain though why a person's mere awareness of the existence of an antitrust violation will not generally result in a finding that this person has participated in the infringement in the absence of any further connection. A second – and more sensible – interpretation of the "awareness" test would be that the parent company is held liable because it has accepted the risks of the infringement and/or has not taken steps to terminate it. See also below: "The 'failure to exercise vigilance' theory".

together with some of its subsidiaries for the latter's participation in the choline chloride cartel.[33] The authority justified its decision on the ground that Akzo Nobel formed a "single economic unit" with its wholly-owned subsidiaries and thus a "single undertaking".[34] Unsurprisingly, Akzo Nobel challenged the Commission's conclusion before the EU Courts. Instead, however, of expressly contesting the "single economic unit" rationale for the attribution of parental liability by pointing to earlier jurisprudence clearly requiring the existence of some sort of link between the parent company and the infringement in question, Akzo Nobel merely claimed that, for a parent company to be considered liable for the activities of its subsidiary, the decisive influence it exercises "must relate to the subsidiary's commercial policy *in the strict sense*".[35]

Considering this plea, the General Court dismissed Akzo Nobel's arguments and fully endorsed the Commission's "single economic unit" justification for holding a parent company liable for the anticompetitive acts of its subsidiaries. Specifically, the Court emphasised that "it is *not (...) because of a relationship between the parent company and its subsidiary in instigating the infringement*, or a fortiori, because the parent company is involved in the infringement, *but because they constitute* a *single undertaking* (…) that the Commission is able to address the decision imposing fines to the parent company of a group of companies".[36] Having explained this, the General Court then introduced a now well-established, yet highly controversial presumption according to which where a parent company holds 100% of the capital of a subsidiary which has committed an infringement, it is presumed "that [it] exercises decisive influence over the conduct of its subsidiary and that *they therefore constitute a single undertaking*".[37] In this case, "it is for the parent company to put before the Court any evidence relating to the economic and legal organisational links between its subsidiary and itself which in its view are apt to demonstrate *that they do not constitute a single economic entity*".[38] Hearing the case on appeal, the ECJ fully upheld the General Court's position.[39]

Unfortunately, the *Akzo Nobel* judgments were not an isolated incident. Rather, the "single undertaking" rationale permeates all subsequent jurisprudence on parental liability. In *Siemens Österreich*, for instance, the ECJ explained that "in certain circumstances, a legal person *who is not the perpetrator* of an infringement of the competition rules may nevertheless be penalized for the unlawful conduct of another legal person, *if both those persons form part of the same economic entity"*.[40] Similar statements may be found in virtually every judgment considering a parental liability-related plea. The shift in the judicial approach was obviously grist to the Commission's mill. On the one hand, the authority no longer had to establish the existence of a connection between the parent company and the infringement in question in order to hold it liable; all it had to demonstrate was that it constituted a "single economic unit" with its subsidiaries. On the other hand, the Commission's burden of proof was considerably eased in the case of wholly-owned subsidiaries thanks to the introduction of the *Akzo* presumption. Coincidentally, the timing of the *Akzo Nobel* judgments proved ideal for the authority. The Modernisation Regulation, which abolished the mandatory *ex ante*

[33] *Choline Chloride* (COMP/E-2/37.533) Commission Decision 2005/566/EC [2005] OJ L190/22, at [167]-[176].
[34] *Choline Chloride* (COMP/E-2/37.533) at [172].
[35] *Akzo Nobel and Others v Commission* (T-112/05) ECLI:EU:T:2007:381, at [36].
[36] *Akzo Nobel and Others v Commission* (ECLI:EU:T:2007:381) at [58] (emphasis added).
[37] *Akzo Nobel and Others v Commission* (ECLI:EU:T:2007:381) at [60] (emphasis added).
[38] *Akzo Nobel and Others v Commission* (ECLI:EU:T:2007:381) at [65] (emphasis added).
[39] *Akzo Nobel and Others v Commission* (C-97/08 P) ECLI:EU:C:2009:536, at [54]-[78].
[40] *Commission v Siemens Österreich and Others et Siemens Transmission & Distribution and Others v Commission*, (C-231/11 P to C-233/11 P) ECLI:EU:C:2014:256, at [45] (emphasis added).

notification system, had recently come into force.[41] As a result, the Commission now had the resources to pursue more cartel cases, which are the main area of enforcement where parental liability is regularly contested.[42] The consequences of *Akzo* were almost immediate. Ever since, the authority has adopted a long stream of decisions holding parent companies responsible for the anticompetitive transgressions of their subsidiaries – often solely on account of the fact that they own a 100% shareholding in the latter.

Unsurprisingly, parent companies have not been too happy with these developments. In fact, almost every action for annulment that reaches the EU Courts these days against Commission cartel decisions includes a plea that the authority has unlawfully imputed liability to the parent company for the anticompetitive acts of its subsidiaries. In cases of full ownership the bulk of the criticisms have been directed against the operation of the *Akzo* presumption. Initially, parent companies attempted to attack the empirical foundation of the presumption, arguing that the existence of a 100% shareholding may be indicative of the *ability* of the parent company to exercise decisive influence over the conduct of its subsidiary, but it is too weak to support in itself an inference that such decisive influence has *actually* been exercised.[43] Any sympathy that the EU Courts had for this argument, however, was rather short-lived.[44] Following *Akzo Nobel*, the typical response to similar challenges has been that a 100% shareholding suffices in itself to activate the presumption that the parent company has actually shaped the conduct of its subsidiary.[45] In fact, the EU Courts have even gone two steps further. Firstly, the parent company's stake in the subsidiary needs not be direct: indirect ownership through an intermediary company will suffice.[46] Secondly, full ownership is no longer required: the presumption may be triggered even where the parent company's shareholding nears – but falls short of – 100%.[47]

In this light, parent companies have also tried their luck at rebutting the *Akzo* presumption. To this end, they have advanced numerous arguments in the hope of demonstrating that their subsidiaries had autonomously determined their market conduct. All their arguments, however, have been dismissed by the EU Courts as irrelevant or insufficient to reverse the finding of liability. Indeed, the few instances where the Commission decision was annulled were due to the authority's breach of its duty to state reasons.[48] Inevitably, parent companies soon started complaining that the *Akzo* presumption is

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[41] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1.

[42] The increase in the number of cartel cases can be also explained by the introduction of the Commission's Leniency Programme (Commission Notice on Immunity from fines and reduction of fines in cartel cases [2006] OJ C298/17), as well as the adoption of the Cartel Settlement Procedure **(**Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases [2008] OJ C167/1).

[43] *Stora Kopparbergs Bergslags v Commission* (C-286/98 P) ECLI:EU:C:2000:630, at [22-23]; *Akzo Nobel and Others v Commission* (ECLI:EU:C:2009:536), at [43]-[47].

[44] *Stora Kopparbergs Bergslags v Commission*, Opinion of AG Mischo (C-286/98 P) ECLI:EU:C:2000:263, at [48]; *DaimlerChrysler v Commission* (T-325/01) ECLI:EU:T:2005:322, at [219]; *Bolloré v Commission* (ECLI:EU:T:2007:115), at [132].

[45] The EU Courts have insisted since *Akzo* that the reference to additional indicia in *Stora* was merely intended to identify all the elements on which the General Court had based its reasoning. (See, for instance, *Akzo Nobel and Others v Commission* (ECLI:EU:T:2007:381), at [61]; *Team Relocations and Others v Commission* (T-204/08 and T-212/08) ECLI:EU:T:2011:286, at [151]).

[46] See, for instance, *General Química and Others v Commission* (C-90/09 P) ECLI:EU:C:2011:21, at [84]-[90].

[47] *Michelin v Commission* (T-203/01) ECLI:EU:T:2003:250, at [290]; *Total v Commission* (T-344/06) ECLI:EU:T:2012:479, at [38]; *ENI v Commission* (C-508/11 P) ECLI:EU:C:2013:289, at [47-49] ; *Schindler Holding and Others v Commission* (C-501/11 P) ECLI:EU:C:2013:522, at [109]; *SLM and Ori Martin v Commission* (T-389/10 and T-419/10) ECLI:EU:T:2015:513, at [376]. Moreover, see *Keramag Keramische Werke and Others v Commission*, (T-379/10 and T-381/10) ECLI:EU:T:2013:457, at [313]-[315].

[48] *L'Air liquide v Commission* (T-185/06) ECLI:EU:T:2011:275, at [63-84]; *Koninklijke Grolsch v Commission* (T-234/07) ECLI:EU:T:2011:476, at [76-93]; *Edison v Commission* (T-196/06) ECLI:EU:T:2011:281, at [56-94]; *Alstom v Commission*

practically impossible to rebut and thus contravenes the principle of effective judicial protection.[49] Despite the fact, however, that not even once has the *Akzo* presumption been successfully reversed,[50] the EU Courts have systematically reaffirmed its rebuttability by stressing, on the one hand, that any evidence of the lack of actual exercise of decisive influence lies within the knowledge of parent companies and subsidiaries, and, on the other hand, that, if mere unsubstantiated assertions were sufficient for its rebuttal, the presumption would be largely robbed of its usefulness. On this basis, the EU Courts have consistently defended the fairness of the *Akzo* presumption by maintaining that, even though it is difficult to rebut, it "remains within acceptable limits".[51]

In any event, parent companies may be held responsible for their subsidiaries' anticompetitive acts even in the absence of a 100% shareholding, where they have the ability to exercise decisive influence over their conduct *and* have actually exercised such influence. In this scenario, the EU Courts have consistently held that it is for the Commission to demonstrate both conditions "on the basis of factual evidence, including, in particular, any management power" exercised by the parent company over the subsidiary.[52] The size of the holding is indicative, but not determinative in this regard. In *Fuji Electric* the Court confirmed that a parent company will usually exercise decisive influence over the conduct of its subsidiary, where it holds a majority interest in its capital.[53] It underlined, however, that a minority interest may equally enable a parent company to control its subsidiary's behaviour, "if it is allied to rights greater than those normally granted to minority shareholders in order to protect their financial interests and which, when considered in the light of a set of consistent legal or economic indicia, are such as to show that a decisive influence is exercised over the subsidiary's market conduct".[54] Along these lines, in *Toshiba* the Court found that the Commission had been right to attribute liability to Toshiba for the conduct of a joint venture, in which it held a share of only 35.5%, since it enjoyed veto rights which went beyond the normal rights of minority shareholders and

(T-517/09) ECLI:EU:T:2014:999, at [97-118]. See also *Elf Equitaine v Commission* (C-521/09 P) ECLI:EU:C:2011:620, at [144]-[170].

49 Article 47 of the Charter of Fundamental Rights of the European Union (CF.R) [2000] OJ C364/1, inspired from the right to a fair trial (Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) [1950]). This is one of the main criticisms raised by scholars, too. See, for instance, A. Svetlicinii, "Parental Liability for the Antitrust Infringements of Subsidiaries: A Rebuttable Presumption or Probatio Diabolica?" (2011) 10 European Law Reporter 288; M.Bronckers and A.Vallery, "*No Longer Presumed Guilty?* The Impact of Fundamental Rights on Certain Dogmas of EU Competition Law" (2011) 34 World Competition 535, pp.548-558; Y.Botteman, J.Joshua and L.Atlee, "'You Can't Beat the Percentage" – The Parental Liability Presumption in EU Cartel Enforcement" (2012) European Antitrust Review 3; S.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) 3(1) Journal of European Competition Law & Practice 11; B.Leupold, "Effective enforcement of EU competition law gone too far? Recent case law on the presumption of parental liability" (2013) 34(11) European Competition Law Review 570; L.F.Pace, "The Parent-Subsidiary Relationship in EU Antitrust Law and the *AEG Telefunken* Presumption: Between the Effectiveness of Competition Law and the Protection of Fundamental Rights" (2014) 7(10) Yearbook of Antitrust and Regulatory Studies 191; J.T.Lang, "How Can the Problem of the Liability of a Parent Company for Price-Fixing by a Wholly-Owned Subsidiary Be Resolved?" (2014) 37 Fordham International Law Journal 1481, at pp.1519-1521. cf. L.Solek and S.Wartinger, "Parental Liability: Rebutting the Presumption of Decisive Influence" (2015) 6(2) Journal of European Competition Law & Practice 73.

50 In *Gosselin Group and Stichting Administratiekantoor Portielje v Commission* (T-208/08 and T-209/08) ECLI:EU:T:2011:287, at [51-58], the General Court found that the presumption had been rebutted. The ECJ, however, disagreed, eventually dismissing the action for annulment as unfounded (*Commission v Stichting Administratiekantoor Portielje* (C-440/11 P) ECLI:EU:C:2013:514, at [58-69]).

51 *Elf Equitaine v Commission* (ECLI:EU:C:2011:620) at [62], citing *Spector Photo Group and Van Raemdonck* (C-45/08) ECLI:EU:C:2009:806, at [43-44], and *Janosevic v Sweden* (Application No 34619/97), Judgment of 23 July 2002, at [101*ff*].

52 *Avebe v Commission* (T-314/01) ECLI:EU:T:2006:266, at [136].

53 *Fuji Electric v Commission* (T-132/07) ECLI:EU:T:2011:344, at [182].

54 *Fuji Electric v Commission* (ECLI:EU:T:2011:344) at [183]. See also at [184] and *Sasol and Others v Commission* (T-541/08) ECLI:EU:T:2014:628, at [49].

conferred on it joint control of the joint venture.[55] Therefore, the Commission may impute liability to a parent company for an antitrust infringement committed by its subsidiary, where it has produced sufficient evidence demonstrating that the former played a key role in the market conduct of the latter and that the two entities thus constitute a "single economic unit".

At this point, it is important to stress that, contrary to the early cases where the Commission was addressing its decisions only against the parent company,[56] post-*Akzo* parent companies are held jointly and severally responsible with their subsidiaries. Indeed, according to now settled case-law, "where several persons may be held personally liable for the participation in an infringement *of one and the same undertaking* for the purposes of competition law, they must be regarded as jointly and severally liable for that infringement".[57] In this light, "the Commission will be able to regard the parent company as jointly and severally liable for the payment of the fine imposed on its subsidiary", unless the parent company adduces sufficient evidence to show that the subsidiary acts independently on the market.[58] This does not mean, however, that the authority is *obliged* to address the decision against both the parent company and the subsidiary. Rather, that the Commission "may choose to penalize either the subsidiary that participated in the infringement or the parent company that controlled it during that period or both of them jointly and severally".[59] Nevertheless, if the authority decides to go after the subsidiary, its liability should be confined "to the extent that it itself participated in the infringement".[60] In other words, a subsidiary may not be found retroactively liable for an infringement committed by its parent company, before it was formed.[61]

Although the principle of joint and several liability seems unambiguous at first glance, in practice its application has caused some tension between parent companies and subsidiaries, especially where the latter are owned by a new parent company at the time when the fine is paid. In these circumstances, the question arises to what extent the parent company is entitled to contribution from the subsidiary with respect to the financial liability in question and *vice versa*. This scenario actually occurred in *Siemens Österreich and Others v Commission*, where the addressees of the Commission decision challenged it, among others, on the ground that the authority had failed to specify the degree of liability of each company for the fine imposed on them jointly and severally in violation of the principle that penalties must be specific to the offender and the offence concerned. Siding with the applicants, the General Court took the view that it was indeed for the Commission – rather than national courts – "to determine the respective shares of the various companies of the fines imposed on them jointly and severally" and that, unless otherwise specified in the decision, it should be considered that liability for the infringement is attributed to the parent company and the subsidiary "in equal measure".[62] Hearing, however, this issue on appeal, the ECJ disagreed and set aside the General Court's judgment. Although the ECJ reaffirmed the principle of joint and several liability in the case

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[55] *Toshiba v Commission* (T-104/13) ECLI:EU:T:2015:610, especially at [107-113] (upheld on appeal: *Toshiba v Commission* (C-623/15 P) ECLI:EU:C:2017:21). See also *Dow Chemical v Commission* (T-77/08) ECLI:EU:T:2012:47, at [92].
[56] An exception in this regard is *ZOJA/CSC – ICI* (IV/26.911) Commission Decision 72/457/CEE [1972] OJ L299/51, where the Commission held both the parent company (CSC) and the subsidiary (Istituto) responsible for the infringement in question. This choice, however, can be explained away by the need to establish the Commission's jurisdiction (see Joined *Istituto Chemioterapico Italiano and Commercial Solvents v Commission* (6/73 and 7/73) ECLI:EU:C:1974:18, at [41]).
[57]*Siemens Österreich and VA Tech Transmission & Distribution v Commission* (T-122/07) ECLI:EU:T:2011:70, at [150] (emphasis added). See also [149].
[58] *Akzo Nobel v Commission* (ECLI:EU:C:2009:536), at [61]. (emphasis added)
[59] *Parker ITR and Parker-Hannifin v Commission* (T-146/09) ECLI:EU:T:2013:258, at [125]. (references omitted)
[60] *Parker ITR and Parker-Hannifin v Commission* (ECLI:EU:T:2013:258) at [126].
[61] *Parker ITR and Parker-Hannifin v Commission* (ECLI:EU:T:2013:258) at [126-127].
[62] *Siemens Österreich and Others v Commission* (ECLI:EU:T:2011:70) at [157-158].

of parent companies and subsidiaries, it stressed that the rules governing the attribution of liability in EU competition law apply to the "undertaking", rather than the legal persons making it up. Consequently, although the Commission has the power to hold a parent company and a subsidiary jointly and severally liable for a competition law infringement "from an external perspective", it does not have "the power to determine the shares to be paid by those held jointly and severally liable from the perspective of their internal relationship"; this "internal" allocation is for the national courts to decide.[63]

A critique of the "single undertaking" argument as a justification for parental liability

The *Akzo Nobel* judgments marked a clear departure from the earlier rules governing parental liability in EU competition law. The requirement for some sort of link between the parent company and the antitrust infringement in question was abandoned. At the same time, a much more expansive test emerged in its place, pursuant to which parental liability is contingent on the existence of a "single economic unit" between the parent company and its subsidiaries and stems from the fact that they form a "single undertaking". This section is devoted to critically examining this new theory underpinning the attribution to parent companies of responsibility for the anticompetitive acts of their subsidiaries.

To better understand the EU Courts' reasoning, a few preliminary remarks are in order. As noted earlier, the EU competition rules are addressed against "undertakings". Although the term is not defined in the Treaty, its contours have been traced in considerable detail in the jurisprudence of the EU Courts. When asked in the seminal *Höfner and Elser* case whether a public body could be liable under the EU competition provisions, the ECJ grasped the opportunity to explain that the definition of an "undertaking" covers "any entity engaged in an economic activity, regardless of the legal status of that entity and the way in which it is financed".[64] Further elaborating on this definition in *Hydrotherm*, the Court stressed that the term "undertaking" must be understood as designating an economic – rather than a legal – unit.[65] In this regard, the existence of distinct legal entities is immaterial; what matters is – as elucidated in *Shell* – that there be a "unitary organisation of personal, tangible and intangible elements which pursues a specific economic aim on a long-term basis and can contribute to the commission of an infringement".[66] Therefore, an undertaking may consist of several persons – whether natural or legal.

The choice to identify the notion of "undertaking" with an "economic unit" is far from arbitrary; in fact, it serves a number of important purposes. First of all, conceiving the addressees of the antitrust rules as economic – rather than legal – units secures the effective protection of competition and consumers by preventing market operators from evading liability solely on account of their legal form or because they typically consist part of the state.[67] Additionally, disassociating the notion of "undertaking" from legal form and adopting an EU-wide definition eliminates the risk of

[63] *Commission v Siemens Österreich and Others* (ECLI:EU:C:2014:256) at [58].
[64] *Höfner and Elser* (C-41/90) ECLI:EU:C:1991:161, at [21], and *AOK-Bundesverband and Others* (C-264/01, C-306/01, C-354/01 and C-355/01) ECLI:EU:C:2004:150, at [46]. According to settled case-law, an activity is economic in nature when its characteristic feature is the offering of goods and services on a given market (*Commission* v *Italy* (C-35/96) ECLI:EU:C:1998:303, at [36]).
[65] *Hydrotherm* (170/83) ECLI:EU:C:1984:271, at [11].
[66] *Shell* v *Commission* (T-11/89) ECLI:EU:T:1992:33, at [311].
[67] See, for instance, *Polypropylene* (IV/31.149) Commission Decision 86/398/EEC [1986] OJ L230/1, at [102]; *Pre-Insulated Pipe Cartel* (IV/35.691/E-4) Commission Decision 1999/60/EC [1998] OJ L24/1, at [157]-[160].

inconsistencies in the application of Articles 101 and 102 TFEU, which may arise from differences in the specific way legal personality has been formulated in the various Member States. Last but not least, the "economic unit" criterion ensures that the reach of the law is confined only to those circumstances, where competition may be actually compromised. Indeed, competition is feasible only among economic operators who are able independently to determine the policy which they intend to adopt on the common market. By contrast, there can be no real rivalry between two companies tied together through ownership and control, notwithstanding their separate legal identities. In this sense, the "economic unit" understanding of the notion of "undertaking" is far-sighted and well-aligned with the realities of commercial life.[68]

Does the "single economic unit" theory, however, have the exegetical power that the EU Courts have assigned to it, when it comes to attributing to parent companies responsibility for the antitrust transgressions of their subsidiaries? In other words, is the doctrine really fit for the purposes of imputing parental liability? The article submits that this theory lacks the capacity to explain – let alone found – the ascription of a subsidiary's anticompetitive acts to the parent company. The reason for this is that the thinking of the EU Courts is premised on a serious fallacy, which has lured judges into a number of unfortunate conclusions.[69]

The fallacy in the EU Courts' reasoning lies in the idea that liability stems *ipso jure* from the notion of "undertaking".[70] To understand why this premise is mistaken, it is necessary to unpack the judicial syllogism. This may be broken down into the following propositions: (a) the parent company and the subsidiary are an economic unit; (b) an economic unit is an undertaking; (c) an undertaking may be liable for a competition infringement; (d) therefore, both the parent company and the subsidiary may be liable for a competition infringement. Whilst this conclusion is not necessarily invalid, it is not always sound either. The reason becomes apparent if one asks themselves whether liability is ascribed to *all* the entities constituting a corporate group, or whether a subsidiary may conversely bear responsibility for the antitrust infringements of its parent company. The answer is obviously negative; the Commission does not hold responsible *all* the companies constituting a single economic unit, but selects only *some* of them to address its decision.[71] Likewise, subsidiaries may not be held liable for the antitrust transgressions of their parent companies, as the Courts have expressly confirmed.[72] If the justification for the attribution of liability were genuinely that the various entities compound an "undertaking", then should not all the entities making up that undertaking share the blame for the wrongdoing of any entity in the "economic unit"? The fact that only some of them are chosen to suffer the repercussions of the unlawful behaviour is not a "limitation (…) of a purely practical nature" – as per the EU Courts' contention;[73] rather, it implies that the ascription of liability is in reality informed by additional considerations. Therefore, insofar as it fails to explain the selection dimension of the attribution process, the "single economic unit" theory lacks the capacity to provide a sufficient justification for parental liability.

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[68] Regrettably, the criteria for ascertaining or refuting the existence of an "economic unit" remain unclear. In any event, it is important to remember that the definition of an undertaking is distinct from the question of the imputation of liability. See W.Wils, "The Undertaking as Subject of EC Competition Law and the Imputation of Infringements to Natural or Legal Persons" (2000) 25(2) European Law Review 99; A.Jones, "The Boundaries of an Undertaking in EU Competition Law" (2012) 8(2) European Competition Journal 301.

[69] For a similar critique, see Thomas, '*Guilty of a Fault that One Has Not Committed*'.

[70] *Commission v Siemens Österreich and Others* (ECLI:EU:C:2014:256) at [57].

[71] O.Odudu and D.Bailey, "The Single Economic Entity Doctrine in EU Competition Law" (2014) 51 Common Market Law Review 1721, pp.1746-1747.

[72] See footnotes 60 and 61 above.

[73] *Commission v Siemens Österreich and Others* (ECLI:EU:C:2014:256) at [55].

Regrettably, this point has been missed by the EU Courts, which have been too quick to reject parent companies" complaints against the rules governing parental liability post-*Akzo*. As a result, their jurisprudence presents significant shortcomings.

First of all, because the "single economic unit" doctrine does not really explain why a parent company should bear responsibility for the acts of its subsidiary, it is impossible to tell whether parental liability in EU competition law is personal or vicarious. Indeed, theories of personal liability – such as direct perpetration, indirect perpetration or complicity – assume some connection between the unlawful outcome and the conduct of the person held responsible for it. Likewise, theories of vicarious liability – such as product liability or employer liability – explicitly articulate the policy rationale and conditions for holding a third party responsible for the acts of someone else. The "single economic unit" theory, however, merely sketches out the profile of the potential "infringer" of the competition rules; neither it requires a connection between the unlawful outcome and the conduct of the parent company nor it makes in itself a policy argument for holding parent companies accountable for the anticompetitive behaviour of their subsidiaries. Therefore, the letter at least of the "single economic unit" doctrine does not allow any conclusion about the rationale underpinning parental liability.

Nevertheless, one might claim that the answer to this question may be deduced from the way in which this test – and in particular the "actual exercise of decisive influence" criterion – has been applied by the EU Courts. The latter, however, has been implemented in such a vague and inherently inconsistent manner over the years that it is impossible to draw any meaningful inference from its use. As explained, pre-*Akzo* the "exercise of decisive influence" requirement assumed a direct connection between the parent company and the infringement – typically in circumstances where the parent company had employed its subsidiary as an "organ" for the implementation of the anticompetitive practice. Post-*Akzo*, however, evidence of actual control by the parent company over the "commercial policy" of the subsidiary – very expansively construed – suffices to trigger the former's responsibility.[74] In fact, in *Schindler Holding* the EU Courts emphasised that the imputation of parental liability does not even require proof "that the parent company influences its subsidiary's policy in the specific area in which the infringement occurred".[75]

Because of this, the post-*Akzo* jurisprudence caused strong suspicions that parental liability is vicarious in nature; the parent company is ultimately held responsible not for its own conduct, but for the acts of a third party – in this instance, its subsidiary.[76] These suspicions are not groundless. In *Akzo Nobel*, for example, the ECJ invoked the "single economic unit" theory to explain why the Commission may impute liability to the parent company "without having to establish the *personal* involvement of the latter in the infringement".[77] Holding, however, parent companies vicariously

[74] *Akzo Nobel and Others v Commission* (ECLI:EU:T:2007:381) at [63]-[65].

[75] *Schindler Holding and Others v Commission* (T-138/07) ECLI:EU:T:2011:362, at [82], [85]. See also *Dow Chemical* (ECLI:EU:T:2012:47) at [106].

[76] Vicarious liability is strict, insofar as it is not contingent on some form of *mens rea*. Strict liability, however, is not necessarily vicarious; rather, it may be personal, where the constituent elements of the offence or crime in question simply require some type of conduct by the liable person (driving, for instance, over the speed limit). Whether antitrust liability is strict or not is ambiguous, especially in light of Article 23(1) of Regulation 1/2003 which implies that a fine may only be imposed where the infringement has been committed negligently or intentionally (on this, see C.Banfi, "Defining the Competition Torts as Intentional Wrongs" (2011) 70(1) Cambridge Law Journal 83). Nevertheless, it is important not to confuse the two concepts. Both parent companies and the EU Courts have employed the term 'strict" liability to refer to what is in reality vicarious liability, i.e. liability for the acts of another entity.

[77] *Akzo Nobel and Others v Commission* (ECLI:EU:C:2009:536) at [59]. See also *Commission v Siemens Österreich and Others* (ECLI:EU:C:2014:256), at [47]; *Commission* v *Tomkins* (C-286/11 P) ECLI:EU:C:2013:29, at [39]; *Roca Sanitario v Commission* (T-408/10) ECLI:EU:T:2013:440, at [201]; *Total v Commission* (C-597/13 P) ECLI:EU:C:2015:613, at [38].

liable for the transgressions of their subsidiaries would contravene the fundamental principle of personal responsibility that underpins EU competition law. Indeed, the EU Courts have repeatedly stressed that, "given the nature of the infringements in question and the nature and degree of severity of the ensuing penalties", competition liability must be "personal in nature".[78] This means that "where [an undertaking] infringes the competition rules, it falls (…) to that entity to answer for that infringement".[79] Therefore, undertakings may only be responsible for their own anticompetitive acts. To soothe the concerns that parental liability is in fact vicarious, the EU Courts have ambiguously asserted that "the parent company is penalised for an infringement which it is deemed to have committed *itself*",[80] even though its involvement is rather indirect.[81] If parental liability is personal though, the question then becomes *how* the parent company has committed the infringement, i.e. what conduct on its part is objectionable.

The question is critical from a deterrence perspective. Like all liability rules, parental liability is prone to discourage parent companies from behaving (or not behaving) in a particular manner. The "single economic unit" theory – as applied by the EU Courts – seems to suggest that the problematic conduct on part of the parent company is that it has somehow shaped certain aspects of the general commercial behaviour of its subsidiary. Such "influence", however, is part and parcel of the parent-subsidiary relationship. Consequently, it is unclear what actions or omissions parent companies should steer clear of. The answer to this question is further obscured by the fact that, as will be explained shortly, arguments that the parent company had taken steps to prevent the infringement or had even explicitly instructed the subsidiary not to participate in it have been dismissed by the EU Courts as irrelevant or insufficient to reverse the finding of liability.[82] In this light, one is left wondering what precisely parental liability is intended to discourage.

In a sense – and rather paradoxically, the answer is nothing. Indeed, parental liability, as applied by the EU Courts, appears to be nothing more than a vehicle for increasing the level of the fines, on the one hand, and ensuring their recovery, on the other.[83] Because the maximum 10% cap is calculated based on the undertaking's total turnover, rather than that of the subsidiary only, the "single economic unit" enables the Commission to impose higher financial penalties for competition infringements with a view to reinforcing the dissuasive effect of its enforcement action.[84] At the same time, parental liability equips the authority with an "additional legal device" to secure the recovery of fines, thereby minimising – as the EU Courts have explained – "the risk of insolvency, which is part of the objective of deterrence pursued generally by competition law".[85] While these concerns are certainly valid

[78] *Commission v Anic Partecipazioni* (C-49/92 P) ECLI:EU:C:1999:356, at [78].
[79] *ETI and Others* (C-280/06) ECLI:EU:C:2007:775, at [39]; *Akzo Nobel and Others v Commission* (ECLI:EU:C:2009:536) at [56].
[80] *Bolloré v Commission* (T-372/10) ECLI:EU:T:2012:325, at [52]. (emphasis added) Also: *Metsä-Serla Oyj and Others v Commission* (C-294/98 P) ECLI:EU:C:2000:632, at [34]; *Schunk and Schunk Kohlenstoff-Technik v Commission* (T-69/04) ECLI:EU:T:2008:415, at [74]; *Kendrion v Commission* (C-50/12 P) ECLI:EU:C:2013:771, at [55].
[81] *Akzo Nobel and Others v Commission* (ECLI:EU:C:2009:536) at [77]; *Bolloré v Commission* (T-372/10) at [52].
[82] See section "The 'failure to exercise vigilance' theory" and footnotes 98-101 below.
[83] Indeed, even in the Commission's early decisional practice, it is clear that parental liability is intended to address the so-called "judgment proof" problem (S.Shavell, "The Judgment-Proof Problem" (1986) 6 International Review of Law and Economics 45). See, for instance, the wording in *LdPE* (IV/31.866) Commission Decision 89/191/EEC [1989] OJ L74/21, at [55]; *PVC* (IV/31.865) Commission Decision 94/559/EC [1994] OJ L239/14, at [44].
[84] Commission officials have explicitly acknowledged this policy stance (e.g. C.Mayock, "Liability of Parents and Subsidiaries in EU Competition Law" (12th EU-China Competition Week, 14-18 March 2016) available at http://www.euchinacomp.org/attachments/article/492/Day_3_Session%202_MAYOCK_Liability_of_parents_and_subsidiaries.pdf).
[85] *Commission v Siemens Österreich and Others* (ECLI:EU:C:2014:256) at [59]; *Akzo Nobel and Others v Commission* (T-47/10) ECLI:EU:T:2015:506, at [427].

though, it is not obvious that parental liability is the only solution – at least in its current form.[86] Deterrence considerations of this kind do not illuminate why parent companies *should* share the blame for the infringement even in the absence of a concrete insolvency risk, whereas – and most crucially – they are very difficult to reconcile with the principle that antitrust responsibility is personal in nature.

As was to be expected, the ambiguous use of the "single economic unit" theory for the purposes of justifying parental liability has led the EU Courts into some unfortunate statements. Indeed, European judges have invoked the "single economic unit" doctrine not only in order to rationalise the imputation of liability to parent companies for the antitrust transgressions of their subsidiaries, but also in order to legitimize the disapplication of core legal principles. Sadly, the standard reply to criticisms that the rules governing parental liability contravene the principle that responsibility must be personal or that the sanction must be specific to the offender and the offence, has been that these principles operate at the level of the "undertaking" only – since it is "undertakings" that are the addressees of the EU competition provisions – and *not* at the level of the specific persons that make it up. In *Siemens Österreich*, for example, the ECJ stressed that the rules and principles of EU competition law are to be applied *only* to the undertaking concerned and not to the legal persons of which the undertaking consists.[87]

This reasoning, however, is at best dubious and at worst dangerous. By definition, personal responsibility assumes the existence of *personhood*, insofar as it is only entities with legal personality that have the capacity to bear legal obligations *and* rights. Were the EU Courts' position to be accepted, it would mean that, although a parent company may be held liable for a competition infringement allegedly because it constitutes an "economic unit" with the subsidiary which committed it, it is not entitled to claim the protection of fundamental legal principles, because such safeguards are only available to "undertakings". The mere fact, however, that "the authors of the Treaties chose to use the concept of an undertaking to designate the perpetrator of an infringement of competition law, who is liable to be punished pursuant to Articles [101 TFEU and 102 TFEU], and not other concepts such as the concept of a company or firm or of a legal person"[88] does not explain why the natural or juridical persons which make up the undertaking may be deprived of the protection which is otherwise afforded to them by the CFR and the general principles of EU law (rather than EU *competition* law).[89]

In conclusion, not only does the "single economic unit" theory lack the capacity to explain and justify parental liability, but also its application by the EU Courts has been deeply problematic.

In search of alternative theories of parental liability

The shortcomings of the "single economic unit" theory force the question afresh: why and in what circumstances may parent companies bear responsibility for the anticompetitive acts of their subsidiaries? The post-*Akzo* approach is no longer defensible and should be abandoned by the EU Courts. This does not imply though that parent companies may never be exposed to antitrust liability.

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[86] See the discussion in C.Koenig, "An Economic Analysis of the Single Economic Entity Doctrine in EU Competition Law" (2017) Journal of Competition Law & Economics 1, at pp.43-44, advance access).
[87] *Commission v Siemens Österreich and Others* (ECLI:EU:C:2014:256) at [55-56].
[88] *Commission v Siemens Österreich and Others* (ECLI:EU:C:2014:256) at [42].
[89]It is interesting that the EU Courts have not applied this reasoning with respect to the rights of defence or the duty to state reasons. Where such pleas have been raised, they have been examined at the level of the legal person in question, rather than the undertaking. The reasons for this differentiation have not been made explicit.

On the contrary, calling the entity at the top of the corporate group to answer for the competition transgressions of its subsidiaries may be well-justified on alternative grounds. The letter of Articles 101 and 102 TFEU certainly allows for this. While both provisions proscribe specific outcomes – i.e. restrictions of competition by object or by effect and abuses of dominance, they are completely silent on what conduct may trigger their application or on the degree or type of contribution required for antitrust liability to arise. As such, they are very pliable and have the capacity to accommodate multiple modes of perpetration, as well as multiple justifications for the imputation of liability. In this light, this section is devoted to exploring alternative rationales for parental liability in EU competition law. The "mastermind" theory, as developed in the early jurisprudence of the EU Courts, remains appropriate for those instances where the parent company has exploited the parent-subsidiary structure of the corporate group in order to perpetrate the infringement.[90] Nevertheless, parental liability may be desirable beyond this rather narrow scenario. Therefore, two additional rationales for attributing to parent companies responsibility for the anticompetitive acts of their subsidiaries are contemplated below: the "failure to exercise vigilance" theory and the "enterprise liability" argument.

The "failure to exercise vigilance" theory

Parental liability may be called-for not only where the parent company has instructed its subsidiaries to commit the competition infringement in question, but also where it has failed to exercise vigilance so as to ensure that their behaviour does not contravene the EU competition rules. The "failure to exercise vigilance" theory is promising, but requires further elaboration. First of all, it must be clarified that parental liability under this theory is derivative, but not vicarious. Although its responsibility is contingent on the subsidiary's breach of the competition rules, the parent company is held accountable for its *own* conduct, i.e. its failure to be sufficiently watchful for indications of the unlawful behaviour in question and proactive in ensuring that its subsidiary was conducting itself on the market in compliance with competition law. The ensuing question, however, is whether the EU competition rules may be construed as encompassing such an ongoing obligation of vigilance. Admittedly, this interpretation has not been expressly endorsed so far.[91] Nevertheless, one may plausibly argue that a "vigilance duty" is actually embedded in Articles 101 and 102 TFEU. Indeed, both provisions restrict the economic freedom of undertakings by conferring upon them an obligation to ensure that their activities do not distort competition. This obligation may be conceptualised both in negative and positive terms: negatively as a requirement to refrain from anticompetitive practices and positively as a responsibility to be alert to and take measures against the risk of unlawful behaviour in the economic unit. The nature of competition as a public interest meriting protection further corroborates the two-sided conceptualization of antitrust liability. If this argument is accepted, the duty to be vigilant against the hazard of anticompetitive behaviour in the unit stems directly from the EU competition rules.[92]

In this case, however, the obligation to exercise vigilance applies to all the entities comprising the economic unit. One may thus reasonably wonder why parent companies are singled out. The answer lies in the fact that the very ability to exercise vigilance assumes, first, access to inside information

[90] See J.Briggs and S.Jordan, "Presumed Guilty: Shareholder Liability for a Subsidiary's Infringements of Article 81 EC Treaty" (2007) 8(1) Business Law International 1.

[91] See, however, *Stora Kopparbergs Bergslags v Commission* (ECLI:EU:T:1998:104) at [83-84]. Also: *Dow Chemical v Commission* (ECLI:EU:T:2012:47) at [101].

[92] See also K.Ost, "From Regulation 1 to Regulation 2: National Enforcement of EU Cartel Prohibition and the Need for Further Convergence" (2014) 5(3) Journal of European Competition Law & Practice 125, at p.127.

about the activities of the entity in question, and second, the power to prevent or address missteps by taking appropriate measures. These two elements typically exist in hierarchical settings, such as the relationship between a parent company and its subsidiary, where links of ownership and control enable the entity at the top to direct and oversee the activities of the entity at the bottom. The ability of a parent company to exercise vigilance against potential violations of the competition rules by its subsidiary will inevitably depend on the precise features of their relationship and is eventually a factual determination. For instance, a parent company whose subsidiary is required to keep it regularly informed of its sales and profits may be in a position to detect unusual patterns of commercial activity or suspicious increases in the prices charged. Likewise, a parent company whose directors hold managerial positions both in it and in the subsidiary is likely to have a better picture of the subsidiary's market conduct and a greater ability to direct it. In this sense – and contrary to the "single economic unit" theory, the "failure to exercise vigilance" justification for attributing parental liability embeds an effective criterion for selecting the legal persons within the corporate group which should bear responsibility for the infringement.

The "failure to exercise" vigilance theory is very appealing from a deterrence perspective. At the policy level, it is well-suited to encourage all entities in the group – and in particular parent companies – to keep a watchful eye over the conduct of the other members – especially their subsidiaries – and to take immediate action in case of a potential breach of the competition rules. At the enforcement level, the theory is capable of accommodating the Commission's current practice of imposing high fines for deterrence purposes. Since parent companies are held responsible for their *personal* contribution in the anticompetitive behaviour of the undertaking, the fine may be calculated on the basis of the joint turnover of the parent company and the implicated subsidiary, whereas liability for paying it may be joint and several. Furthermore, the "vigilance" theory could mitigate some currently paradoxical aspects of the EU Courts' jurisprudence by casting a different light on them. Indeed, if parental liability derives from the parent company's failure to detect and take action against the subsidiary's unlawful behaviour, it is irrelevant that "it gave no instructions to its subsidiaries which might (…) have authorised or encouraged contacts contrary to Article [101 TFEU], and had no knowledge of any such contacts".[93] Equally immaterial would be the fact that the parent company has never operated itself in the sector in question or that the subsidiary determined autonomously its day-to-day operations, their market acquisitions, the conclusion of contracts or their pricing policy.[94] The critical question is rather whether the parent company could have taken measures to prevent the infringement at hand, or, in the alternative, whether it could have detected it and brought it to an end.

Nevertheless, for the operation of the "failure to exercise vigilance" theory to be coherent, the blamed entity must be given the chance to contest its liability – in the same way that its subsidiary may claim, for instance, that it did not participate in the cartel meeting in question. In principle, two different arguments may be advanced. The first is that the parent company was not sufficiently "close" to the subsidiary in financial, legal, organizational and structural terms and was thus unable to exercise vigilance against the risk of unlawful behaviour on its part. Considering, however, the ownership connection between parent companies and subsidiaries and its typical 'spillover" implications for control, the threshold for this argument to succeed is likely to be very high. An exceptional example in this regard might be the case of pure financial investors: in rare circumstances, a parent company

[93] *Schindler Holding and Others* (ECLI:EU:T:2011:362) at [85].
[94] See, for instance, *FMC v Commission* (T-197/06) ECLI:EU:T:2011:282, at [131]; *ENI v Commission* (ECLI:EU:C:2013:289) at [64-67]; *Keramag Keramische Werke and Others v Commission* (ECLI:EU:T:2013:457) at [308-322].

could in principle escape liability, where its role was exhausted to providing financial assistance to the subsidiary and it lacked even the theoretical possibility of influencing in any way the latter's management.[95] Apart from this scenario, the Commission appears to have identified two further instances in which a parent company might theoretically evade liability: where the parent company holds 100% of the shares in the subsidiary only temporarily and for a short period and where legal reasons prevent the parent company from fully exercising its control over the subsidiary.[96]

In any event, a second argument is also conceivable, that is that the parent company did everything in its power to prevent the infringement in question and/or bring it to an end, and thus cannot be regarded as having failed to exercise vigilance. Indeed, for their responsibility under this theory to be truly personal, parent companies should be given a chance at exoneration based on their own conduct; otherwise, the finding of an infringement by the subsidiary will always lead to their automatic conviction.[97] In this light, parent companies have occasionally attempted to challenge the ascription of liability on the ground that they had taken steps to eliminate the risk of anticompetitive behaviour by their subsidiaries. In *Schindler Holding*, for instance, the parent company had adopted a code of conduct and guidelines with the specific aim of keeping competition violations at bay,[98] whereas in *Evonik Degussa* the parent company had explicitly instructed the sole manager of its subsidiary not to enter into agreements with competitors regarding the products in question, but its instructions had been blatantly disregarded.[99]

Pleas of this kind, however, have been invariably unsuccessful – and sometimes they have even backfired. According to the EU Courts, the implementation of a compliance programme "does not alter the reality of the infringement" found against the parent company; on the contrary, it constitutes further evidence that the parent company exercises decisive influence over its subsidiary and thus forms a "single economic unit" with it.[100] Even the blatant disregard by a subsidiary of the parent company's specific instructions is insufficient to reverse the latter's liability, where the subsidiary's failure to carry out those instructions "is not the norm".[101] Although one may sensibly demand that the acquittal of the parent company be conditioned on evidence of precautionary or corrective action specific to the committed infringement, a theory of liability attribution under which the parent company's only option is to claim that its subsidiary did not commit the infringement is hardly compatible with the principle of personal responsibility. Therefore, were the "failure to exercise

[95] *Akzo Nobel and Others v Commission*, Opinion of AG Kokott (C-97/08 P) ECLI:EU:C:2009:262, footnote 67; *Ballast Nedam v Commission*, (T-361/06) ECLI:EU:T:2012:491, at [54]. In practice, however, such arguments have been unsuccessful: see *Arkema v Commission* (T-168/05) ECLI:EU:T:2009:367, at [76]; *Shell Petroleum and Others v Commission*, (T-38/07) EU:T:2011:355, at [70]; *Hit Groep v Commission* (T-436/10) ECLI:EU:T:2015:514, at [125]. For an exception: *Alliance One International and Others v Commission* (T-24/05) ECLI:EU:T:2010:453, at [143, 195].

[96] *Akzo Nobel and Others v Commission*, Opinion of AG Kokott (C-97/08 P) ECLI:EU:C:2009:262, footnote 67.

[97] This appears to be the case at the moment. See *Dow Chemical v Commission* (ECLI:EU:T:2012:47) at [101].

[98] *Schindler Holding and Others* (ECLI:EU:T:2011:362) at [88].

[99] *Evonik Degussa and AlzChem v Commission* (C-155/14 P) ECLI:EU:C:2016:446, at [15-16].

[100] *Schindler Holding and Others v Commission* (ECLI:EU:C:2013:522) at [113-114]. Also: *General Technic-Otis and Others v Commission* (T-141/07, T-142/07, T-145/07 and T-146/07) ECLI:EU:T:2011:363, at [85]. cf. *General Química and Others v Commission* (ECLI:EU:C:2011:21) at [60-62, 79].

[101] *Evonik Degussa and AlzChem v Commission* (C-155/14 P) ECLI:EU:C:2016:446, at [41]. See also the Opinion of AG Mengozzi in this case (ECLI:EU:C:2015:529, at [49-64]), as well as *Fresh Del Monte Produce* v *Commission* and *Commission* v *Fresh Del Monte Produce* (C-293/13 P and C-294/13 P) EU:C:2015:416, at [96-97].

vigilance" theory to be endorsed by the EU Courts, their jurisprudence in this area should be reconsidered.[102]

Naturally, however, one may wonder how much may be requested from the parent company. Does "doing everything in its power to prevent the infringement and/or bring it to an end" entail an obligation to report the anticompetitive activities of the subsidiary to the competition authority? Or is it sufficient that internal measures be taken – such as, for instance, removing the individuals that are implicated in the infringement or setting up adequate information channels? It is submitted that imposing a reporting obligation would be excessive. In practice, leniency programmes offer incentives for companies to report a cartel in exchange for immunity or fine reduction. Most importantly, however, as a matter of principle, the detection of infringements is the responsibility of competition authorities, not firms. Consequently, appropriate internal measures should be accepted as sufficient to shield a parent company from liability under the "failure to exercise vigilance" theory of attribution.

The "enterprise liability" theory

In any event, parental liability could be alternatively grounded in the "enterprise liability" theory. The latter has been predominantly developed in the context of tort law in reaction to the ramifications of the doctrine of separate legal personality and of the principle of limited liability of shareholders – especially in the case of corporate groups. In a nutshell, the "enterprise liability" theory encapsulates the idea that, insofar as parent companies receive the benefits from the activities of their subsidiaries, they should also bear the respective risks.[103] Accordingly, the theory sees the group holistically as a single "enterprise" and essentially allows the lifting of the corporate veil, to the extent that it enables third parties to go after the parent company when seeking compensation for the loss they have suffered as a result of the subsidiary's acts.

Transposed in EU competition enforcement, the "enterprise liability" theory presents several advantages. First of all, it offers a persuasive justification for holding parent companies accountable for the anticompetitive behaviour of their subsidiaries. Indeed, if a parent company benefits from the procompetitive activities of its subsidiaries, it is not unreasonable to expect that it should also share liability arising from their anticompetitive acts. This argument is particularly compelling in the case of cartels, where the subsidiary's unlawful conduct may generate illicit profits for the parent company. Second, contrary to the "single undertaking" rationale as proclaimed by the EU Courts, the "enterprise liability" theory provides a helpful criterion for selecting the entities against which the Commission decision may be addressed. Instead of capturing all the companies forming the corporate group, it only targets the company which benefits from the activities of the subsidiary. Third, this theory serves deterrence, too. Although it has been admittedly developed in the context of tort cases, where compensation objectives take priority, it has a strong preventive potential, insofar as it strongly

[102] Also: Lang, "How Can the Problem of the Liability of a Parent Company for Price-Fixing by a Wholly-Owned Subsidiary Be Resolved?", at p.1513; K.Hofstetter and M.Ludescher, "Fines against Parent Companies in EU Antitrust Law: Setting Incentives for "Best Practice Compliance"' (2010) 33(1) World Competition 55; R.Burnley, "Group Liability for Antitrust Infringements: Responsibility and Accountability" (2010) 33 World Competition 595, p.613; W.Wils, "Antitrust Compliance Programmes and Optimal Antitrust Enforcement" (2013) 1(1) Journal of Antitrust Enforcement 52-81.
[103] The theory was initially developed by A.Berle, "The Theory of Enterprise Entity" (1947) 47(3) Columbia Law Review 343.

incentivises corporate groups to avoid harming competition and consumers by prompting parent companies to ensure that their subsidiaries behave in an antitrust-compliant manner.[104]

At the same time, the "enterprise liability" theory may flexibly accommodate the post-*Akzo* jurisprudence. On the one hand, the concept of "enterprise" strongly resembles the "single economic unit" notion, as developed over the years by the EU Courts. As noted earlier, the latter has been construed as a "unitary organisation of personal, tangible and intangible elements which pursues a specific economic aim on a long-term basis". On the other hand, the post-*Akzo* construction of the "actual exercise of decisive influence" criterion would lose much of its contentiousness, if seen through the lens of the "enterprise liability" theory. Not only the latter does not require any connection between the control exercised by the parent company over its subsidiary and the committed infringement, but also the existence of an "enterprise" has been traditionally conditioned on tests structured upon elements of economic and behavioural domination. In this light, the "enterprise" rationale has the capacity to provide the "missing link" for making sense of the post-*Akzo* approach to parental liability and to inject a much-needed dose of coherence in the EU Courts' jurisprudence. The following passing statement in *Dow Chemical* is promising in this regard; as the General Court remarked, '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".[105] Properly modified, this statement could provide the starting point for the explicit endorsement of the "enterprise" rationale in the future as the justification for the imputation of parental liability.

Despite its potential, however, the transition into an "enterprise liability" theory in EU competition enforcement would not be bump-free. In brief, two possible challenges may be identified. The first one stems from the principle of limited liability of shareholders for the debts of the company.[106] Indeed, parent companies have already criticised parental liability as contravening this principle, insofar as it extends the liability of the subsidiary to its shareholder – i.e. the parent company – and inappropriately pierces the corporate veil.[107] This criticism, however, has been dismissed by the EU Courts. As AG Kokott duly noted in her Opinion in *Schindler Holding*, "in assessing an undertaking's responsibility under antitrust law, the crucial factor cannot be whether there is a "corporate veil" between the parent company and the subsidiary".[108] Rather, "what is important is economic reality, since competition law is guided not by technicalities, but by the actual conduct of undertakings on the market".[109] Following suit, the ECJ confirmed that, whilst the principles of separate legal personality and limited liability of shareholders are "of particular importance especially as regards liability in the

[104]See M.Dearborn, "Enterprise Liability: Reviewing and Revitalising Liability for Corporate Groups" (2009) 97(1) California Law Review 195.
[105] *Dow Chemical v Commission* (ECLI:EU:T:2012:47) at [101].
[106] On the evolution and function of limited shareholder liability, see F.Easterbrook and D.Fischel, "Limited Liability and the Corporation" (1985) 52 University of Chicago Law Review 89; P.Blumberg, "Limited Liability and Corporate Groups" (1985-1986) 11 Journal of Corporate Law 573; L.Ribstein, "Limited Liability and Theories of the Corporation" (1991) 50 Maryland Law Review 80.
[107] The piercing of the corporate veil doctrine has given rise to much debate in academic scholarship, whereas it has been applied by courts rather reluctantly. See H.Hansmann and R.Kraakman, "Towards Unlimited Shareholder Liability for Corporate Torts" (1991) 100 Yale Law Journal 1879; S.Bainbridge, "Abolishing Veil Piercing" (2001) 26 Journal of Corporate Law 479; D.Millon, "Piercing the Corporate Veil, Financial Responsibility and the Limited of Limited Liability" (2007) 56 Emory Law Journal 1309-1382.
[108] *Schindler Holding and Others v Commission*, Opinion of AG Kokott (C-501/11 P) ECLI:EU:C:2013:248, at [66].
[109] *Schindler Holding and Others v Commission*, Opinion of AG Kokott (ECLI:EU:C:2013:248) at [66].

sphere of civil law, it cannot be relevant for defining the perpetrator of competition law, which is concerned with the actual conduct of undertakings".[110]

Nevertheless, the most crucial objection against the "enterprise" rationale is that it is nearly impossible to reconcile with the principle of personal responsibility. Indeed, enterprise liability is vicarious in nature, in the sense that the parent company is not held accountable because of an act or omission of its own.[111] Rather, its responsibility is automatically triggered as soon as its subsidiary engages in an anticompetitive behaviour and the only "defence" a parent company may invoke is that it does not constitute a "single economic unit" with it. The EU Courts, however, have consistently stressed that responsibility for an antitrust infringement must be "personal" in light of "the nature of the infringements in question and the nature and degree of severity of the ensuing penalties".[112] Indeed, antitrust fines are driven by retribution and deterrence considerations, whereas the past decades have witnessed a staggering rise in the financial sanctions imposed by the Commission. Accordingly, antitrust fines may not be downplayed to mere "debts" of the subsidiary, of which the Commission is the creditor.[113] In fact, classifying competition penalties as debts *of the subsidiary* disregards the fact that their calculation is based on the *undertaking*'s turnover, including thus that of the parent company.[114] Last but not least, insofar as the *Siemens Österreich* judgment accepts that responsibility for the antitrust fine may be internally allocated between the parent company and the subsidiary, it may be taken to imply that each of them may bear different degrees of "blame" for the infringement. Such a statement, however, would hardly fit well with the "enterprise" rationale, under which parental liability is fault-free.

Unfortunately, there is no obvious escape from these limitations. In a sense, the problem goes beyond the confines of competition law. Indeed, chartering the frontiers of corporate responsibility – especially in the realms of criminal law – has proved to be no easy feat and is still a work in progress.[115] While, however, legal fictions certainly should not stand in the way of economic reality, the rules governing the imputation of liability must be well-justified, clear and coherent. Therefore, if the "enterprise" argument is to be endorsed as the justification for parental liability in EU competition

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[110] *Schindler Holding and Others v Commission* (ECLI:EU:C:2013:522) at [101]. By contrast, the General Court's explanation for rejecting this argument is much more controversial. According to the latter, the applicant's plea was "based on a false premiss, namely that no infringement has been found to have been committed by the parent company", while the parent company is "*deemed to have committed [the infringement] itself* on account of the close economic and legal links between it and its subsidiaries" (*Schindler Holding and Others v Commission* (ECLI:EU:T:2011:362) at [83] (emphasis added)).

[111] Koenig, "An Economic Analysis of the Single Economic Entity Doctrine in EU Competition Law", explains that vicarious parental liability is economically justified in the antitrust context, recognising, however, that certain aspects of the case-law do not fit well with this approach.

[112] See footnotes 78-79 above.

[113] This appears to be the perception of the EU Courts. See *Akzo Nobel v Commission* (ECLI:EU:C:2009:536), at [61]; *Commission v Siemens Österreich and Others* (ECLI:EU:C:2014:256) at [48], [59]; *Alliance One International v Commission* (C-679/11 P) ECLI:EU:C:2013:606, at [39]; *Commission v Versalis and Others* (C-93/13 P and C-123/13 P) ECLI:EU:C:2015:150, at [42]; *Merck v Commission* (T-470/13) ECLI:EU:T:2016:452, at [531]; *Villeroy & Boch v Commission* (C-625/13 P) ECLI:EU:C:2017:52, at [152].

[114] According to Article 23(2) of Regulation 1/2003, the 10% fining cap applies to the turnover of the *undertaking*. Moreover, in setting the fine the Commission may increase it for recidivism, where *the parent company* has committed an antitrust infringement in the past, and for specific deterrence, in order to ensure that the fine will have a sufficiently deterrent effect, especially in the case of undertakings which have a particularly large turnover beyond the sales of goods or services to which the infringement relates (Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 [2006] OJ C210/2, at [28] and [30]).

[115] See D. Fischel and A. Sykes, "Corporate Crime" (1996) 25(2) Journal of Legal Studies 319-349; V. Kharma, "Corporate Criminal Liability: What Purpose Does It Serve?" (1996) 109(7) Harvard Law Review 1477; C. Wells, *Corporations and Criminal Responsibility* (2nd edn, Oxford University Press 2001).

enforcement, it is difficult to see how the judicial confidence that the post-*Akzo* approach respects the principle of personal responsibility – at least as traditionally understood – may be sustained.

Conclusion

The justification for parental liability in EU competition enforcement has grown into a thorny question that the EU Courts may no longer evade. While parental liability was initially conditioned on the existence of some sort of connection – whether directly established or inferred – between the control exercised by the parent company over its subsidiary and the committed infringement, the judicial approach changed markedly in *Akzo*. Ever since, parent companies have been held responsible for the transgressions of their subsidiaries, where the two entities constitute a "single economic unit" and *thus form a single undertaking*.

The shift into this new rationale for parental liability has been met with considerable resistance by firms. Regrettably, the change of tack post-*Akzo* was not expressly acknowledged by the EU Courts, which insisted that the "single undertaking" justification for holding parent companies responsible for the anticompetitive acts of their subsidiaries stems from earlier jurisprudence. As a result, for many years parent companies were fruitlessly attempting to contest their liability on grounds which were ineffective, simply because of the mismatch between their perception of what they were "blamed" for and the actual rationale behind parental liability – i.e. the "single undertaking" argument. Coupled with the prevalence of the *Akzo* presumption in the case of wholly-owned subsidiaries, the parent companies' persistent efforts to adduce evidence capable of reversing their liability directed the attention towards issues of proof and fairness and away from the real problem, i.e. the merits of the "single economic unit/undertaking" justification for imputing to parent companies responsibility for the anticompetitive acts of their subsidiaries.

This article critically examined the post-*Akzo* explanation for parental liability in EU competition enforcement and demonstrated that not only the "single undertaking" argument lacks the exegetical power assigned to it by the EU Courts, but also its application presents serious deficiencies. While, however, it is evident that the "single undertaking" theory is no longer tenable, the proper way forward is not easy to detect either, especially in light of the current state of the case-law. Two alternative theories of parental liability were discussed in this regard: the "failure to exercise vigilance" rationale and the "enterprise" argument. As explained, none of these options is perfect; each presents its own advantages and limitations. Nevertheless, it is submitted that – all things considered – the "failure to exercise vigilance" approach may offer a better – and more realistic – solution to the problem of developing a coherent theory of parental liability in EU competition law. Indeed, while the "enterprise" justification seems to better resonate with the current practice of the Commission and the EU Courts, it is almost impossible to reconcile with firmly established legal doctrine. The "failure to exercise vigilance" approach, on the other hand, is well-suited to promote deterrence as a goal of competition enforcement, whilst remaining in harmony with core legal principles. Equally importantly, it would require a refinement – rather than a drastic overhaul – of the existing jurisprudence, were it to replace the 'single undertaking' rationale. Inevitably, the final choice lies with the EU Courts, but it is clear this is a task which may no longer be postponed.