

**PARENTAL LIABILITY FOR COMPETITION LAW VIOLATIONS: LESSONS
FOR EMERGING MARKETS**

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Abstract

During last few decades the issue of attribution of liability for competition law infringement committed by a subsidiary company to its parent (the so-called parental liability) has become widely discussed in among scholars and competition law practitioners, “thanks to” EU competition law developing the doctrine.

As a result, nowadays the issue of parent company liability for their subsidiary’s conduct is nothing but an example of dialectic dilemma, involving two contrasting doctrines – EU law notion of undertaking and corporate separateness principle, deriving from Roman law concepts of legal personality.

This paper is devoted to present a comprehensive comparative analysis of doctrines of parental liability and corporate separateness from the prospective of developing competition regimes, their implications in practice of U.S. and EU antitrust authorities and to answer the question, whether it is worth to adopt parental liability and if yes, whether EU model is a good solution.

The ultimate result of the research is that parental liability as a concept of competition law is able to produce positive effects and should not be denied without establishing effective alternative. However, number of different issues shall be taken into account when adopting the theory, while, as it appears to be in the EU, it may put a heavy burden on parent companies and may prevent them in a long-term prospective from adoption of effective compliance policies and entering new markets. Therefore, the EU model shall not be blindly copied by developing states.

List of abbreviations

EU	European Union
Commission	European Commission
U.S.	United States
UK	United Kingdom
TFEU	Treaty on the functioning of the European Union
CJEU	Court of Justice of European Union
GC	General Court
AG	Advocate-General
EC Treaty	Treaty Establishing the European Community
EU Merger Regulation	Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings
Regulation 1/2003	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
CFI	Court of First Instance
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms
FTC	U.S. Fair Trade Commission
DOJ	U.S. Department of Justice
JV	Joint venture
BoD	Board of Directors
Art.	Article
LLC	Limited Liability Company

Introduction

The significant role of competition in today's globalized economy will hardly be a discovery. As it was noted by UK Government in its White Paper "Productivity and Enterprise", "competition is a central driver for productivity growth in the economy, and hence the UK's international competitiveness"¹. This conclusion is fair for every nation, building market economy. Therefore, either developed or developing states should consider promotion of effective competition law regime, which can be a precondition to economic growth and wealth.

During last few decades the issue of attribution of liability for competition law infringement committed by a subsidiary company to its parent (the so-called parental liability) has become widely discussed in among scholars and competition law practitioners, "thanks to" EU competition law, developing the doctrine.

As a result, nowadays the issue of parent company liability for their subsidiary's conduct is nothing but an example of dialectic dilemma, involving two contrasting doctrines.

One of them is a concept of an "undertaking", developed in European Union. This concept has a dual nature of economic and legal notion², that gave ground for Commission to treat separate legal entities as one economic unit. It was further supplemented with another development of EU competition law, i.e. notion of decisive influence, which apart of its role in regulation of mergers, is a specific tool used to establish parental liability for competition law infringements.

¹ White Paper "Productivity and Enterprise: A World Class Competition Regime" Cm 5233, 2001

² Ritter, Lennart, W. David Braun, and Lennart Ritter. *European Competition Law: A Practitioner's Guide*. The Hague; Frederick, MD: Kluwer Law International; 2004. pp. 1-92

The other side of the coin is a general concept of legal personality, which entails principles of limited corporate liability, separateness of legal entities and thus, puts under doubt the ability of parent company to bear the responsibilities of their subsidiaries.

These discrepancies between the two doctrines became a ground for criticism for both proponents of parental liability and their opponents. However, the discussion has changed when in the recent decade Luxembourg courts together with Commission have raised the bar for rebuttal of parental liability so high, that issue of legal certainty, principle of proportionality as well as presumption of innocence now are used to criticise parental liability doctrine alongside with a corporate separateness theory³.

Anyway, parental liability is now broadly applied by Commission and thus, one shall agree that this concept is a relevant part of EU competition law.

However, it is usually analysed only as a part of some other, more complex topics, therefore it is usually mentioned in a narrative way, so the reader just comes to conclusion that this phenomena exists, is being used by Commission and that's it⁴. Of course, there are some analytical works, which are usually published in professional journals, but they are oriented to the public already familiar with the topic⁵. Therefore, there is a need in a comprehensive research, systematising of the knowledge on the topic.

The other aspect that was rarely touched by prior researches on the topic is a face-to-face comparison of core concepts of undertaking and legal personality and their implications in EU and U.S. jurisdictions (that are representing opposing concepts).

³ See, for example, Bronkers, Marco, and Anne Vallery. "No Longer Presumed Guilty? The Impact of Fundamental Rights on Certain Dogmas of EU Competition Law." *World Competition: Law & Economics Review* 34, no. 4 (December 2011): 535-570.; Scordamaglia-Tousis, Andreas. *EU Cartel Enforcement: Reconciling Effective Public Enforcement with Fundamental Rights*. Kluwer Law International, 2013: 556.

⁴ See, for example, Furse, Mark. *Competition law of the EC and UK*. 481: Oxford Univ. Press, 2008; Korah, Valentine. *An introductory guide to EC competition law and practice / Valentine Korah*. n.p.: Oxford ; Portland, Or. : Hart Pub., 2007, n.d; Van Bael, Ivo. *Competition law of the European Community*. n.p.: Kluwer Law International, 2010: 1674

⁵ See, for example, *supra* note 3.

It should be also noted that the choice, developing states have to make in order to introduce parental liability in their antitrust laws, has never been addressed by researchers. This issue, however, is important because the leading world economies do not have common approach to the issue. As well as it is hard to confirm the clear interdependence between the imputation of liability to parent companies and economic wealth of states. However, sooner or later, developing competition regimes will face the question, whether they are efficient enough and are able to preserve the deterrent effect of competition regulation. Therefore, the analysis of the divergence between the mentioned doctrines is crucial for the developing competition regimes.

This research is devoted to present a comprehensive comparative analysis of doctrines of parental liability and corporate separateness from the prospective of developing competition regimes, their implications in practice of U.S. and EU antitrust authorities and to answer the question, whether it is worth to adopt parental liability and if yes, whether EU model is a good solution.

This thesis is divided into four Chapters, each of them addressing specific block of issues. Chapter 1 of the paper presents the insight on legal personality and corporate separateness doctrine, the way it has developed in the realm of corporate law. This Chapter will also analyze the exception to corporate separateness principle, namely, a corporate-veil piercing doctrine (or disregard of corporate entity).

Chapter 2 of this paper presents the analysis of parental liability doctrine in EU competition law, focusing on the notion of undertaking (which is a precondition for liability to be attributed to parent company), as well as, analyzing the development of the doctrine itself. This Chapter also addresses the approach of U.S. antitrust law to parental liability doctrine.

Chapter 3 addresses specifically the issue of parental liability applied for the infringement committed by joint ventures, which is an important issue in light of development of parental liability concept and crucial for emerging markets, where joint ventures are welcomed mechanism of investment. It will also discuss issue of attribution liability to parent companies for infringements of their partially-owned subsidiaries, that is a closely related topic and prerequisite to parental liability for JVs conduct.

Finally, Chapter 4 will present author's concerns about effects of parental liability doctrine, as applied in the EU, discussing in particular, setting sanctions issue, pointing out pros and cons of the doctrine in general and giving the recommendations deriving from the results of the research.

Chapter 1. Legal personality doctrine in light of parental liability concept

Legal personality concept is a core of private law and is a precondition to every commercial activity, as it allows creating legal entities.

In order to present comprehensive view on the corporate separateness, the concept that is used to oppose application of parental liability, it is important to look at the historical development of legal personality doctrine, as well as its basic notions and exceptions.

Thus, this Chapter will discuss the legal personality doctrine in its historical retrospective, then analyze more recent developments and will address the issue of corporate veil piercing, that is an exception from the corporate separateness doctrine.

1.1. Historical aspect of legal personality concept.

While discussing corporate structures, lawyers tend to use the terms of parent company, sister company or even the corporate family instead of term “corporate group”⁶, which is a figurative way to express some kind of analogy between social relationships of human beings and relationships within corporate groups. This analogy, however, is not just a verbal figure, but the essence of the doctrine of legal personality, which basically “refers to the particular device by which the law creates or recognizes units to which it ascribes certain powers and capacities.”⁷. In other words, legal personality means “the legal status of one regarded by the law as a person”⁸. In its turn, this definition leads to an important legal fiction that there are persons, involved in legal relationships, which enjoy almost the same legal

⁶ See, for example James, Sylvia R. M. "Researching Company Structure and Linkages Globally Part 1: Understanding the Corporate Family Tree." *Business Information Alert* 18, no. 5 (May 2006): 1-4.; Villa, John K. "The attorney-client privilege in the parent-subsidiary context." *Annual Institute On Securities Regulation* 40, no. 2 (November 2, 2008): 401

⁷ Paton, G. W, and David P Derham. 1972. *A Textbook of Jurisprudence*. Oxford: Clarendon Press, p. 393;

⁸ *Black's law dictionary*, 9th ed., s.v. “personality”;

treatment as a natural person⁹. These persons are known as either artificial (juridical) persons or legal entities¹⁰.

Among scholars it is a popular idea that the doctrine of legal entity was introduced in the Middle Ages by the Pope Innocent IV (Sinibaldo dei Fieschi)¹¹. In order to preserve the growing power of the church at that time, he expanded the Roman law notion of corporate body (*universitas*) so, that to exempt the church from liability for damages as well as avoid the imposition of excommunication sanctions¹². To be more particular, it is important to note that while it is questionable whether Roman jurists conceived corporate bodies as persons¹³ and Digest do not define *universitas*¹⁴, Roman law nevertheless confirmed the existence of corporate bodies and described some of its features. One of the most remarkable characteristics of *universitas* is that it does not share rights and obligations with its individual members¹⁵. This Roman law concept was upheld by Innocent IV, who personified corporate entity¹⁶ and, thus, created a theoretical background for existence of juridical persons.

It is also worth mentioning that the Pope Innocent IV was cautious and understood possible limitations of such doctrine¹⁷. In particular, he stated that "*universitas*, just like a

⁹ Maitland, Frederic William, *The Collected Papers of Frederic William Maitland*, ed. H.A.L. Fisher (Cambridge University Press, 1911). 3 Vols. Vol. 3. available from <http://oll.libertyfund.org/titles/873>; accessed 24 March 2014

¹⁰ Terms "legal entity", "artificial person", "juridical person" are considered as synonyms. See, for example, *Black's law dictionary*, 9th ed., s.v. "artificial person"

¹¹ See Savigny, Friedrich Carl von. *System des heutigen römischen Rechts*. 2. n.p.: Scientia-Verl., 1981., pp. 235-373; Koessler, Maximilian. "Person in Imagination or Persona Ficta of the Corporation" *Louisiana Law Review* no. 4 (1948), p. 437

¹² Koessler, p.437

¹³ Burdick, William L. *The Principles of Roman Law and Their Relation to Modern Law*. Clark, N.J.: Lawbook Exchange, 2004, p. 274

¹⁴ Ibid., p.275

¹⁵ Dig, 3 ,4, 7, 1

¹⁶ Koessler, p. 438

¹⁷ Thus, he concluded that *universitas* could not be subject to all legal measures, while some of those are based on assumption of the existence of human soul, like excommunication sanctions. See Koessler, p. 439

chapter, nation or clan is rather a legal term, but not the names of persons”¹⁸. Actually, this postulate produces a number of further implications. First, the understanding of a nature of corporate entity as a creature of legal system allows making a clear distinction between natural and legal persons, so that the latter are excluded from all the rights and obligations closely related to the person as a human being (including, for instance, inheritance rights¹⁹). The other point, deriving from the above quote of Innocent IV is that the scope of application of legal personality fiction is flexible and can be shaped by the legal system, depending on its purposes²⁰. The latter point of view has proven to be true, as Maximilian Koessler correctly noted that the mentioned quote of the Pope Innocent IV “became a precursor of those American lawyers who centuries later established that well-known principle which is usually referred to as the doctrine of “disregard of corporate entity.””²¹, closely related to the main issue of this research.

At this point let us have a look at further development of legal personality concept and the doctrine of disregard of corporate entity.

1.2. Limited corporate liability - development of legal personality concept

Centuries after the works of Innocent IV, separate juridical existence of corporate entities has become widely accepted around the Europe and now is considered as a doctrine

¹⁸ It is an author’s translation of the original Latin quote “quia universitas, sicut est capitulum, populus, gens et haec nomina sunt juris et non personarum”, found in Gillet, Pierre. *La personnalité juridique en droit ecclésiastique : spécialement chez les décrétistes et les décrétalistes et dans le Code de droit canonique*. n.p.: W. Godenne, 1927, p.121

¹⁹ Not to be confused with succession of legal entities, which is a different concept.

²⁰ For example, one cannot treat a land plot as a tangible good, while it is physically intangible. Therefore, land plot, being an object of regulation by law, has a kind of “natural” limits, preserving an adequate treatment, consistent with the features of the object. Compare it to legal personality that is a mere legal fiction and therefore leaves a bigger room for interpretation of margins of its application.

²¹ Koessler, p. 439

forming a foundation of Western legal systems²². Not digging into details of the development of the legal personality doctrine in different jurisdictions, it should be mentioned, that, by the 19th century, both Europe and the U.S. developed legal personality doctrine in a way to answer questions, incomparable with those analyzed in the Middle Ages by Roman law commentators. The era of industrial development brought a strong bourgeoisie, able to dictate its will to state authorities, while national economies were getting dependent from businessman. The other important aspect of such social and economic reality was that states were encouraging entrepreneurship. In this environment the Company law has played a major role in a Western legal doctrine, when introduced the limited liability doctrine that was the ultimate consequence of states' acceptance of the concept of separate legal entity applied to corporate entities²³.

As Phillip Blumberg correctly notes, “limited liability of corporate shareholder is a traditional cornerstone both in Anglo-American corporation law and in the corporation law of the civil system”²⁴. This doctrine is dedicated to protect the enterprise investor from the liabilities “above and beyond the loss of his or her capital investment”²⁵. What is more interesting here is that when applied to corporate groups, this doctrine protects not only the ultimate investors (natural persons as shareholders) from the debts of a joint business enterprise, conducted by the parent company and its subsidiaries²⁶. In fact, here takes place another analogy between the individuals, being investors of a corporation, and corporation, which acts like an individual investor in case of such a collective business enterprise. As a result, “fragments within the enterprise” are protected from the liability for other fragments’

²² Blumberg, P.I. *Blumberg on Corporate Groups*. Wolters Kluwer Law & Business, 2004, §2.01. Accessed March 28, 2014. <http://books.google.hu/books?id=SdNI5AxJs3QC>. See also Savigny, *supra* note 6; Gierke, Otto von. *Political theories of the middle age: With an introd. by Frederic William Maitland*. n.p.: Univ. Press, 1968.

²³ Blumberg, §3.02.

²⁴ *Ibid.*, §3.01

²⁵ *Ibid.*

²⁶ *Ibid.*

obligations²⁷. Therefore, these fragments are like “Lego” bricks – they are of various forms, perform their own functions and may not be designed in a way, so we could consider the whole construction as a single unit. However, developing this metaphor, the unity of a whole group depends a lot on the construction and thus, logical question is raised, whether the entities are always just a single “bricks”, or something more than that. The history of this issue gives us a number of answers.

Considering preconditions for limited liability to be introduced, mentioned above, there is no wonder that France has become the flagship of the doctrine. The bourgeois French revolution impacted all Western civilization in many senses, it was also the revolution of legal theory, inspired by Montesquieu. What it brought to private law was the *Code Napoléon* (French Civil Code of 1804) and *Code de Commerce* (Commercial code of France) dated 1807. The Civil code reflects ideas of *Corpus juris civilis*, while Commercial Code dealt with the issues subsequent to general framework of *Code Napoléon*. Still, Commercial code introduced and spread the doctrine of limited liability throughout the European continent²⁸. Today probably every jurisdiction, that followed the civil law system, has in their company law provision like the following:

“1. The joint stock corporation is a corporation with its own legal personality. The company is a stock corporation that constitutes a separate legal entity. 2. Liability to creditors with respect to obligations of the corporation shall be limited to the corporation’s assets.”²⁹

²⁷ Ibid.

²⁸ Ibid., §3.05 . In particular, French Commercial code provided for limited liability for stock corporations.

²⁹ Author’s translation of § 1 of German Stock Corporation Act. See, Aktiengesetz vom 6. September 1965 (BGBl. I S. 1089), das zuletzt durch Artikel 26 des Gesetzes vom 23. Juli 2013 (BGBl. I S. 2586) geändert worden ist, §1 et.seq. <http://www.gesetze-im-internet.de/aktg/>

In no case does this example limit the application of limited liability doctrine to stock corporations.

This statute provision illustrates a reflection of Roman law concept of legal personality and its further development in order to establish the limited liability doctrine, prevailing in civil law.

At the same time, it should be noted that in common law application of limited liability doctrine had its own path, it took more time for UK and U.S. to embrace this doctrine³⁰.

For the United Kingdom the adoption of limited liability rule was not an easy task due to peculiarities of local business, where after Industrial revolution joint stock associations, organized under a deed of settlement, played a big role³¹. This situation reflects the lack of State's involvement in the process of business regulation at the rise of industrial era, not introducing any alternative mechanisms for starting a corporation³². Therefore, limitation of shareholder's liability was in some cases a charter provision³³.

However, things changed significantly after the Depression of 1845-1848 and successful adoption of limited liability for railways that appeared to be a successful strategy³⁴. It then resulted in the enactment of two legislative Acts – one on Limited Liability dated 1855, and the other on Joint Stock Companies – which introduced general limited liability³⁵.

Regarding the acceptance of limited liability doctrine in the United States, it should be noted that Americans departed from inheritance of English legal system and appeared to be even faster in the application of this particular doctrine, than UK³⁶. The first attempt to introduce limited liability happened in New York State in 1811, when the general limited

³⁰ *Supra* note 28

³¹ *Ibid.*, §3.05 [D]

³² *Ibid.*

³³ *Ibid.*, 3.03 [A]

³⁴ Gower, Lawrence C. *Principles of modern company law*. n.p.: Stevens, 1979, p.43

³⁵ Blumberg, §3.03 [C]

³⁶ *Ibid.*, §3.04

liability law relating to manufacturing companies, was enacted³⁷. It is also worth mentioning that in the U.S. for a long time there was a debate on the need to keep the unlimited liability for corporations: Michigan in 1837, New Hampshire in 1842, Wisconsin in 1849 and Pennsylvania in 1853 turned to it for a relatively short period and then returned back to limitation³⁸. Even more intriguing is a statement that “in the United States, limited liability was not perceived as an essential attribute of corporation”³⁹ and it emerged “as a political response to economic and political pressures, rather than as a necessary consequence of the entity concept”⁴⁰, which, as will be shown later, is not really compatible with the practice of U.S. courts, insisting on the fundamental role of limited liability doctrine decades after it has been introduced.

Anyway, it should be concluded that the concept of limited liability has been adopted in common and civil law jurisdictions. One of the main reasons for its popularity we shall consider the attractiveness for businesses. As it was pointed out by District of Columbia Circuit⁴¹, limited liability encourages taking entrepreneurial risks⁴². Moreover, diminished financial responsibility of investors, apart from its possible negative effects can also produce the economic benefits, resulting from financial risk-taking⁴³, in particular, it “unlocked vast sums previously put in safe investments; it also freed new companies from the burden of fixed-interest debt. The way was open to finance the mounting capital needs of the new railways and factories that were to transform the world”⁴⁴. From the prospective of corporate groups, today’s reality is that both developed and developing nations have direct interest in

³⁷ "The key to industrial capitalism: limited liability. (cover story)." *Economist* 353, no. 8151 (December 31, 1999): 89-90. <http://www.economist.com/node/347323>

³⁸ Blumberg, §3.04 [F]

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Circuit is a short name for United States Courts of Appeals

⁴² *Labadie Coal Co. v. Black*, 672 F.2d, para. 96

⁴³ Radin, Max. "The Endless Problem of Corporate Personality." *Columbia Law Review* no. 4 (1932): 643, pp.653-654

⁴⁴ *Supra* note 37

encouraging large corporations “to do business through subsidiaries and thus limit their liability, subject to rules which are designed to ensure that at least a reasonable amount of capital is exposed within each debt-incurring, risk-creating activity”⁴⁵.

Therefore, the limitation of corporate liability is an advantageous invention of jurisprudence that makes a very predictable economic impact, helping countries to develop. Therefore, one may raise the question, why should state oppose the application of limited liability doctrine? The answer to it will be given in the next subchapter.

1.3. Disregard of corporate entity or veil-piercing

First of all, from the economic prospective there are some remarks, should be taken into account in regard to limited liability doctrine. In particular, some authors argue that despite general advantageous impact on the economy, limited liability is not something essential for the industrial development⁴⁶.

However, the most significant adverse effect of the shield that limited liability creates for shareholders is the one, which in the previous subchapter was considered as an advantage – the diminished liability of an investor. Here it should be stated, that, unfortunately, any legal provision is something that can be easily breached – it is not a wall, which is hard to overstep. Moreover, the will to break the rule depends from the result of a simple proportion, where the dividend is the number of benefits from the breach of rule, and the divisor would be the amount of sanctions and liabilities for the breach. If the result of such calculation is

⁴⁵ Westbrook, Jay Lawrence. "Theories of Parent Company Liability and the Prospects for an International Settlement [article]." *Texas International Law Journal* no. 2 (1985): 321, p. 325

⁴⁶ See Dodd, E. Merrick. "The Evolution of Limited Liability in American Industry: Massachusetts." *Harvard Law Review* no. 8 (1948): 1351, pp. 1378-1379. The author states, in particular, that the role of limited liability for industrial development in the U.S. may have been overestimated. "Competition in attracting investment, rather than a real need for limited liability to encourage risk-taking, might be a better explanation for the development of the doctrine in the United States" Ibid.

more than some balance point, some abstract “one”, the more chances for the law to be breached. This piece of philosophy describes the very basic idea, why the legal liability in many cases is represented by large penalties or other sanctions, as they should not only punish, but to create deterrence, they have to prevent others from committing the same violation of laws. In the case of corporate relationships limited liability doctrine created a loophole for investors to avoid liability for some illegal practices, which could be conducted by a separate corporate entity.

As it was mentioned earlier in this paper, the Pope Innocent IV has created a precursor for the doctrine of “disregard of corporate entity” to be established. Under this doctrine (also known as “piercing the corporate veil” or simply “veil-piercing”) it is agreed to understand “the judicial act of imposing personal liability on otherwise immune corporate officers, directors, or shareholders for the corporation's wrongful acts”⁴⁷. From the prospective of parental liability, this “doctrine can be invoked to avoid corporate liability limitations when a showing can be made that the owner of the offending corporation previously had ignored or abused the corporate form and thus should be treated as if the limited liability shield had never been erected.”⁴⁸.

While the term was developed in English-speaking states, the veil-piercing is usually considered as a doctrine of common law states. Definitely, in the United States this doctrine is widely applied, while the greatest number of litigation, related to piercing of the corporate veil took place in the U.S.⁴⁹, and there is no sign of decline. To some extent, it can be explained with the culture of litigation in the U.S., where jury trial is lenient to those, who suffer from large corporations. However, more obvious reason for that is a well-developed

⁴⁷ *Black's law dictionary*, 9th ed., s.v. “disregard of corporate entity”, “piercing the corporate veil”

⁴⁸ Westbrook, p.323

⁴⁹ Robert B. Thompson. “Piercing the corporate veil: an empirical study.” *Cornell Law Review* 76, (July 1, 1991): 1036.

case law that touches different aspects of the doctrine and its application. In particular, veil-piercing “is frequently associated with intentional acts of fraud, but other conduct of a misleading nature creating an injustice could trigger veil-piercing”⁵⁰. The examples of such misleading conduct are nonobservance of formalities, gross undercapitalization, and commingling of assets⁵¹. In a context of parent-subsidary relations it is important to note, that U.S. case law presents a variety of examples of parental dominance, that court takes into account when deciding on the parental liability. One of the most representative in this regard is a decision in case of *United States v. Jon-T Chemicals, Inc.*⁵², where the court has examined such issues as whether:

- there is a common stock ownership between the parent and subsidiary;
- there is common directorate of the parent and subsidiary;
- there are common business departments;
- there are consolidated financial statements and tax returns for the parent and subsidiary;
- parent directly finances the subsidiary;
- the subsidiary operates with inadequate capital;
- there is a common budget of salaries between parent and subsidiary;
- the parent uses the property of a subsidiary and to for what purposes;
- the daily operations are separated between the companies;
- the subsidiary conforms with corporate formalities like keeping their own books and records, whether shareholder and board meetings are held.⁵³

However, it should be noted that veil-piercing is also known in civil law jurisdictions. One of the best examples is Germany, whose legislation and court practice, according to Sandra Miller, provide for the greatest opportunity for veil-piercing of a subsidiary company⁵⁴. Again, in a German doctrine the level of control over the subsidiary’s conduct

⁵⁰ Miller, Sandra K. "Piercing the Corporate Veil Among Affiliated Companies in the European Community and in the U.S.: A Comparative Analysis of U.S., German, and U.K. Veil-Piercing Approaches." *American Business Law Journal* 36, no. 1 (Fall98 1998): 73, pp.117-118; See also *supra* note 49.

⁵¹ Miller, p.118

⁵² *United States v. Jon-T Chemicals, Inc.*, 768 F.2d 686

⁵³ *Ibid.* See also Miller, p.122

⁵⁴ Miller, p.117

plays an important role in piercing of a corporate veil of subsidiary (meaning in establishing parental liability)⁵⁵. Among the peculiarities of German approach is a relevance of an arms-length relationship, maintained between parent company and its subsidiary, the lack of which can be regarded as *De Facto Konzern*⁵⁶.

In total, it should be concluded that the doctrine of disregard of corporate entity is more or less recognized worldwide and gives ground for the discussion on parent company liability as a matter of corporate, bankruptcy, tax laws⁵⁷.

It should be also stated that proponents of veil-piercing have been actively discussing the possibility of change of company law and the concept of legal personality in order to “preserve the accountability of modern business in its contemporary form”⁵⁸. For instance P. Blumberg notes, that

“It is no longer realistic to adhere to the traditional view that for legal purposes each of the constituent corporations in a corporate group is a separate legal entity with rights and duties unaffected by its functioning as an integral component of a group collectively conducting a common business under common control. It is time for the bench, bar, and academy to consider the circumstances under which the parent and affiliated companies of the group should also be liable for the duties and obligations of other group constituents in order either to protect persons dealing with companies of the group in cases arising at common law or to implement government controls and prevent their frustration and evasion more effectively in cases involving statutory law”⁵⁹.

⁵⁵ Ibid., p. 120

⁵⁶ This notion is established in §311 of German Stock Corporation Act, meaning that different entities can be recognized as a single unit by defining the duties of controlling enterprise to subsidiary. See, Aktiengesetz vom 6. September 1965 (BGBl. I S. 1089), das zuletzt durch Artikel 26 des Gesetzes vom 23. Juli 2013 (BGBl. I S. 2586) geändert worden ist, §311 et.seq. <http://www.gesetze-im-internet.de/aktg/>. See also Miller, p. 121

⁵⁷ Here we should also note that veil-piercing nowadays is also present, for example, as an issue discussed in the context of Corporate Social Responsibility, which is an intriguing topic, where the Human Rights law interferes and uses the same instrument to establish liability. See, in general, Westbtook, *supra* note 40

⁵⁸ Miller, p. 130

⁵⁹ Blumberg, Phillip I. "The Corporate Entity In An Era Of Multinational Corporations." *Delaware Journal Of Corporate Law* 15, (April 1, 1990): 283, p.287. See in general, *supra* note 17.

Still, challenging the doctrine of limited liability and corporate separateness is not the easiest task, while the issue itself is hardly new one⁶⁰. The reason why it remains an issue without a clear-cut solution may be that economists are opposing, arguing that limited liability is indispensable for the functioning of capital markets⁶¹. The other point regarding capital markets is also the growing role of passive investors, who are not taking measures to exercise a control over the corporation and thus, their liability for subsidiary's misconduct can be too excessive instrument.

Considering the above-mentioned, in light of such diversity in approaches to parental liability, established via application of veil-piercing it is even more important to examine a particular issue of parental liability for competition law infringements. It is also intriguing topic to discuss in regard to mentioned above conflicting approaches of economists and corporate lawyers, because competition law impacts both legal and economic reality. Thus, we shall proceed with the examination of EU and US antitrust law approaches to the question of parent company liability.

⁶⁰ Miller, p. 131

⁶¹ Easterbrook, Frank H. "Limited Liability and the Corporation." *University Of Chicago Law Review* 52, (January 1, 1985): 89, pp. 93-94; Halpern, Paul, Michael Trebilcock, and Stuart Turnbull. "An Economic Analysis of Limited Liability in Corporation Law." *The University Of Toronto Law Journal* no. 2 (1980): 117

Chapter 2. Competition and antitrust law approaches to parental liability.

It was examined in a Chapter 1 of this paper that parental liability exists within the framework of a corporate law and is represented by the doctrine of corporate veil-piercing. The issue, this doctrine raises and deals with is that a single right-and-duty bearing unit, has to bear the liability for the infringement of law, committed by another entity. In the meantime

Having analyzed basic doctrines of corporate law, which lead us to the issue of parental liability in general, let us analyze now a specific area of competition and antitrust law, which is designed to protect the market economy from different kinds of misconduct on behalf of its participants.

2.1 The EU competition law notion of 'undertaking' as a precondition for parental liability

In contrast to corporate law in general and the discussion above on the legal personality doctrine, European Community has introduced a specific concept of undertaking that appears to be a main player in the realm of EU competition law. As Valentine Korah notes, “undertaking is a broad concept, which has the same meaning in Articles 81, 82 and 86”⁶². It “determines the categories of actors, to which the competition rules apply”⁶³.

However, the term undertaking itself is not defined in the TFEU or Commission’s regulation, so that the only source from which we can find the relevant information is the practice of CJEU and the GC⁶⁴. According to established case law, this construct applies to

⁶² Korah, Valentine. *An introductory guide to EC competition law and practice* / Valentine Korah. n.p.: Oxford ; Portland, Or. : Hart Pub., 2007, n.d, p. 45. Here author uses the numbers of Articles of TEC. Nowadays it means Articles 101.102 106 of TFEU.

⁶³ Case *Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie*, [1999], ECR I-5751, para. 206

⁶⁴ Jones, Alison, and B. E Sufrin. *EU Competition Law: Text, Cases, and Materials*, Oxford Univ. Press; 2014, p. 127; Joshua, Julian, Botteman, Yves and Atlee, Laura “You can’t beat the percentage” – The Parental Liability Presumption in EU Cartel Enforcement’ in ‘*The European Antitrust Review 2012*’ Global Competition Review Special Report, p.4

any entity engaged in a commercial activity, irrespective of its legal status or the way it is financed⁶⁵. Based on this definition, some competition lawyers come to partly fair conclusion that undertakings “are thus economic rather than legal entities”⁶⁶.

As Okeoghene Odudu correctly notices it, this definition of undertaking, given in *Höfner*, tells us that Article 101 TFEU “is not addressed to *entities* at all; rather it addresses *activities*”⁶⁷, which is an indication of the functional approach to the issue⁶⁸. Considering the possible ultimate implications of functionality, as a main criterion for defining undertaking, he comes to conclusion that “because *entities* are only ever addressed in relation to *activities*”⁶⁹, the same entity can be an undertaking in one case and cannot in the other, so “*there are no bodies that cannot be considered undertakings, only activities that are not considered economic* [emphasis added]”⁷⁰. This phrase is essential for understanding of the undertaking concept that has no limits regarding the legal personality.

However, this theoretically broad concept is not limitless in its application. Boundaries of the notion of undertaking have to be defined for a number of practical purposes. First, is that there should be a clear understanding of applicability of substantive rules on competition⁷¹. It simply means that there should be a certain level of foreseeability for persons, constituting single undertaking, that their inner business (i.e. agreements within a

⁶⁵ *JCJ Wouters v Commission* [2002] ECR I-1577, para. 46.; *Höfner and Elser v Macrotron GmbH* [1991] ECR I-1979, para. 21

⁶⁶ Joshua, Julian, Botteman, Yves and Atlee, Laura “You can’t beat the percentage” – The Parental Liability Presumption in EU Cartel Enforcement’ in *‘The European Antitrust Review 2012’* Global Competition Review Special Report, p.4.

⁶⁷ Odudu, Okeoghene. “Meaning of Undertaking within 81 EC” *Cambridge Yearbook Of European Legal Studies* (2004): 211, p. 212

⁶⁸ Functional approach means focusing on the type of activity performed rather than on the characteristics of the actors, which perform it. *AOK-Bundesverband and Others*, [2004] ECR I-2493, *Opinion of AG Jacobs*, para. 26

⁶⁹ Odudu, p. 213

⁷⁰ *Ibid.*

⁷¹ Wils, W. P. “The undertaking as subject of E.C. competition law and the imputation of infringements to natural or legal persons.” *European Law Review* 25, (2000): 99-116, p. 100.

group of persons, no matter legal or natural), will not be considered, as subject to regulation by Art. 101 TFEU. The other reason is that, if agree on the economic nature of the term “undertaking”, there is a need to determine the circle of natural and legal persons, who can bear the liability for undertaking’s infringement of substantive rules. It derives from a fact that “economic operators appear in a wide variety of forms, ranging from single traders to often very complex corporate structures”⁷².

Therefore, in practice, “undertaking may range from a single individual to two or more companies within a corporate group, i.e. it may comprise natural persons, legal persons (made up of individuals) and groups of persons (made up of natural or legal persons)”⁷³. It should be specified, that the concept include companies (corporations) and natural persons, but also partnerships, State or public bodies (regardless to the facts that they supply public services or are subjects to public service obligations)⁷⁴. Moreover, according to the case law of CJEU, trade associations⁷⁵, collecting societies⁷⁶, agricultural cooperatives⁷⁷, sports governing bodies⁷⁸ can be considered as undertakings, if they carry out economic activity.

For instance, in *Wouters* case, even though law regulated the activity of the Bar, it was still considered as undertaking, because it provided services for a fee⁷⁹. Another thing to note

⁷² Ibid.

⁷³ Jones, Alison. "The Boundaries of an Undertaking in EU Competition Law." *European Competition Journal* 8, no. 2 (August 2012): 301-331, p. 305; See also *Imperial Chemical Industries Ltd (ICI) v Commission* [1979] ECR-619, para 11. The court established that “For the purposes of applying the rules on competition, *unity of conduct on the market...overrides the formal legal separation between those companies resulting from their separate legal personality* [emphasis added]”.

⁷⁴ Jones and Sufrin, *supra* note 64, p. 128; See also, *Höfner case*, *supra* note 60, where the Federal German Employment agency was recognized as undertaking.

⁷⁵ *NV IAZ International Belgium v Commission* [1983] ECR 3369

⁷⁶ *Belgische Radio en Televisie (BRT) v SV SABAM* [1974], ECR 313

⁷⁷ *Gøttrup-Klim ea Grovvareforeninger v Dansk Landbrugs Grovvarerelskab AmbA* [1994] ECR I-5641

⁷⁸ *Distribution of Package Tours during the 1990 World Cup* [1992] OJ L326/31, paras. 43-58

⁷⁹ *JCJ Wouters v Commission* [2002] ECR I-1577, paras. 46-49, 64

is that the intent of an entity to make profits is not essential to confirm the existence of undertaking⁸⁰.

At the same time, significant point is that the undertaking is actually targeting economic units⁸¹ “which consist of a unitary organization 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”⁸².

Still, we should bear in mind the moment when undertaking as an economic concept meets the legal reality of its enforcement. It is clear, that “for enforcement purposes, competition authorities must address their decisions to natural or legal persons”⁸³. According to Article 299 (1) TFEU, “Acts of the Council, the Commission or the European Central Bank which impose a pecuniary obligation on persons other than States, shall be enforceable”. Moreover, CJEU takes the uniform approach on the issue, confirming the Commission’s duty to specify the legal person, on whom the sanction can be imposed⁸⁴.

Based on this fact, we can conclude that there is ground for discrepancies between the economic nature of undertaking doctrine and the legal personality. The latter appears to be the only tool available to enforce the decision on undertaking’s conduct and thus, to enforce the concept of undertaking in general. We will see later in this paper, that parental liability is an example how the economic-based approach of EU competition regime can face obstacles on the level of enforcement.

Still, the ultimate outcome of this analysis is that undertaking is a special concept of mixed legal and economic nature, which defines subjects, regulated by EU competition law. One of its main features is that it focuses on entities engaged in a commercial activity

⁸⁰ *GVL v Commission* [1983] ECR 483; *Fédération Française des Sociétés d'Assurance and Others v Ministère de l'Agriculture et de la Pêche* [1995] ECR I-4013, para. 17

⁸¹ *Supra* note 73; Wils, p.101

⁸² *Shell International Chemical Company v Commission* [1992] ECR II-757, para 311

⁸³ *Supra* note 66

⁸⁴ *Koehler v Commission* [2009] ECR I-7191, para. 38

irrespective of their legal personality or sources of financing. Therefore, this concept itself is crucial for establishment of parental liability under the EU competition law.

2.2. Application of parental liability for competition law infringements in the EU

2.2.1. Early developments

It is hard to oppose this statement: “a correct attribution of liability for antitrust infringements...is essential for the proper functioning of any antitrust enforcement authority and constitutes an important part of the European Commission's enforcement policy”⁸⁵. As it was analyzed in the previous subchapter, within the framework of EU competition law this issue is complicated due to the fact, that sanctions should be addressed to persons (legal or natural), while the infringement can be committed by undertaking, which may include a number of such persons.

While the notion of undertaking is broad, corporate groups become eligible for being considered as a single economic unit⁸⁶. One side of this concept is that it can constitute ground for application of various block exemptions, EU competition law provides for. In *Hydroterm* case, for instance, the CJEU established that a natural person, limited partnership and a firm, while being controlled by a single person, were constituting a single economic unit, that allowed then to apply to it a block exemption relating to technology transfer agreement⁸⁷. This conclusion is fair enough, while there is no adverse effect to competition on the market, because “where entities form part of the same economic unit, competition

⁸⁵ Montesa, Aitor, and Angel Givaja. "When Parents Pay for Their Children's Wrongs: Attribution of Liability for EC Antitrust Infringements in Parent-Subsidiary Scenarios." *World Competition: Law And Economics Review* 29, no. 4 (December 2006): 555-574, p. 555

⁸⁶ *Supra* note 82

⁸⁷ *Hydrotherm Gerätebau GmbH v Compact del Dott Ing Mario Andreoli & C Sas* [1984] ECR 2999.

between the parties is impossible”⁸⁸. Furthermore, in the *Viho* case this approach was developed in a way that “the unified conduct in the market of the parent company and its subsidiaries takes precedence over the formal separation between those companies as a result of their separate legal personalities”⁸⁹. In those particular circumstances it meant that if “the subsidiary’s strategy is determined by the parent, the parent and subsidiary will pursue a common course irrespective of the existence of any agreement between them”, which was in this case important for evaluation of a distribution system and applicability of Art. 85 (1) of EC Treaty (now Art. 101 (1) TFEU).

The other side of this concept of economic unit is that it became a weapon used by European Commission to target with sanctions “big pockets” by attributing the liability for a subsidiary’s conduct on the parent companies. Alison Jones describes the algorithm as follows:

“A subsidiary commits a breach of Article 101 or 102; the subsidiary forms part of the same undertaking/economic unit as the parent if it does not decide independently upon its own conduct in the market, but carries out, in all material respects, the instructions given to it by the parent company; the Article 101 and 102 prohibitions are directed at “undertakings”; decisions penalising breaches of competition rules must be addressed to, and fines imposed on, persons, natural or legal; and the economic unit doctrine allows the conduct of a subsidiary to be imputed to the parent which forms part of the same undertaking”.⁹⁰

Why does Commission need to apply hold parent companies liable?

First reason is obvious and is related to dichotomy between undertaking and persons, who shall be the addressees of competition law sanctions. To some extent it is fair statement that possibility of holding parent companies liable is required in order to prevent economic and legal reality splitting, while separate legal personality can be very handy shield for large

⁸⁸ Jones, p.308; See also *Ibid.*, para 11

⁸⁹ *Viho Europe BV v Commission* [1995] ECR II-117, para. 50

⁹⁰ Jones, p. 309

corporations to avoid liability for infringements, deriving from their policy, not the subsidiary's own behavior⁹¹.

Wouter Wils, for instance, points out that “subsidiary's apparent freedom would only exist by parent's grace, which could change at any time. It would thus be not a real freedom”⁹². He further develops this idea:

“Given that parent companies, as shareholders, benefit from their subsidiaries' antitrust infringements, not holding parent companies liable would create a perverse incentive for parent companies to encourage their subsidiaries to engage in antitrust infringements, in particular by setting excessive financial targets or incentives that create pressure to commit infringements”⁹³.

Therefore, for the subsidiary it is hard to gain true independence on the market, so parent should bear some level of responsibility for its subsidiary's conduct. In this context there is also an interesting analogy, supporting this kind of thinking. Elena Islentyeva makes comparison between parental liability concept in competition law and “the ancient approach “like father like son” or in this particular case, maybe, “like son like father””⁹⁴, talking about low probability of subsidiary's independent (“without it's parent's supervisio”⁹⁵) participation in a cartel, for example.

It is also worth mentioning, commentators agree on that “the motivation of the EU Commission, when exercising its discretion to hold a parent company liable, is deterrence”⁹⁶.

⁹¹ Opinion of AG Warner in case *Commercial Solvents v Commission* [1974] ECR 223, para 263. In particular, AG Warner stated that there is a risk that blindly importing the doctrine of separate legal personality in the present context would “serve only to divorce the law from reality.”

⁹² Wils, *supra* note 66

⁹³ Wils, Wouter P. J. “Antitrust Compliance Programmes and Optimal Antitrust Enforcement.” *Journal of Antitrust Enforcement* 1, no. 1 (April 1, 2013): 52–81, p. 60 doi:10.1093/jaenfo/jns006

⁹⁴ Islentyeva, Elena. “Like father like son – The parental liability under the EU Competition law today.” *Global Antitrust Review (The Interdisciplinary Centre for Competition Law and Policy)*. no. 4 (2011): 99-115. [http://www.icc.qmul.ac.uk/GAR/GAR2011/GAR journal 2011.pdf](http://www.icc.qmul.ac.uk/GAR/GAR2011/GAR%20journal%202011.pdf) (accessed March 28, 2014), p. 102

⁹⁵ Ibid.

⁹⁶ Ibid. See also, *supra* note 66

It can be reached, as Senior Commission officials point out, “by maximising the pain of the fines imposed on transgressors”⁹⁷. Moreover, it should be noted that deterrence is generally accepted as the general aim of fine imposition, defined in 2006 Commission Guidelines on setting fines⁹⁸:

“Fines should have a sufficiently deterrent effect, not only in order to sanction the undertakings concerned (specific deterrence) but also in order to deter other undertakings from engaging in, or continuing, behaviour that is contrary to Articles 81 and 82 of the EC Treaty (general deterrence)”.

The other relevant motive for application of parental liability is that parent companies probably would like to avoid liabilities by shifting them to subsidiaries that might be unable to pay the amount of fine (the most radical example is that subsidiary is insolvent). Therefore, holding parent company liable is a method to guarantee the actual enforcement of Commission’s sanctions⁹⁹. Thus, there is no wonder that CJEU stated in its *Siemens/VA Tech* judgement that “the concept of joint and several liability for the payment of fines is an autonomous concept which is ‘merely an ipso jure legal effect’ of the ‘concept of “undertaking” for the purposes of competition law”¹⁰⁰.

While we found out that there are practical motives behind the application of parental liability, like ensuring deterrence effect of competition law sanctions, let us now have a more detailed view on the application of the concept in practice.

In the early days of parental liability under EU competition law in order to impute liability to parent company, the Commission was obliged to prove not only that this company

⁹⁷ *Supra* note 66

⁹⁸ Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, [2006] OJ C 210/02, para. 4. Available at: <http://eur-lex.europa.eu/en/index.htm>

⁹⁹ Isentyeva, p. 102

¹⁰⁰ *et al. Siemens/VA Tech*, 3 March 2011, OJ C 140, para. 155. See in general, Thomas, Stefan. “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.” *Journal of European Competition Law & Practice*, October 18, 2011. doi:10.1093/jeclap/lpr073, pp. 21-27

was “able to exercise decisive influence over the policy” but also that it “in fact used this power”¹⁰¹. The criteria were applied to situations where a 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”¹⁰².

Here we should stop for a moment and note that decisive influence as a concept operates primarily in the framework of EU Merger Regulation and is closely tied with a notion of control. As it derives from the quote of *ICI* case above, under decisive influence EU competition law understands the power to exercise control over the subsidiary’s commercial policy, so there is one economic unit acting on the market and not the separate and independent entity.

This concept of decisive influence and parental liability remained untouched for a long time. However, it was disadvantageous for the Commission, while the burden of proof was on its side and the information on possible instructions of parent company towards its subsidiary was usually in ones hands. This “informational asymmetry” has become something Commission would like to overcome¹⁰³.

Here one might say that this quote is not actually true, because there are legal instruments for discovery of information, EU Commission is empowered to use: from whistle-blowing to dawn raids. However, apart from some practical obstacles (like, for instance, location of parent company in non-EU state, so the Commission may struggle to conduct all required activities for investigation), it will be shown below that the other, more universal solution was found.

An example of how the policy of CJEU in this regards started to change is the *AEG* case, where the court stated that “a whole-owned subsidiary of AEG necessarily follows a

¹⁰¹*Imperial Chemical Industries Ltd (ICI) v Commission* [1979] ECR-619, para. 137

¹⁰² *Ibid.*, paras. 132–133

¹⁰³ Scordamaglia-Tousis, Andreas. *EU Cartel Enforcement: Reconciling Effective Public Enforcement with Fundamental Rights*. Kluwer Law International, 2013: 556, p.313

policy laid down by the same bodies as, under its statutes, determine the AEG's policy"¹⁰⁴.

Out of this case derives a conclusion that Commission does not really have to search for a proof of factual use of decisive influence on behalf of the parent in case of wholly owned subsidiaries¹⁰⁵. Still, it was not a well developed argument and required clarification in future.

However, further development of case law on this matter was even characterized by commentators as "chaos, brought by inconsistent Commission decisions and oblique rulings"¹⁰⁶. In particular, in *Stora* case CJEU stated:

"As that subsidiary was wholly owned, the Court of First Instance could legitimately assume, as the Commission has pointed out, that the parent company in fact exercised decisive influence over its subsidiary's conduct, particularly since it had found ... that during the administrative procedure the appellant had presented itself as being . . . the Commission's sole interlocutor concerning the infringement in question. In those circumstances, it was for the appellant to reverse that presumption by adducing sufficient evidence."¹⁰⁷

What this paragraph did, is that it left a field for lawyers to interpret it, as if "in the case of wholly-owned subsidiaries, the Commission should also bring forward at least some further indicia of parent company actual exercising decisive influence over its wholly-owned subsidiary"¹⁰⁸. In the meantime, the wording of this case was too ambiguous, so it was not totally wrong to come up with the conclusion opposite to above-mentioned. Moreover, this ambiguity "appears a priori justified"¹⁰⁹, while it relates to different approaches to the concept of influence on commercial policy: one is broad and expresses a generic influence

¹⁰⁴ *AEG v Commission* [1983] ECR 3151, para. 50.

¹⁰⁵ *Supra* note 98

¹⁰⁶ Pijnacker Hordijk, Erik H., and Simone J. H. Evans. "The Akzo Case: Up a Corporate Tree for Parental Liability for Competition Law Infringements." *Journal Of European Competition Law & Practice* 1, no. 2 (January 2, 2010): 126, p.128

¹⁰⁷ *Stora Kopparberg Bergslags AG v Commission* [2000] ECR I-9925, para. 29

¹⁰⁸ *Supra* note 101; See also la Rocca, Laura. "The controversial issue of the parent-company liability for the violation of EC competition rules by the subsidiary." *European Competition Law Review* 32, no. 2 (February 2011): 68., p. 70

¹⁰⁹ *Supra* note 98, p.314

(like every holding company enjoys), and the other is a specific influence on particular commercial matters¹¹⁰.

In its turn, *Bolloré* case seemed to confirm this approach in *Stora*, stating that the ability to exercise decisive influence in case of 100 per cent ownership in its subsidiary “is not in itself sufficient to attribute liability to the parent for the conduct of its subsidiary. Something more than the extent of the shareholding must be shown, but this may be in the form of indicia. It need not necessarily take the form of evidence of instructions given by the parent company to its subsidiary to participate in the cartel”¹¹¹.

Still, it will be fair to say that Commission’s will to shape policy in a suitable way prevailed, which resulted in a milestone decision in *Akzo* case¹¹², that actually put to an end possibility to somehow hamper the application of parental liability rules. Not digging into facts of this case, it is worth mentioning that according to this decision of CJEU, in the case of a wholly-owned subsidiary:

- 1) the parent company can (is able to) exercise a decisive influence over its conduct;
- 2) a rebuttable presumption that the parent company does in fact exercise a decisive influence over the conduct of its subsidiary is established.

Therefore, the Commission got an opportunity to regard the parent company as jointly and severally liable for the competition law infringement, committed by its subsidiary, “unless the parent company adduces sufficient evidence to show that its subsidiary acts independently on the market”¹¹³. In other words, parent can avoid liability in case it succeeds to prove that it does not constitute a single economic entity with its subsidiary, committed an infringement.

¹¹⁰ *Bitumen Nederland*, 13 Sep. 2006, OJ L 196, 28 Jul. 2007, pp. 40–44

¹¹¹ *Bolloré SA v Commission* [2007] ECR II-947, para 132

¹¹² *Akzo Nobel NV v Commission* [2009] E.C.R. I-8237

¹¹³ *Supra* note 101, p.127

It should be also noted, that the concept of decisive influence, as described in *ICI* case above, has been changed by this decision of CJEU. If the judgement in *Stora* was interpreted as the one, requiring Commission to prove actual exercise of decisive influence, in *Akzo* CJEU comes to conclusion, that in cases of whole ownership it is enough to examine “evidence relating to the economic and legal organisational links”¹¹⁴ between subsidiary and parent company. When this evidence are not “apt to demonstrate that they [parent and subsidiary] do not constitute a single economic entity”¹¹⁵, the presumption of exercise of decisive influence is applied and basically, no other evidence is needed¹¹⁶.

This opinion is somewhat contrary to the *Stora* judgement. However, the court gave new interpretation to its prior practice, stating that reference to actual exercise of decisive influence was used in *Stora* “solely for the purpose of identifying all elements on which the CFI based its reasoning”¹¹⁷. Thus, there are no additional indicia relating to the exercise of decisive influence by parent company. Moreover, AG Kokott in her opinion on the case, that was totally upheld by CJEU, stated that requirement of such kind of indicia would put on the Commission excessive burden of proof – “100% plus X”¹¹⁸.

While these arguments are still debatable, the *Akzo* case is considered as the one that brought the “long-awaited clarity on parental liability for the anti-competitive conduct of wholly-owned subsidiaries”¹¹⁹. As a result the Commission got a “green light” for imputation of liability on parent companies in general, and even “greener light” for establishing parental liability in case of 100-per-cent-controlled subsidiaries. Moreover, this case has become a

¹¹⁴ *Akzo Nobel NV v Commission*, *supra* note 102, para. 65

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*, para. 61

¹¹⁷ Pijnacker Hordijk et. al., *supra* note 101, p. 128. See also, *supra* note 107, para. 62

¹¹⁸ Opinion of A.G. Kokott in *Akzo Nobel BV v Commission* [2009] E.C.R. I-8237, paras. 62-70

¹¹⁹ Pijnacker Hordijk et. al., p.127

fundament for Luxembourg courts to impute parental liability in a number of further cases and in no way can be regarded as outdated.

2.2.2. Recent case law and critics

The approach of CJEU, taken in *Akzo*, while being prevalent in Commission's practice, is still a very controversial and debatable issue among experts and practitioners. As it was correctly noted, this judgment has left "a bitter taste"¹²⁰. Logical question is why would one complain, if this doctrine is devoted to benefit of competition and consumers of internal market of EU.

However, things are not that simple. Author understands that parental liability concept in its essence is an extraordinary measure, meaning that it is a development of last decades, that was supposed to exclude some flaws of legal personality concept, which in the area of competition law is not helpful as to economic impact of entity's market conduct. Still, parental liability should not be blindly applied. Most of critics regarding the issue of parental liability in a way, it is applied in the EU is related right to the lack of precise criteria for its application.

First of all, even at a very theoretical level there is a debate on reasons, why the parent company should be held liable. For instance, Damien Geradin gave his reply to Wouter Wils' statement that parent companies create an incentive to breach the laws by maximizing financial targets (and thus, should be held liable for subsidiary's conduct)¹²¹, stating that

"While imposing strict targets on employees may well incentivize them to breach the law (although other factors are at stake), the parallel argument that by imposing demanding financial targets on their subsidiaries parent companies would incentivize the employees of the latter to breach antitrust rules is less than clear and, to the best of my knowledge, such a correlation has not been proved empirically. Moreover, the Paper's constant emphasis on the fact that companies would cause antitrust breaches when they set demanding targets is puzzling considering we operate in a market economy where investors want to obtain a return

¹²⁰ Ibid., p.128

¹²¹ *Supra* note 93

on their investment and this is seen as maximizing the efficient use of resources in society.”¹²²

Furthermore, replying to Mr. Wils’ next argument that parent companies, as shareholders, benefit from their subsidiaries’ infringements¹²³, he noted that for the very same reason parent companies suffer from significant penalties imposed on them, so this argument could be easily applied vice-versa¹²⁴.

It is important to note that both positions here are well defensible. Moreover, this debate is also an example of conflict between those, who are practicing antitrust lawyers (and represent interests of companies) and Commission officers¹²⁵. However, there are more questions raised before Commission and competition lawyers on this topic.

Thus, the first question after *Akzo* judgement, that was raised by practitioners, was how can the parent rebut the presumption of decisive influence, while “nothing ‘hands-on’ comes to mind when reading that phrase”¹²⁶. The only possible strategies for rebuttal were offered by AG Kokott in her opinion on *Akzo*, namely the following: “(a) the parent company is an investment company and behaves like a pure financial investor, (b) the parent company holds 100% of the shares in the subsidiary only temporarily and for a short period, (c) the parent company is prevented for legal reasons from fully exercising its 100% control over the subsidiary”¹²⁷. It is also agreed¹²⁸ to include to this list one more ground for rebuttal,

¹²² Geradin, Damien. “Antitrust Compliance Programmes and Optimal Antitrust Enforcement: A Reply to Wouter Wils.” *Journal of Antitrust Enforcement*, May 22, 2013. doi:10.1093/jaenfo/jnt004., p. 331

¹²³ *Supra* note 93

¹²⁴ *Supra* note 122

¹²⁵ It is intriguing that Mr. Geradin is a Partner at law firm, while Mr. Wils is a Commission officer. Of course, both of them are highly respected scholars, but still, their approaches clearly represent both sides of every parental liability case. Thus, this kind of generalization can be used here as an analogy.

¹²⁶ *Supra* note 120

¹²⁷ *Supra* note 118, footnote 67

¹²⁸ See Isentyeva, *supra* note 94; Pijnacker Hordijk et. al., *supra* note 106

expressed in *BMW* case¹²⁹ – when subsidiary disregards the instruction, given by parent company.

Still, these grounds for rebuttal are questionable. For instance, it is fair assessment that “nowadays the early capitalistic image of a pure rent seeker, without any engagement with the business, is very rare”¹³⁰. Thus, the rebuttal of pure financial investor may not always work in practice, while it is reasonable even for portfolio investors to be engaged in some managerial activity in order to ensure its income. However, it will be unfair to say that this concept does not work at all. There is some hope for pure investors to escape from liability based on the decision in *Alliance One*¹³¹ case, where one of the companies – TCLT – had purely financial interest in a subsidiary, and thus, escaped liability. What is more interesting that Commission’s appeal to CJEU was also dismissed¹³².

Still, this kind of successful rebuttal still looks more like an exception. For instance, in case of legislative prohibition of exercise of decisive influence, which is deemed as an exception by AG Kokott, “one may note that the group liability principle will still be applicable in cases where a parent company, while able to exercise a decisive influence, cannot be held liable for the conduct of its subsidiary under national law.”¹³³. Thus, this ground for rebuttal can also be ineffective.

The argument, proposed in *BMW* regarding the subsidiary’s non-compliance with parent’s instructions does not also look promising, while the concept of decisive influence is treated that broad that it does not deal with decisive influence on commercial policy on the relevant market¹³⁴. Instead, “disregarded instructions e.g. on the compliance program, or even

¹²⁹ *BMW Belgium and Others v. Commission* [1979] ECR 2435

¹³⁰ Islentyeva, p. 110

¹³¹ *Alliance One and others v European Commission* [2010], case T-24/05 before GC.

¹³² *Alliance One and others v European Commission* [2012], joined cases C-628/10 P and C-14/11 P (not reported)

¹³³ Islentyeva, p. 105, referring to *Flat Glass* [2008] OJ C 127

¹³⁴ Islentyeva, p. 105

misleading the parent for a period, while the parent could and did exercise its decisive influence on other aspects of commercial policy”¹³⁵ do not save parent company from being held liable. Moreover, makes sense the point that holding companies have to be protected “in the event that on a group level general instructions have been issued regarding strict compliance with the EU competition rules which subsequently turn out to have been violated by employees of one or the other subsidiary”¹³⁶.

As a result, there is not many ways for manoeuvre, if parent company would like to avoid attribution of liability. For instance, let us have a look on a very practical chart, illustrating and summarizing the practice of Luxembourg courts denying rebuttals made by corporations¹³⁷ (cited without any changes to content):

Companies' argument	Courts' refutation
Parent was pure financial holding company with no operational role	Does not rule out possibility (sic) that it exercises decisive influence over conduct of subsidiaries by coordinating financial investments
Parents did not intervene in commercial policy of subsidiaries	Division of functions inside a group is normal phenomenon
Parent only involved in high level strategic decisions by subsidiary affecting group as a whole	Demonstrates that parent's function was to ensure group 'run as one', confirms existence of single economic entity
Subsidiary determined its own commercial policy without reference to parent company	Exercise of decisive influence not confined to commercial activity in narrow sense (distribution strategy or price)
No reporting system between subsidiary and parent on operational matters: purely on regulatory and financial matters as required by law	Since assessment of autonomy not limited to operational factors, absence of reporting system does not suffice to prove autonomy of subsidiary
Parent was holding company of a diversified conglomerate whose supervisory activity of subsidiaries was limited to what was required by obligations to own shareholders under applicable law.	In group context, holding company's function of seeking to regroup shareholdings and ensure various companies are 'run as one' can amount to exercise of decisive influence.
Parent shared no common customers or commercial activities with subsidiaries	Irrelevant

¹³⁵ Ibid.

¹³⁶ *Supra* note 120

¹³⁷ *Supra* note 66, p.7.

Industry and public perceive subsidiary as separate player in its own right	Perception by third parties of company image irrelevant
Requiring proof of total autonomy from parent requires refutation of abstract possibility, amounts to probatio diabolica and renders presumption irrebuttable	Companies able to refute presumption by means of any evidence relating to economic, organisational and economic links they believe apt to show they did not constitute a single economic unit: fact companies could not produce such evidence in specific case does not show presumption can never be rebutted
Autonomy of subsidiary confirmed by Commission treating it as separate undertaking in previous cases	Commission not obliged to check systematically that infringing conduct of subsidiary was attributable to parent

Moreover, this chart can be also added with other examples¹³⁸. For instance, one of the most intriguing rebuttals, that failed, is the existence of the general compliance programme for the corporate group¹³⁹. In those cases, Commission treated the existence of such program as a sign of decisive influence being exercised¹⁴⁰. The simple consequence of such is that corporate groups have the same outcome either they draft competition compliance policy, or not, they are to bear their subsidiary's liabilities for infringements¹⁴¹. The same issue was also raised by Damien Geradin, when he was anticipating that "the robust compliance programmes...could be used to demonstrate, together with other forms of evidence, that a parent company exercises decisive influence on its subsidiary"¹⁴². Therefore, corporate groups as to their compliance policies are in a kind of deadlock.

It is worth paying attention to the frequently raised argument of *probatio diabolica*, established in *Akzo* and subsequent cases, like *Quimica*, where the Commission and GC broadened the *Akzo* test, stating that the "wholly-owned" presumption may be applied automatically in cases of 100% ownership, and, is also applicable even though the 100%

¹³⁸ See for example, Burnley, Richard. "Group Liability for Antitrust Infringements: Responsibility and Accountability." *World Competition: Law And Economics Review* 33, no. 4 (December 2010): 595-614, pp. 603-605

¹³⁹ Islentyeva, p.106

¹⁴⁰ *Flat Glass* [2008] OJ C 127, para 413. See also *PO/ Elevators and Escalators* OJ C (2007) 512, para. 631

¹⁴¹ Burnley, *supra* note 138, pp. 605

¹⁴² *Supra* note 122

ownership in the subsidiary is held indirectly through other entities¹⁴³. In total, Luxembourg courts insist on the fact that failure of companies to present proper evidence does not mean, that presumption of decisive influence cannot be rebutted¹⁴⁴.

Moreover, this kind of burden on companies raises an issue of personal liability principle and human rights violation (mainly in the meaning of the right to a fair trial and presumption of innocence, provided by ECHR). Some commentators come to fair conclusion that there is a clear contradiction with these principles, so the approach of Commission should be changed in a way to comply with these requirements¹⁴⁵.

Still, it is fair to say that despite some inconsistencies in application of exclusions, offered by AG Kokott, the bar for rebuttal remains to be high. Commission, supported by courts, expands the general presumption of decisive influence even to unusual parent companies (meaning non-industrial companies like holdings, financial investors). Thus, in case of *I.garantovaná* “the GC confirmed the Commission’s finding that the Slovak investment company is liable for the anticompetitive conduct of one of its portfolio companies Novacke chemicke zavody”¹⁴⁶. Moreover, in the very recent case of *Portielje*, CJEU overruled the GC decision, which would allow escaping parent company from liability for its subsidiary¹⁴⁷. While GC concluded, that Portielje is not an undertaking, as it is not engaged in economic activity, and it was considered as a first truly successful rebuttal of a

¹⁴³ *General Química SA, Repsol Química SA, Repsol YPF SA v European Commission* [2011] ECR I-00001, paras. 41-88. In addition, this was a clear case, where holding company was considered liable for subsidiary’s conduct.

¹⁴⁴ *Elf Aquitaine SA v European Commission* [2011] ECR I-08947, paras. 53-67.

¹⁴⁵ Bronkers, Marco, and Anne Vallery. "No Longer Presumed Guilty? The Impact of Fundamental Rights on Certain Dogmas of EU Competition Law." *World Competition: Law & Economics Review* 34, no. 4 (December 2011): 535-570.

¹⁴⁶ Stanevičius, Mantas. "Portielje: Bar Remains High for Rebutting Parental Liability Presumption." *Journal Of European Competition Law & Practice* 5, no. 1 (January 2014): 24, p.26. Even pure investors like Goldman Sachs are involved as possibly liable parent companies. See *supra* note 66, p. 7.

¹⁴⁷ *Commission v Stichting Administratiekantor Portielje, Gosselin Group NV*, C-440/11 P [2013] (not reported)

presumption of decisive influence¹⁴⁸, the CJEU reversed this decision. As a result, liability was imposed on parent company. Moreover, Court of Justice admitted that the concept of single economic unit “does not necessarily presuppose the adoption of formal decisions by statutory organs and that, on the contrary, that unit may also have an informal basis, consisting *inter alia* in personal links between the legal entities comprising such an economic unit”¹⁴⁹.

In addition to having almost strict liability regime of competition law liability for subsidiary’s misconduct, in the very end of proceedings companies face such risks as:

- The maximum fining cap of 10 per cent of worldwide turnover applies to the aggregate sales of the group constituting the undertaking¹⁵⁰;
- Parent company can be found a recidivist, when there are multiple infringements on behalf of different subsidiaries within a group, meaning additional increase in the amount of fine¹⁵¹
- Private competition enforcement, that is even encouraged by the Commission¹⁵²

As an ultimate conclusion of this part of analysis, it should be stated that the presumption of decisive influence, developed in *Akzo* case, has put a very high bar for the companies’ defence. Author can hardly explain, what kind of evidence the company can produce, in order to rebut it successfully, while many practitioners are also puzzled with this kind of legal regime. That is why the issue of parental liability is so debated, while it developed in a mechanism to fine companies with a very little chance for them to oppose.

¹⁴⁸ Stanevičius, p. 24

¹⁴⁹ *Supra* note 146, para. 68

¹⁵⁰ Thomas, cited in *supra* note 95, p. 17

¹⁵¹ *Supra* note 66, p. 4

¹⁵² *Ibid.*; See also Isentyeva.

2.2. The U.S. antitrust law and corporate separateness.

This Subchapter will not provide for that many details, as the previous one, while the approach of U.S. antitrust law to the issue of parental liability is radically different.

The principle “like father, like son” was brought by commentators to illustrate the current state of EU competition policy related to parent companies. In the U.S., however, one may find more traditional view on, let’s say, family relations: “Just as we do not punish parents for the sins of their children, so it is that most national legal systems do not routinely or lightly impose liability on a shareholder for the conduct of the company whose shares are held.”¹⁵³. Definitely, it is fair to say that EU concept of parental liability with its irrebutability may sound like heresy to U.S. lawyers¹⁵⁴, who do not use the concept of undertaking. Two fundamental antitrust statutes – the Sherman Act and Clayton Act – do not provide any guidance on the notion of undertaking or anything similar, they just define punishable conducts and exemptions¹⁵⁵. Of course, one may argue that these statutes are relatively old ones and there were not dealing with the market that EU was at the time of its establishment. Moreover, it should be beared in mind that case law gives broad interpretation to both antitrust acts.

However, it is hard to find any source from the U.S., that would address precisely the issue of economic unit, as subject to antitrust regulation.

Instead, for the U.S. legal system it is usual to have two antitrust authorities – Fair Trade Commission and Antitrust Division of Department of Justice – both of which, are considered as some kinds of adjudicature and, to some extent, they are competing in

¹⁵³ Briggs, John D., and Sarah Jordan. "Presumed Guilty: Shareholder Liability for a Subsidiary's Infringements of Article 81 EC Treaty" *Business Law International* no. 1 (2007), p.2.

¹⁵⁴ *Supra* note 66, p. 4

¹⁵⁵ Posner, Richard A. *Antitrust law*. n.p.: Univ. of Chicago Press, 2001, pp. 33-50

enforcement of antitrust cases¹⁵⁶. However, the main role is for the courts, which have to decide suits, brought privately or as a public action on behalf of FTC or DOJ¹⁵⁷.

It should be noted that antitrust cases in the U.S., primarily, deal with the issue of establishing jurisdiction over the conduct of company, while “it must be shown that the defendant, whether an individual or a corporation, and whether a U.S. national or a foreigner, has sufficient minimum contacts with the forum to satisfy the applicable due process clause and enable the court to adjudicate the case”¹⁵⁸.

In case of parental liability it is also important to note that “as a practical matter, antitrust lawsuits filed in the United States against foreign corporations who are carrying on any substantial business in the U.S. seldom fail to meet the due process test of personal jurisdiction”¹⁵⁹. However, it is still not sufficient to establish parental liability, while there is a “general legal principle that the separate identity of corporations will be recognized, even if those corporations are linked in a close corporate family of common ownership and control”¹⁶⁰.

There is also a clear understanding that parent corporation together with its 100-per-cent-owned subsidiaries “will normally be treated as separate entities for purposes of assessing whether a U.S. court has personal jurisdiction over one or the other of the two corporations.”¹⁶¹.

One of the most quoted cases in this regard in a field of antitrust law, not the corporate, is the *Bestfoods*, which clearly stated, that “a corporation and its stockholders are

¹⁵⁶ Ibid., p. 280

¹⁵⁷ Ibid. pp. 274-280

¹⁵⁸ Joelson, Mark R. *An international antitrust primer: a guide to the operation of United States, European Union, and other key competition laws in the global economy.*: Kluwer Law International, 2006: 717, p.90

¹⁵⁹ Ibid., p. 92

¹⁶⁰ Ibid., p. 93

¹⁶¹ Ibid.,

generally to be treated as separate entities”¹⁶². However, it was not the first case decided in this direction. For instance, in *British Leyland Motors* the Ninth Circuit ruled that “relationship between a subsidiary and a British parent company was insufficient to hold the British parent liable under the antitrust laws for the acts of a subsidiary”¹⁶³. The doctrine of separateness was then applied in other cases, like, for instance, *Arnold Chevrolet LLC*, where the Court decided that “in the antitrust context, courts have held that absent allegations of anticompetitive conduct by the parent, there is no basis for holding a parent liable for the alleged antitrust violation of its subsidiary”¹⁶⁴. Thus, we may note that in the United States in order to hold parent company liable for the infringement of antitrust laws, it should directly participate in this infringement. Only that fact can be a valid ground for the court to establish jurisdiction over the case.

Still, it should be noted, that there are few exceptions to this widely recognized in U.S. rule. One of them is represented by *Copperweld* case, where the U.S. Supreme Court held that parent company and its wholly-owned subsidiary cannot be parts of agreement, prohibited under the Section 1 of Sherman Act¹⁶⁵. In particular, Supreme Court stated that

“with or without a formal ‘agreement’ the subsidiary acts for the benefit of the parent, its sole shareholder...If a parent and a wholly owned subsidiary do ‘agree’ to a course of action, there is no sudden joining of economic resources that had previously served different interests, and there is no justification for §1 scrutiny...They share a common purpose whether or not the parent keeps a tight rein over the subsidiary; the parent may assert full control at any moment if the subsidiary fails to act in the parent’s best interests”¹⁶⁶.

¹⁶² United States v. Bestfoods, 524 U.S. 51, 61 (1998)

¹⁶³ *Sherman v. British Leyland Motors, Ltd.*, 601 F.2d 429, 441 (1979); See also Sandrock, Ryan M., Samuel R. Miller, and Sidley Austin. "Parental Liability For A Subsidiary's Antitrust Violations Under U.S. Law." GCP: The Antitrust Chronicle. no. November (1) (2009): 1-4. <https://www.competitionpolicyinternational.com/file/view/6186> (accessed March 27, 2014).

¹⁶⁴ *Arnold Chevrolet LLC v. Tribune Co.*, 418 F. Supp. 2d 172, 178 (2006)

¹⁶⁵ *Copperweld Corp. v. Independence Tube Corp.* 467 US 752 (1984)

¹⁶⁶ *Ibid.*

As it was reasonably noted, “the Court made the basic antitrust policy decisions”¹⁶⁷, intending to exclude from liability for conducting business as a group, to exclude some intra-group transactions from the scope of antitrust regulation. This is analogy to EU law, where the notion of undertaking is used, among others, for this particular purpose¹⁶⁸. However, Phillip Blumberg notes that while this *Copperweld* case was dealing with foreign parent company, in case of domestic parents U.S. courts are more reluctant to apply this rule¹⁶⁹, which in author’s opinion might be considered as another incentive for corporations to invest in United States, having this kind of protection in a foreign antitrust regime (meaning U.S.).

The other important exception to the rule of corporate separateness is the concept of *alter ego*, which is a standard tool of corporate veil-piercing¹⁷⁰. “Most often, this finding of an *alter ego* relationship occurs when a corporate parent has exercised control over the operations of a subsidiary corporation to such a great degree that the legal distinctions between the two entities are no longer being observed”¹⁷¹.

In this regard, one of the major cases in the U.S. is the *Scophony Corp.*, where the Supreme Court found that supervision of a British company over the American was strong enough to find that “British Scophony was “found” in the Southern District of New York, within the meaning of Section 12 of the Clayton Act, inasmuch as, through key officials in New York, it exercised a continuing supervision over and intervention in the affairs of the American company”¹⁷². While this approach is somewhat resembling the concept of parental liability under EU law in part of legal, economic ties, as well as personal, in order to establish decisive influence, *Scophony Corp.* doctrine is more restricted in application, so it cannot override the *alter ego* concept.

¹⁶⁷ Blumberg, *supra* note 22, §97.07 [B]

¹⁶⁸ See in general Chapter 2.1 above

¹⁶⁹ *Supra* note 167

¹⁷⁰ Sandrock et. al., p. 3

¹⁷¹ *Supra* note 158, p. 93

¹⁷² *United States v. Scophony Corp.* 333 U.S. 795 (1948)

One of the most easy for understanding definitions of *alter ego* was given in *Swiss Watchmakers* case, namely “where the substance of corporate independence is not preserved and the subsidiary acts as an agent of the parent, this corporate separation has been found without significance”¹⁷³.

It is also important to note in this context, that *alter ego* doctrine is not usually invoked on its own, it should be always supplemented with some indications of fraud or injustice¹⁷⁴, as it is required by in veil-piercing in general. However, it is still considered in the U.S. as “an extreme remedy” that is “sparingly used”¹⁷⁵.

What is eye-catching in the U.S. antitrust system (and in the corporate law as well) is, that the agency doctrine generally executes the same function as *alter ego*. It may be applied in “situations where there is no corporate relationship involved”¹⁷⁶. Under agency law, if an agent does not act independently, but “acts on behalf of and subject to the full control of another party – the principal – the principal is liable for the agent's actions”¹⁷⁷. Thus, a corporation or an individual (even foreigner) can be found subject to U.S. court personal jurisdiction via finding a business agent, controlled by this person in the United States¹⁷⁸.

This is probably one of the main “long-arm” tools, which may be used in regard to foreign businesses, while in general, United States are loyal to corporations in sense, that the doctrine of corporate separateness prevails over the doctrine of parental liability. The only way to hold parent company liable is to prove its own misconduct (no matter as a single actor, or in group with its subsidiaries).

¹⁷³ *United States v. Watchmakers of Switzerland Inf. C.* 133 F.Supp. 40 (1955)

¹⁷⁴ Sandrock et. al., p. 4

¹⁷⁵ *Sonora Diamond Corp. v. Superior Court*, 83 Cal. App. 4th 523, 539 (2000)

¹⁷⁶ Joelson, p. 95

¹⁷⁷ Ibid.

¹⁷⁸ Ibid.

Chapter 3. Application of parental liability to joint ventures.

While the purpose of this research is to produce some valuable lessons for emerging economies, it is important to analyze the issue of joint ventures, which appear to be a widely used mechanism of foreign capital investments.

However, as it was shown in the previous Chapter, United States are not willing to apply concept of parental liability as presented by EU Commission. For every type of corporate vehicle rules on agency, corporate veil-piercing, cited above, shall be applicable. In these circumstances the field of relevant knowledge is the EU practice on this matter. Therefore, this Chapter will provide reader with an insight on partial ownership in the context of parental liability (that is a prerequisite to parental liability for JV's misconduct), and will address the issue of parental liability for JV's competition violations under EU Competition law.

2.1. Parental liability in case of partially owned subsidiary

The issue of parental liability for competition law violation committed by partially owned subsidiary was intentionally omitted in the previous Chapter. This issue is, actually, suitable for analysis within the chapter on joint ventures, as the latter are an example of partial ownership.

While EU Commission together with Luxembourg courts brought certainty to question of parental liability for the conduct of wholly-owned subsidiary, applying the presumption of decisive influence, cases of partial ownership remain to be in a "gray" zone. It is even more intriguing issue to discuss, while "normally under merger rules there can be sole control above even 50%"¹⁷⁹.

¹⁷⁹ Islentyeva, p. 108

First of all, it should be noted that the presumption of Akzo case was expanded to cases, close to whole ownership, like more than 99% but less than 100%¹⁸⁰, or 96%¹⁸¹. However, the basic court decision in this field is a judgement of GC in *Arkema* case, where the court stated that:

“the parent company which owns the near entirety of its subsidiary’s share capital is, in principle, in a situation that is similar to that of an exclusive owner, regarding its power to exert a decisive influence over its subsidiary’s conduct, as regards the economic, organisational and legal links which relate it to said subsidiary. Therefore, the Commission may apply to such situation the same regime of evidence, namely, rely on the presumption that said parent company effectively uses its power to exert a decisive influence on its subsidiary’s conduct”¹⁸².

Thus, the court introduced the notion of “near entirety” of share capital in a subsidiary, which is a flexible tool to decide on a case-by-case basis on the limits of this kind of entirety. The rationale behind this approach can be explained as the other attempt to adapt law to economic reality, where lack of percent or few is only a formal reason to consider the subsidiary as not wholly-owned. In the real life there is no doubt that majority shareholder will be capable to control the subsidiary in its entirety and is likely to ignore the minority’s opinion. However, one may ask what if minority shareholders have privileged shares or other powers, allowing them to restrain managerial powers of the parent company?

The GC was cautious enough about this issue and confirmed that it is not something impossible, however, to have minority shareholders, who “might have rights towards the subsidiary” and their existence can be an eligible ground for challenging the aforementioned analogy¹⁸³. Therefore, the GC has left a space for further policy choices in every particular case. On the other hand, courts might not be willing to specify criteria on the lowest limit

¹⁸⁰ *Michelin v Commission* [2003] ECR II-04071, para. 290

¹⁸¹ *Flat Glass*, *supra* note 135.

¹⁸² *Arkema France, Altuglas International SA, Altumax Europe SAS v Commission* [2011] ECR II-02593, para. 53

¹⁸³ *Ibid.*

for parental liability, while this uncertainty on this matter is, in fact, beneficial for the Commission, so it will not be strictly bound by clear criteria.

In more general terms, it should be noted that the *Akzo* presumption is not usually applied in cases of partial ownership, while it was targeting cases of 100 per cent ownership. Logically, in order to make shareholder liable for subsidiary's conduct, Commission has to prove the actual exercise of decisive influence. Based on the current case law and scholar works in this field, there are a number of typical signs the influence is exercised¹⁸⁴.

For instance, share capital. The rule here is simple – “the closer the shareholding in the subsidiary is to 100%, the more likely decisive influence will be found”¹⁸⁵. Furthermore, as it was mentioned above, numbers of shares, very close to 100% have given rise to the use of *Akzo* presumption. In particular, voting rights of minority shareholders may lead to the exercise of decisive influence over strategic decisions of the subsidiary¹⁸⁶.

The use of same trade name or trademark, which creates a unity of perception for third parties (consumers) and for other market players¹⁸⁷, is probably one of the most obvious examples of circumstances that can lead to imputation of parental liability for the conduct of partially owned subsidiary.

The other factor, that can play a role, is a composition of BoD or supervisory bodies, while, as it was shown in *Stora*, Commission takes into account personal links between entities, like overlapping positions etc¹⁸⁸. While it is still very disputable, because today it is usual business practice that one person may hold positions in supervisory bodies of several different entities, this mere fact may still result in parental liability. Somewhat analogous to this situation is either direct or indirect use of parent's assets (including employees) by

¹⁸⁴ Islentyeva, p. 111; Burnley, pp. 609-611

¹⁸⁵ Islentyeva, p. 111

¹⁸⁶ Ibid.

¹⁸⁷ *Knauf Gips KG v Commission* [2010] ECR I-6371, para. 104

¹⁸⁸ *Stora*, *supra* note 107, para. 70; See in general, Islentyeva, p. 111

subsidiary¹⁸⁹, that was also considered as a ground for establishing the exercise of decisive influence.

Among other Commission's concerns is the activity of parent and subsidiary on the same market¹⁹⁰, "instructions to the subsidiary or reporting lines going up from the subsidiary to the parent"¹⁹¹. Still, the mentioned instructions may relate to any issue, but not to the infringement committed by subsidiary¹⁹², which is another sign of disproportion, existing in attribution liability cases, because even minor contact with subsidiary or its officers may be considered as the reflection of decisive influence being exercised.

The accounting may be also considered as a proof of unity between entities. In particular, a big role is devoted to sales between parent company and subsidiary – if they appear in papers as intra-group, then it is a clear sign of decisive influence, according to *Knauf Gips* case¹⁹³.

To conclude, it should be first noted that, parental liability in case of partially-owned subsidiaries can be established based on the doctrine of decisive influence. As a general rule, the presumption of exercise of decisive influence, developed in *Akzo*, is not applicable to this type of cases. However, there is an exception of nearly-wholly-owned subsidiaries, when this presumption comes to play.

It should also be pointed out that there is a variety of factors, Commission and EU courts will take into account in order to establish the unity of an economic entity and the exercise of decisive influence over a partially-owned company. While in this type of cases it is relatively easy to avoid *Akzo* presumption, it is still hard to present ties between parent and subsidiary in a way that would exclude the possibility of attribution of liability to parent,

¹⁸⁹ *Knauf Gips*, *supra* note 187 paras. 101-102

¹⁹⁰ *Stora*, *supra* note 107, para. 83

¹⁹¹ *Supra* note 185

¹⁹² *Ibid.*

¹⁹³ *Supra* note 188, para. 78

because reasons, cited above, are not something unusual in commercial practice and thus should not amount to establishment of decisive influence (if not supported by other sufficient evidence).

2.2. Legal nature of joint venture in a competition law prospective.

Joint ventures are an important development of legal and economic systems. These types of entities are widely spread around the globe – they are usual thing for both developed states and for emerging markets. As every other legal entity, JV acts on the market and thus produces various effects on competition. No wonder that antitrust laws also regulate JVs. However, some legal systems, like UK¹⁹⁴, treat JVs as other market participants without giving them some special status. EU competition law is specific, while JVs are deeply considered in light of merger control. Thus, analysis of parental liability as to illegal conduct of joint venture is important for in-depth analysis of EU competition law attitude to parental liability.

First of all, it should be noted, that “the term JV, as used by the industry, resists clear definition”¹⁹⁵. Still, in the context of EU competition law Commission has applied the term “joint venture” “only to an undertaking that is (i) a separate business entity and (ii) jointly controlled by at least two parents”¹⁹⁶. In the meantime, it should be noted that for the purpose of correct application of EU competition law, the two main types of JVs should be distinguished: structural and behavioral (or non-structural) joint ventures¹⁹⁷. The main difference between the two is that structural JV is a separate legal entity, an establishment

¹⁹⁴ Furse, Mark. *Competition law of the EC and UK*. 481: Oxford Univ. Press, 2008, p. 382

¹⁹⁵ Bellamy, Christopher W, Child, Barr, and Peter Roth. *European Community Law of Competition*. 1644: Oxford University Press, 2008, para. 7.002

¹⁹⁶ Ibid.

¹⁹⁷ ECLF Working Group on State Aid in the Banking, Crisis. "Comments on the Draft Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements." *European Competition Journal* 6, no. 2 (August 2010): 507-540, pp. 534-535

with its own legal personality and thus “is to be treated as distinct from parent or shareholder undertakings”¹⁹⁸. There are also two types of structural JV depending on the functions, it performs, namely full-function and partial-function JV¹⁹⁹. Behavioral JV, in its turn, is cooperation (usually contract-based) between two or more entities without creation of a separate legal person²⁰⁰.

From the prospective of parental liability JVs can be considered as a specific example of partial ownership. Furthermore, for joint ventures are usually created as equally shared by its parents (of course, it is not a rule), therefore in this cases is no majority shareholder and one might say that it is rather joint ownership, rather than partial, leading to sole control over an entity.

Classic approach to JVs is that they are separate entities and their ties with parent companies are not very strong²⁰¹. Moreover, Art. 3 (4) of EU Merger Regulation²⁰² provide that among others, it is applied to full-function joint ventures, which are performing on a lasting basis all the functions of an autonomous economic entity.

However, in a specific case of *Avebe* GC held liable parent companies for the misconduct (participation in cartel) of its contractual joint venture²⁰³. Among scholars and practitioners this case was understood as very particular and unique one, because there were many specific details in it: for instance, one of the parent companies was kept constantly

¹⁹⁸ Ibid.

¹⁹⁹ It should be noted that before the change of EU Merger Regulation in 1998, full-function JV was split into two types – concentrative and cooperative full-function JV. See Ibid.

²⁰⁰ *Supra* note 197

²⁰¹ Atlee, Laura. "Joint Venture...Subsidiary... What's the Difference for Cartel Liability and Fines? ." *CPI Antitrust Chronicle*. no. April (1) (2012): 1-8. <https://www.competitionpolicyinternational.com/joint-venture-subsidiary-what-s-the-difference-for-cartel-liability-and-fines-2/> (accessed March 27, 2014), p. 2

²⁰² Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings

²⁰³ *Coöperatieve Verkoop- en Productievereniging van Aardappelmeel en Derivaten Avebe BA v Commission* [2006] ECR II-3085.

informed about the collusion, employees of the other parent were directly involved in the cartel and JV had no separate legal personality²⁰⁴. As a result, this decision was not really contrary to competition policy of the EU at that time.

Totally different approach was presented in a case of *Rubber Chemicals*, where Commission upheld the decision on the independence of full-function JV from its parents; it was considered a separate legal entity²⁰⁵.

After that, in a growing debate on the topic, competition lawyers were pointing out that the essential feature of JV is that it is neither a part of one parent undertaking, nor part of the other, so that it cannot be in any way considered as constituting single economic entity together with both parents²⁰⁶. Thus, there is no ground for the same treatment, as subsidiaries get in regard to issue of parental liability and *Avebe* case should not be applied to full-function JVs.

However, in a relatively short period of time both GC and Commission have made a significant shift towards parental liability in case of JV's illegal conduct²⁰⁷. In the mentioned earlier *Alliance One* case GC came to following conclusions:

"Where an undertaking is under the joint control of two or more other undertakings or persons, those undertakings or persons are by definition able to exercise decisive influence over it. That is not enough, however, to enable them to be held liable for the infringement of the competition rules committed by the undertaking which they control jointly, because such liability also requires the fulfillment of the condition concerning the actual exercise of decisive influence.

...
If it transpired that in reality only one of the undertakings or persons holding joint control in fact exercises decisive influence over the conduct of their subsidiary, or if other circumstances were able to justify it, the Commission would be able to hold only that undertaking or person jointly and severally liable, with its subsidiary, for the infringement committed by the subsidiary"²⁰⁸.

²⁰⁴ Atlee, p.3

²⁰⁵ *Rubber chemicals* [2006] O.J. L 353/50.

²⁰⁶ *Supra* note 197, p. 539

²⁰⁷ Atlee, p.3. See also, *Cementbouw Handel & Industrie v Commission* [2006] ECR II-319; COMP/38629 – *Chloroprene Rubber C* (2007) 5910

²⁰⁸ *Supra* note 131, para. 165

Therefore, it was established that joint control over an entity leads automatically to possibility to exercise of decisive influence and that for holding these parent companies liable it is required to it has been exercised in fact. Therefore, this test is almost similar to the approach taken by Commission to partially-owned companies and their parents. It is worth mentioning that CJEU have confirmed GC's decision, when it came to appeal²⁰⁹.

Today the issue of parental liability applied to parents of JVs is discussed, generally, in the course of two similar judgements in cases *Dow*²¹⁰ and *El DuPont*²¹¹. Procedural posture of those cases is that both Dow and El DuPont challenged Commission's decision in *Chloroprene Rubber*²¹² and lost their cases first in GC (cases T-77/08 and T-76/08 respectively) in 2012, and recently, in September, 2013, lost their appeals in CJEU. In both cases it was confirmed that, "parent company can be held liable and fined by the European Commission for the antitrust infringements of its 50:50 joint venture in the EU"²¹³.

In order to decide these cases, GC has applied the so-called "I know it when I see it" test²¹⁴, stating that "a parent company may exercise decisive influence over its subsidiaries even when it does not make use of any actual rights of co-determination and refrains from giving any specific instructions or guidelines on individual elements of commercial policy"²¹⁵, while decisive here is the answer to question "whether the parent company, by

²⁰⁹ *Supra* note 132

²¹⁰ Case C-179/12 P, *Dow Chemical v Commission*

²¹¹ Case C-172/12 P, *El du Pont de Nemours and Others v Commission*

²¹² *Supra* note 206

²¹³ "50:50 joint ventures – Possibility of parental liability for EU antitrust infringements confirmed." *Kluwer Competition Law Blog* (blog), September 27, 2013. <http://kluwercompetitionlawblog.com/2013/09/27/5050-joint-ventures-possibility-of-parental-liability-for-eu-antitrust-infringements-confirmed/> (accessed March 23, 2014).

²¹⁴ Atlee, p. 5

²¹⁵ *Supra* note 209, para. 77

reason of the intensity of its influence, can direct the conduct of its subsidiary to such an extent that the two must be regarded as one economic unit”²¹⁶.

Basically this approach and the one used in *Alliance One*, are producing the same effect, while worded in a different language.

As to the facts, GC has taken into account, when decided on the exercise of decisive influence on behalf of Dow and El DuPont, main issues that court addressed, were:

- The LLC Agreement, under which JV was established. It provided the Members’ Committee (a supervisory body of JV) with significant managerial powers, like the ability to block some strategic decisions²¹⁷;
- The presence of parent companies on chloroprene rubber market only through their JV²¹⁸;
- Approval on a closure of plant in UK²¹⁹;
- Former employees of parent companies have taken positions in a JV (like the head of legal department, who worked for El DuPont before joining the JV)²²⁰
- An internal investigation, conducted by El DuPont and Dow in order to examine whether the JV might have participated in the cartel, which “confirms that those parent companies believed that they had the means of requiring their joint venture to conduct itself in accordance with the competition rules”²²¹.

As one may note, most of cited facts are the common practice for corporations, running a JV, while they have to comply with the agreement under which it is established. It is obvious, as well, that parent companies would like to have a sort of control over the

²¹⁶ Ibid.

²¹⁷ *Supra* note 210, para.70

²¹⁸ Ibid.

²¹⁹ Ibid., para. 71

²²⁰ Ibid., para. 73

²²¹ Ibid.

strategic decisions of JV. In author's opinion, the opposite situation makes the very idea of JV useless, because the synergy effect of joint venture (when parent companies share capital and expertise in order to satisfy their economic interests) will hardly be reached. As to the argument about internal competition compliance investigation, commentators note that parent companies are left in an "awkward position"²²². In a broader context, the same can be stated in a case of competition compliance policy, introduced by a parent to their subsidiaries, because it can also be considered as the exercise of decisive influence. The adverse effect of such situations is that (i) companies may lose incentive to adopt strong compliance policies within the group, as well as (ii) to refrain from conducting internal investigations, while it will simply create another ground to establish parental liability.

Nevertheless, despite the criticism of GC decisions in *Dow* and *El DuPont*, CJEU confirmed that the rules were correctly applied²²³. Moreover, CJEU have also contributed to the motivation of GC, adding that:

"Where two parent companies each have a 50% shareholding in the joint venture which committed an infringement of the rules of competition law, it is only for the purposes of establishing liability for participation in the infringement of that law and only in so far as the Commission has demonstrated, on the basis of factual evidence, that both parent companies did in fact exercise decisive influence over the joint venture, that those three entities can be considered to form a single economic unit and therefore form a single undertaking for the purposes of Article 81 EC"²²⁴.

Thus, court makes emphasis on the fact that parent companies and JVs are considered as one undertaking solely for the purposes of establishing liability, which is probably a response to criticism about inconsistencies between treatment of JVs under Merger Regulation and Commission's will to hold parent companies liable²²⁵. CJEU addressed this issue even more specifically, stating that:

²²² Atlee, p.6

²²³ See cases C-172/12 P *El du Pont de Nemours and Others v Commission* [2013] and C-179/12 P, *Dow Chemical v Commission* [2013] (both not reported)

²²⁴ C-172/12 P *El du Pont de Nemours and Others v Commission* [2013], para. 47

²²⁵ See, in general, *supra* note 197, pp. 536-540

“Although a full function joint venture is deemed, for the purposes of the EU Merger Regulation, to perform on a lasting basis all the functions of an autonomous economic entity and is, therefore, economically autonomous from an operational viewpoint, that autonomy does not mean that the joint venture enjoys autonomy as regards the adoption of its strategic decisions such that there cannot be decisive influence. “The decisive influence of one or more parent companies is not necessarily tied in with the day-to-day running of a subsidiary”²²⁶.

Therefore, it will be fair to say that the approach of Commission and Luxembourg courts to the issue of parental liability imposed for infringement of competition rules by JVs in its current state does not really differ from cases of wholly-owned subsidiaries and their parent companies. Moreover, in case of JVs some commentators even before the Dow case was decided by CJEU were stating that “the only possible defense left for a parent company is to try to convince the Commission that it does not, in fact, exercise the decisive influence attributed to it – *good luck*”, while “*a parent company can be found to have exercised its decisive influence by doing practically nothing*”²²⁷.

While tools for establishing liability are different for these types of cases (for 100 per cent ownership works *Akzo* presumption, and in case of JVs the exercise of decisive influence shall be proved), in the outcome, by virtue of broadly interpreted concept of decisive influence, the probability of establishment of liability for parent companies now is very high.

²²⁶ *Supra* note 212. See also *supra* note 223, para. 52

²²⁷ Author’s emphasis. See Atlee, p.7

Chapter 4. Effects of holding parent companies liable for competition law infringements

In this Chapter author will analyze, whether states with emerging economies are likely to introduce parental liability model, developed in EU. Here author will also give his opinion on possible consequences of further development of parental liability doctrine, based on the prior analysis.

4.1. Controversial issues of setting sanctions mechanism

It was mentioned earlier in this paper that parent companies in case of being held liable for violations of competition rules, committed by their subsidiaries, face a number of consequences, starting from fines defined as maximum fining cap of 10 per cent of worldwide turnover to private competition enforcement (see Chapter 2). However, these issues are not that crystal clear in the dimension of practical application.

First of all, as to the sanctions in the EU competition law, it should be noted that in general the system of setting fines consists of rules, set out in different acts – Art.103 TFEU, Art. 23 of Regulation 1/2003, 2006 Guidelines on method of setting fines and, of course, general principles of EU law²²⁸. This system is being criticized for a number of reasons and from different points of view²²⁹. Let us see, how some of those concerns regarding the mechanism of setting fines are magnified when the parental liability doctrine becomes more trending in EU competition enforcement.

²²⁸ Geradin, Damien, The EU Competition Law Fining System: A Reassessment (October 3, 2011). *TILEC Discussion Paper No. 2011-052*. Available at SSRN:

<http://ssrn.com/abstract=1937582> or <http://dx.doi.org/10.2139/ssrn.1937582>

²²⁹ Ibid.

For instance, some experts come to conclusion that “the co-existence of public and private enforcement can, however, be problematic when uncoordinated”²³⁰. Among possible adverse effects of both systems being active are the following:

- it leads the system to over-deterrence²³¹;
- private enforcement may harm the leniency system, while immunity from sanctions relates only to Commission’s sanctions and does not prevent private individuals to sue the corporation²³².

In the meantime, as it was analyzed in the previous Chapters, parent companies are held liable for infringement, they did not commit – the exercise of decisive influence is broad and open to interpretation by the Commission concept. It is even possible to be held liable for the conduct of subsidiary’s own subsidiary²³³. Moreover, parent company is considered as a single undertaking with the infringing subsidiary, which constitutes ground for private claims.

In aggregate with the fact that private claims can be submitted to courts of EU Member States²³⁴, bound by CJEU judgements, it leads to conclusion that within EU competition law system parent companies are more vulnerable to suffer excessive sanctions, while still being remote from the actual infringement.

The other interesting aspect of fine setting mechanisms is, for example, the notion of recidivism, used by Commission. As it was stated earlier in this paper, parent companies are under the risk to be considered recidivists, while they or their subsidiaries have committed

²³⁰ Ibid., p.17

²³¹ Frese, Michael J. "Fines and Damages under EU Competition Law: Implications of the Accumulation of Liability." *World Competition: Law And Economics Review* 34, no. 3 (September 2011): 397-432.

²³² *Supra* note 228, p. 17

²³³ See *Quimica v Commission*, *supra* note 143

²³⁴ Art. 6 of Regulation 1/2003

other infringements before. It may result in an increase of the amount of fine²³⁵. However, one may note that it is not easy to find the limits of application of that notion. First, recidivism covers only “the same or similar” infringements, according to 2006 Guidelines on setting fines²³⁶. As to the boundaries of its application, the only limit is when different rules are breached, like Art. 101 and 102 TFEU²³⁷. However, it is fair observation that “vertical and horizontal collusion both infringe Article 101”²³⁸.

The other problem is that there is no limitation period after which recidivism cannot be found to exist, which is considered as one of the most important in this regard²³⁹.

Again, when parental liability is established, the above-mentioned lack of clear regulation of recidivism becomes even more significant, while parents are likely to face nearly maximum fines based on the conducts of various legal entities during different periods of time, not being directly involved in these episodes of misconduct.

Another example, author would like to point out is actually the certainty as to the intentional violations and negligent conduct, while Commission pays only limited attention to this issue²⁴⁰. Still, Art. 23 of Regulation 1/2003 gives that distinction between the intentional and negligent violation, which presumably, was made in order to establish different consequences for such offences²⁴¹. If this issue will get its portion of interest and will be clarified, then the parental liability will become an intriguing question. According to the system of parental liability developed in the EU, it is hard to define, whether parent is always negligent regarding to the infringement of subsidiary, or not. If the answer to this question is positive, then some lesser sanctions should be considered. If the answer is negative and

²³⁵ *Hoechst v Commission* [2009] ECR II-3555, paras. 145-147

²³⁶ See para. 28

²³⁷ Case T-66/01 *ICI v. Commission* [2010], paras. 375-381

²³⁸ *Supra* note 228, p. 40

²³⁹ Riley, A. "The modernisation of EU anti-cartel enforcement: Will the Commission grasp the opportunity?." *European Competition Law Review* 31, no. 5 (2010): 191-207.

²⁴⁰ *Supra* note 228, p. 42

²⁴¹ *Ibid.*

parent is deemed to act intentionally, then it can lead to conclusion that parent companies are directly involved in an infringement (so why then parental liability exists?).

Considering all above-mentioned, we may conclude that while the concept of parental liability is strongly supported by Commission and EU courts, there are very challenging issues as to setting of fines. If sanctions are applied according to current rules, there is a number of negative consequences for parent companies, namely:

- Commission's discretion on the possibility to invoke recidivism, while there are no clear criteria for its application;
- The problem of unproportional burden of sanctions, while both public and private enforcement mechanisms are involved without the required "synchronization" of the two.

In addition to some criticism of parental liability, described in the previous Chapters, we may conclude that there is enough questions to think about, if some non-EU jurisdiction would like to introduce to its antitrust law the doctrine of parental liability. For EU it is still an opened question as to the proportionality of sanctions (leading to over-deterrence) and to the essential issue of compliance with basic principles of law like the presumption of innocence.

4.2. Parental liability doctrine – pros, cons and emerging markets prospective

Competition law regulation is an important tool to put some limits for the market, to control the state of competition on it, and, of course, to protect interests of consumers. Moreover, it is important to note that competition law is an advantageous tool, which combines both administrative and economic methods of influence on the market, unlike criminal law or other public law areas. Probably every state with an emerging market economy has today their competition law doctrine, respective controlling authority. When it

comes to the issue whether to introduce parental liability, competition authorities have to consider a number of factors.

First of all, the most important issue for emerging markets is the attraction of investments. Therefore, it should be carefully considered, to what extent they shall apply (if apply at all) the concept of parental liability. It should be remembered, that “for a developing nation to adopt worldwide financial responsibility as a legal concept would be to provide a powerful incentive for investment to be directed to other countries”²⁴². Therefore, in a fight for capital investments to the economy, parental liability doctrine can be considered as one of important tools.

Definitely, investing in a developing economy is in its essence a risky thing to do for corporations, as it is usually new business and legal environment, new rules. Therefore, existence of parental liability in emerging markets may become an issue.

The other thing is that sometimes the amounts of fines in these states can be insufficient to create deterrence, so that large corporations may easily get over these sanctions, while the benefits outweigh the sanction imposed. To illustrate this situation, author would like to give example from his professional experience – in Ukraine fines for competition law infringements were relatively low, while the competition authority was founded in 1992. Therefore, for companies such procedure as merger clearance was something, they could pay no attention on at all. Moreover, it was even cheaper to pay the fine at the end, rather than hiring lawyers to file the concentration application. The shift happened only in recent years, when there was increase of fines.

However, the other side of a coin is that competition authorities may be regarded in developing markets as a source of income for the state budget, like tax or customs services.

²⁴² Westbrook, *supra* note 45

Therefore, regimes might be severe in sanctioning and imputation of liability on parent companies can make the environment even less investment-friendly.

The other issue, worth mentioning, is that states should consider the parental liability from the perspective of legal certainty, when the competition regime should be consistent with other areas of law, like human rights, criminal law and others. Especially, the adjustment of parental liability with the corporate law is important, while there should be a clear understanding of what is prevalent and to what extent it may be applied.

Another important thing to note is that choosing between different models of parental liability should also be careful. For instance, it is not a secret that, while EU introduces its own competition regime, there are some deviations on the Member State level, when it comes to parental liability issues. In particular, Germany, Poland and Denmark “do not allow—although to varying degrees—the imposition of fines on parent companies”²⁴³.

Take an example of Germany, we shall conclude that competition law regime depends on other areas of law. According to German administrative penal law, “the addressee of a fine is a legal person. This legal entity is liable for any offence committed by a representative of that specific legal entity”²⁴⁴. Therefore, it is not possible to attribute conduct of one legal entity to another, even if they constitute in European terms the same economic unit²⁴⁵. However, German antitrust authority – Bundeskartellamt – is currently imposing fines on parent companies, based on a supervisory duty, originally beared by the representative of a company in order to supervise its workforce²⁴⁶. Why is this example relevant? Because the actual deterrence effect can be reached with other tools, than the parental liability, as presented by EU authorities. While German law basically reaches similar effect of restraining

²⁴³ Ost, Konrad. "From Regulation 1 to Regulation 2: National Enforcement of EU Cartel Prohibition and the Need for Further Convergence." *Journal Of European Competition Law & Practice* 5, no. 3 (March 2014): 125, p. 126

²⁴⁴ Ibid., p.127

²⁴⁵ Ibid.

²⁴⁶ Ibid.

conduct of corporate groups, it uses somewhat modified duty of care, known in corporate law.

However, the outcome is absolutely different in part, that it excludes grounds for private enforcement (breach of duty of care is not equal to participation in the infringement) and creates incentives to adopt competition compliance programs, while they “may exonerate the parental company” under this concept²⁴⁷. It is interesting that the lack of such mechanism is one of the arguments for critics of EU competition regime, because the question of whether to hold the parent company liable for subsidiary’s conduct should depend on the implementation of “Best Practice Compliance” standard by this company, or rather within a corporate group²⁴⁸.

Still, while it is likely that German competition law will be brought in line with EU law²⁴⁹, this is an example of alternative available for emerging competition regimes to choose, while it represents more balanced approach in some of issues that are ground for criticism in the EU legislation.

Again, if develop on criticism of parental liability concept, we should also conclude that the experience of U.S. in this regard is relevant. Basically, issues of parental liability are covered by the universal concept of corporate veil-piercing. Therefore, in the U.S. courts are not willing to create some other grounds for holding parent companies liable for their subsidiaries. Moreover, when they deal with veil-piercing cases, criteria taken into account to establish the link between parent and subsidiary’s conduct are comparable with those, used in EU law²⁵⁰. Therefore, one may consider this type of approach as more reliable and balanced.

²⁴⁷ Ibid.

²⁴⁸ Hofstetter, Karl, and Melanie Ludescher. "Fines against Parent Companies in EU Antitrust Law: Setting Incentives for 'Best Practice Compliance'." *World Competition: Law And Economics Review* 33, no. 1 (March 2010): 55-76

²⁴⁹ At least, this question is usually raised even in Germany. See in general, Ibid.

²⁵⁰ See for details Subchapter 1.3 and Chapter 2

However, there are definitely some advantages of EU competition law system. Author would like to emphasize, as one of the main pros of EU law approach, on the concept of undertaking is still a very dynamic notion and is more true to life (and the way, how the business is done), even despite some imbalance created regarding the burden of proof.

The other advantage of the system is, of course, that it is uniting several legal systems into one. While it can be a debatable issue, it should be stated that Company law is not capable to produce same effect on a regulation of competition simply be it is national law, which is hard to harmonize due to very old legal traditions of leading European states²⁵¹.

Definitely, as it was mentioned in previous Chapters, the Commission used parental liability as a tool to create deterrence, not limited to “names” of companies, but related to the corporate groups behind names of their numerous subsidiaries. To some extent it is true that penalties for large businesses can be effective only when the amount of penalty is huge enough, so it will not be considered as “ordinary” expenses.

Still, from the prospective of emerging markets there will always be a question raised, whether EU model of parental liability is something deriving from common values and principles of competition law in general, or maybe it is just a specific product of a harmonized Community competition law, that, in its turn, was developed to harmonized different legal systems of Member states. Therefore, let us now have a look on few examples of how states other than EU and U.S. deal with the issue of parental liability.

For instance, there is a valuable example of Brazil, which is a growing but powerful economy already. Brazilian competition law model is not based solely on U.S. or EU model. As to the issue of parental liability, however, there is a sort of similarity between the EU and Brazilian legislation. Thus, latter provides that “individuals that have influenced the adoption

²⁵¹ See, for example, Islentyeva, p. 113

of anticompetitive conducts by legal entities are also subject to antitrust law liability”²⁵². This principle is expanded to the relationships within corporate groups, while subsidiaries and parent companies are considered to be jointly liable for competition violations in cases, when:

“ (i) the ‘order’ or ‘guidance’ comes from an entity and the conduct is actually performed by another entity (depending on the evidence of involvement of the subsidiary in case the violation is practiced by the parent company); and (ii) *the conduct is performed by the subsidiary, even without the direct participation of the parent company in anticompetitive practices* [emphasis added]”²⁵³.

Hence, we can conclude that Brazil has taken a very EU-like approach to attribution of liability to parent companies. However, there is not many sources available on the enforcement practice, so it was possible to find out how far does this doctrine goes in this jurisdiction.

The other examples, that might be interesting to analyze, are Asian largest economies of Japan, China and South Korea.

Chinese experience is valuable because it had the described above choice of which model to choose, while Chinese Antimonopoly law was implemented only in 2009²⁵⁴. In general, it should be noted that while there are signs that China has adopted a model of regulation, similar or at least inspired by European concept of competition law²⁵⁵, the notion of undertaking used in Art. 7 of Chinese Antimonopoly act may be interpreted in different ways, as it provides that “An ‘undertaking’ in this Law refers to a natural person, a legal person, or any other entity that engages in production or operation of commodities or

²⁵² Gaban, Eduardo Molan, and Juliana Oliveira Domingues. *Brazilian Competition Law: A Practitioner’s Guide*. Kluwer Law International, 2013, p.88

²⁵³ Ibid.

²⁵⁴ Eggert, David, and Jingbo Hou. "Liability of a Parent for the Antitrust Violations of a Subsidiary Under Asian Antitrust Law." *GCP: The Antitrust Chronicle*. no. November (1) (2009): 1-7. <https://www.competitionpolicyinternational.com/liability-of-a-parent-for-the-antitrust-violations-of-a-subsiary-under-asian-antitrust-law/> (accessed March 25, 2014), p. 3

²⁵⁵ Ibid., p. 4

provision of services.”. Therefore, this definition is more about legal entities rather than economic units and does not itself constitute a ground for developing parental liability concept.

In Japan and Korea the situation is not that ambiguous, while both courts and legislation stay on their positions of corporate separateness, especially in Japan²⁵⁶. However, commentators come to conclusion that in South Korean practice offers few cases that demonstrate its openness to approach where “the parent and the subsidiary act as a single economic unit and one is simply the sales arm of the other”²⁵⁷.

In order to bring experiences from almost all continents, let us briefly have a look on South African approach to parental liability, while this state is also among headliners of economic development in the region. To be brief, it is worth to note that South African competition authority officers do not hesitate to state expressly, that they rely on EU legislation and its approach to parental liability²⁵⁸. Therefore, many EU rules were considered as samples to use. It therefore resulted in “presumption of parent liability when the subsidiary is wholly-owned by the parent company”²⁵⁹.

Hence, as one might have noticed, even in this small comparison there is a balance between states that are proponents of parental liability doctrine and those, which are insisting on corporate separateness and prevalence of legal entity doctrine. Of course, there is a complex of specific reasons for every state to choose one of approaches, including their historical ties with other states, political, economic reasons as well as even national mentality and its particularities.

²⁵⁶ Ibid, pp. 5-7

²⁵⁷ Ibid.

²⁵⁸ Sakata, Nelly, and Temosho Sekgobela. "Child collusion a parent's responsibility – Sanctioning the parent company in terms of South African Competition Law". <http://www.compcom.co.za/assets/Uploads/events/Seventh-Annual-Conference-on-Competition-Law-Economics-Policy/Parallel-3A/Parent-liability-Article-by-Temosho-and-Nelly-Final-21Aug13.pdf> (accessed March 20, 2014).

²⁵⁹ Ibid.

Therefore, the conclusion will be that each doctrine – parental liability and corporate separateness – are now in force and the adherence to one or the other does not actually guarantee the growth of economy. However, when deciding whether to introduce parental liability for competition law infringements in its jurisdiction, every state has to look at a wide range of factors, that may affect both economy (by increase or decrease of investments, for instance, when introduce parental liability for JV's conduct) and the legal system, where the proportionality principle, as well as legal certainty shall be respected and competition enforcement has to be effective.

At the same time, author would like to express his opinion and thus, to point out that total denial of parental liability concept without providing the adequate alternative within the legal system seems to be ineffective and far from the reality of economic relationship. Moreover, attribution of liability to parent companies, if carefully introduced, shall be beneficial for the competition enforcement, while it will create a required deterrent effect, create incentive for corporations to adopt strict and effective compliance policies. However, under “careful” introduction of this doctrine author means a very cautious approach to issues, raised in the context of EU competition law, where Commission managed to set probably unattainable bar for corporations to successfully rebut allegations to attribute parental liability to them, which made the system in this regard look more like mere hunting for money of rich corporations, rather than will to create sufficient level of deterrence.

Therefore, if developing markets are going to adopt parental liability in their competition laws, it should not be a blind copying of EU mechanism, as well as there should be a clear understanding of all underlying doctrines and possible consequences of every provision related to this issue. Actually, the same conclusion shall be applicable to cases, when state refuses to use this concept.

In addition, author would like to point out that in his opinion the application of parental liability to JV's infringements has to be considered with even more precisely, while these entities have a very specific nature and excessive imputation of liability to parent companies may result in simple prevention of companies to create JVs and enter markets with such an aggressive competition policy in a long-term prospective.

Conclusions

Attribution of liability for competition law violations, committed by subsidiaries, to parent companies is controversial issue in competition law. Nowadays there is no common understanding of the problem, while two models of competition law – U.S. and European, represented by EU – understand this issue differently.

The roots of the problem are hidden in the concept of legal personality, which in its turn, became a ground for establishment of corporate separateness doctrine in the 19th Century in the Western world. This concept was created in order to promote entrepreneurship, to let corporations minimize their risks of entering new markets. In the meantime, 20th Century brought to this core principle of corporate and company law the exception, which would allow overriding corporate separateness, when there is an abusive use of corporate form.

The EU, in its turn, in order to regulate competition on the common market, developed a special notion of undertaking that is of economic nature and is devoted to allow Commission look behind the corporate form and focus on economic unity of a number of persons. It was further developed in a way to establish parental liability for competition law infringements.

The concept of parental liability was developed in the EU in two stages. During the latter, significant shift of burden of proof was made from Commission to parent companies involved. Since that time a discussion on parental liability has become active and there were raised arguments regarding the priority of corporate separateness, as well as other issues like setting incentives for corporations to comply with competition laws, rather than punish them, presumption of innocence and legal certainty issues. Moreover, there was a discussion in a case law on the issue, whether EU doctrine of parental liability (i.e. the *Akzo* presumption) results in *probatio diabolica*. However, as it was shown in this paper, grounds for holding

parent companies liable under EU competition law are only expanding, while even cases of partial ownership of subsidiaries and JV's infringements resulted in a setting of relatively high bar for rebuttal of the exercise of decisive influence over the subsidiary's conduct.

In the meantime, U.S. accepts as a core principle, the corporate separateness, and thus, parental liability in this jurisdiction is not accepted. However, there is one exception to this rule, which is a concept of *alter ego*, applied in cases when corporation lacks a separate identity from a shareholder that results in a sort of injustice. As a result, it is a tool to invoke piercing of corporate veil.

As to pros and cons of parental liability doctrine, it was noted that apart from mentioned above discrepancies with the corporate separateness principle, in practice parental liability results in a number of issues related to setting fines, while there is a risk that it creates over-deterrence effect (because of two dimensions of competition enforcement – public and private) and prevents companies from application of effective compliance policies.

Therefore, the answer to question whether it is worth to adopt parental liability in developing markets and if yes, whether EU model is a good solution, shall split in two. Answering the first part of this question, it was concluded that denial of parental liability concept without providing the adequate alternative for it is not an effective approach. Moreover, attribution of liability to parent companies is, in general, beneficial for the competition enforcement. However, in this regard it was also concluded that EU law model of parental liability has become excessively burdensome for parent companies and raised a number of debatable issues, mentioned earlier. Therefore, developing states should avoid blind copying of EU model of parental liability, considering all the underlying principles and issues raised in this paper.

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