The Single Economic Entity Doctrine and Corporate Group Responsibility in European Antitrust Law

Nada Ina Pauer
# Table of Contents

Foreword xv  
Acknowledgements xvii  
Introduction 1  

## Chapter 1
The Single Economic Entity Doctrine as an Essential Criterion for the Application of Antitrust Law on a Corporate Group 5  
§1.01 Issue of Discussion 5  
§1.02 Problem Assignment: The Contested Facts of a ‘Single Economic Entity’ 8  
[A] The ‘Group- or Concern Privilege’ under Article 101(1) TFEU 9  
[B] The Determination of a ‘Single Economic Entity’ 11  
[C] The Application of the Concept of a ‘Single Economic Entity’ for the Attribution of Liability 15  
§1.03 Terminological Determinations 21  
[A] Affiliated Undertakings, Corporate Groups, Concerns 21  
[B] Joint Ventures 23  
[C] Topic Delineation 26  

## Chapter 2
The Implementation of Article 101(1) TFEU on a Corporate Group of Companies: Practice of the Commission and the European Courts 29  
§2.01 The Intra Enterprise Doctrine or ‘Group Privilege’ as Original Basis for the Assumption of an ‘Economic Entity’ 34  
[A] Initial Decisions Recognizing the Distinctiveness of Group-Intern Agreements 34  
[1] The Primary Decision of ‘Christiani & Nielsen’ 34  
Table of Contents

[a] The Kodak Case 36
[b] Béguelin Import Co. v. S.A.G.L. Import Export 38
[c] Centrafarm I & II 39

[B] Subsequent Adjudication Leading to the Current Position of Assessing Agreements between Affiliated Companies 41
[1] The Classification of a ‘Single Economic Entity’ 41
[a] Hydrotherm Gerätebau GmbH v. Ing. Mario Andreoli 41
[b] Corinne Bodson v. S.A. Pompes Funèbres des Régions Libérées 44
   [i] The Decision of Viho Constituting the Status Quo of European Case Law on Intra-group Agreements 45

§2.02 The Concept of a ‘Single Economic Entity’ and the Attribution of Antitrust Responsibility 50
[A] The Employment of the Concept of a ‘Single Economic Entity’ for the Issue of Attributing Conduct between Companies of a Corporate Group 51
[1] The Development of Attributing Liability in European Competition Law 51
[a] Imperial Chemical Industries Ltd. and Others 51
[b] Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents 55

[a] Ahmed Saeed Flugreisen & Silver Line Reisebüro GmbH 58
[b] Societa Italiana Vetro SpA v. EC Commission 60

[1] The ‘Belt and Braces’ Approach to Antitrust Liability 62
[a] AEG-Telefunken v. EC Commission 62
[b] Stora Kopparsberg Bergslag AB v. EC Commission 66
[c] Assessment of the Stora-Decision in Subsequent European Practice 70
   [i] The Burden of Proving ‘Decisive Influence’ 70
   [ii] The Ascertainment of the Correct Legal Entity in a Group of Companies 73
   [iii] The Assessment of Indicia Pointing to ‘Decisive Influence’ 77
[d] Assessment of European Practice Following ‘Stora’ under Principles of Corporate Law 81
Table of Contents

[i] The Principles of Corporate 'Entity Law' 84
[ii] The Concept of 'Piercing the Corporate Veil' 86
[iii] The Criteria Parent Companies Have Relyed on in an Attempt to Rebut the 'Stora Presumption' 88
[iv] The Ambiguity of the 'Stora-Presumption' 89

[2] The ECJ's Judgment in the Case of Akzo Nobel 93
[a] The Court's Ruling 93
[b] Assessment of the Court's Ruling 102
[i] Review of the Necessity of Additional Criteria Pointing to the Existence of 'Decisive Influence' 102
[ii] The 'Rebuttable Presumption' for Wholly Owned Subsidiaries 105
[iv] The Ambiguity of the Current Mode of Assessing 'Parental Responsibility' 113
[v] Assessment on the Basis of General Legal Principles 115
[vi] The Legal Consequences of an Extensive Application of the 'Single Economic Entity' Doctrine 118

CHAPTER 3
The 'Single Economic Entity' Doctrine: An Assessment of 'Privileges and Responsibility' in a Corporate Group 125
§3.01 The Classification of the 'Single Economic Entity Doctrine' 134
[A] Assessment of an 'Economic Entity' under the Facts of Article 101 TFEU 137
[1] The Fact of 'Agreements or Concerted Practices' 138
[2] The Fact of an 'Undertaking' in the Sense of Article 101(1) TFEU 143
[a] Legal Personality as a Precondition of an 'Undertaking' 145
[b] The Requirement of an Autonomous 'Entity' with Legal Personality as an Addressee of Article 101(1) TFEU 146
[i] Independent Entities as Addressees of Article 101 TFEU 147
[ii] The Term 'Undertaking' in European Competition Law 148
[iii] The Danger of a Two-Tiered Definition of an Undertaking 150

ix
<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>[c] The Ambivalent Criteria of an 'Economic Entity' under Current European Practice</td>
<td>151</td>
</tr>
<tr>
<td>[i] The Practice of Equalizing 'Economic Entities' with a Unitary Undertaking</td>
<td>151</td>
</tr>
<tr>
<td>[ii] The Notion of 'Control' Requires a Differentiated Assessment</td>
<td>152</td>
</tr>
<tr>
<td>[iii] Current Practice</td>
<td>153</td>
</tr>
<tr>
<td>[iv] Criticism of the Current Practice</td>
<td>154</td>
</tr>
<tr>
<td>[v] The Assessment of Commercial Agents</td>
<td>155</td>
</tr>
<tr>
<td>[d] Intermediate Result</td>
<td>157</td>
</tr>
<tr>
<td>[a] The Structure and Purpose of a 'Prevention, Restriction or Distortion to Competition'</td>
<td>159</td>
</tr>
<tr>
<td>[i] The Objective of the Competition Principles</td>
<td>160</td>
</tr>
<tr>
<td>[ii] The Concept of Competition</td>
<td>160</td>
</tr>
<tr>
<td>[b] The Protection of Economic Freedom and Competition</td>
<td>161</td>
</tr>
<tr>
<td>[i] The Postulate of Economic Autonomy</td>
<td>162</td>
</tr>
<tr>
<td>[ii] The Concept of 'Workable Competition'</td>
<td>164</td>
</tr>
<tr>
<td>[iii] The Protection of a Company's Freedom of Action</td>
<td>165</td>
</tr>
<tr>
<td>[c] Critical Assessment of the 'Single Economic Entity'-Doctrine upon the Postulate of 'Corporate Autonomy'</td>
<td>167</td>
</tr>
<tr>
<td>[i] The Position of Third Companies on the Market</td>
<td>167</td>
</tr>
<tr>
<td>[ii] The Necessity of a More Economic Approach</td>
<td>168</td>
</tr>
<tr>
<td>[iii] The Requirement of a Competitive Relationship</td>
<td>169</td>
</tr>
</tbody>
</table>

§3.02 The Notion of 'Control' in the Context of a 'Single Economic Entity'

[A] Comparison to the Concept of 'Control' under the European Merger Regulation 174

[1] The Definition of Control under the European Merger Regulation 175


[B] The Commission's Approach under the Merger Regulation 177

[C] Elements Pointing to the Existence of 'Decisive Influence' 178


§3.03 The Requisite Degree of 'Control'

[A] Potential versus Actual Control: A Uniform Application of the 'Single Economic Entity Doctrine' 182

185
Table of Contents

[1] Assessment with Regard to Group-Intern Agreements 185
  [a] The Commission's Approach 187
  [b] The Principle of Limited Liability 188
[B] The Relevant Factors for Determining 'Control' 190
  [1] Criteria Mentioned in European Case Law 191
[C] General Policy Considerations 195
  [2] The Upper Limit of Fines 196
  [3] Determining Liability under the Principle of Organizational Negligence 196

§3.04 The Assessment of 'Joint Control' 197

CHAPTER 4
Intermediate Result 203

CHAPTER 5
The Concept of Corporate Liability 205

§5.01 The Standard of 'Legal Separation' under Corporate Entity Law 205
  [A] The Principle of 'Limited Liability' and the Consideration of 'Enterprise Principles' 206
  [B] The Standard of 'Organizational Autonomy' 209

§5.02 Employing the Standard for Attributing Liability in European Antitrust Law 210
  [A] The Consideration of Corporate Affiliations 210
    [1] Current Practice 211
    [2] The Court's Role in Determining Antitrust Liability 212
    [3] Applying the Concept of Corporate Control under the ECMR 213
  [B] The Respective Business Areas in Which Parental 'Control' May Lead to the Assumption of an Actual Exertion of 'Decisive Influence' 214
    [1] The Case of a Single Legal Representation 215
    [3] Influence on the Operative or Personal Level 222
    [4] Intermediate Result 224
CHAPTER 6
An Assessment of Corporate Group Liability on the Basis of ‘Organizational Autonomy’

§6.01 The Consideration of Compliance Efforts under Current Procedural Standards of European Competition Law
[A] The Insufficient Identification of ‘Personal Liability’ in European Competition Law
[1] Intentional Conduct
[2] Negligent Conduct

[B] The Significance of ‘Corporate Compliance Measures’ in Setting Fines on ‘Controlling’ Companies
[1] The Preventive Value and Efficiency of Antitrust Compliance Programs
[a] The Standard of Intent or Negligence
[b] The Aspect of Prevention
[c] Dogmatic Inconsistency towards Leniency
[a] The Commission’s Burden of Proof
[b] The Duty to Review another Company’s Conduct
[c] Reversal of the Burden of Proof for Compliance Programs

[4] Résumé

§6.02 The Consideration of Compliance Measures: A Harmonization of Antitrust Jurisdictions
[A] The Extension of Jurisdiction in Antitrust Matters and the Principles of International Law
[4] Restraints of Extraterritorial Jurisdiction under Considerations of International Law

[B] The Extraterritorial Application of European Competition Law
[1] The ECJ’s Wood Pulp Decision

[C] The Consideration of Compliance Measures under the Aspect of ‘Positive Comity’
Table of Contents

[1] Different Substantive Approaches to Parental Liability:
   Comparison to U.S. Practice 262
   [a] Approach under Common Law 262
   [b] The Implications on an International Level 263
   [c] Applying the FTAIA 264

[2] The Reference to 'Best-Practice-Compliance'
   for Internationally Active Corporate Groups 265

[D] Résumé 267

CHAPTER 7
Conclusion 269

Index 273