PARENTAL LIABILITY UNDER THE ECN+ DIRECTIVE AND ITS EXTENSION TO ACCESSORY SANCTIONS

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Abstract *Under EU law, there are certain circumstances in which a parent company can be held liable for the unlawful conduct of its subsidiary. While parental liability has been a CJEU case-law based doctrine, Directive 1/2019 (ECN+ Directive) codified it in its article 13(5). This article aims at analysing the impact of the Directive's entry into force on the doctrine of parental liability, namely regarding the implementation process in the Member States. In particular, it assesses the Portuguese implementation, in particular, its legislative choice of extending parental liability to accessory sanctions.*

Key-Words Antitrust, Antitrust Law, Competition Authority, Competition Policy, Collusion, Competition, Regulation.

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1. INTRODUCTION

The doctrine of parental liability, consisting of the possibility of holding parent companies responsible for competition law infringements committed by their subsidiaries, has been developed by the Court of Justice of the European Union (CJEU)[1] for several years. Nonetheless, not only has it been debated within the legal community, but also it has been inconsistently applied by national competition authorities (NCAs) and national courts across Europe, also due to competing interpretations of principles enshrined in domestic constitutions, such as the principle of personal liability. The CJEU's most recent case-law significantly clarified many of these topics, contributing to enhance legal certainty.

It is against this backdrop that the European Commission (Commission) has proposed the ECN+ Directive (Directive), aiming at achieving greater effectiveness and uniformity in the enforcement of EU competition law. The Directive was adopted by the European Parliament and the Council on 11 December 2018[2] and the Member States have until February 2021 to implement it. To reach its main objective, the Directive *inter alia* sets out rules to improve the uniform application of the concept of "undertaking" among EU Member States, in order to "unblock" the full application of the parental liability doctrine. The ongoing Portuguese implementation seems to be imbued with the same objective, to which it appears to give a broad meaning.

This article aims at analysing the Directive's impact on the doctrine of parental liability in EU competition law, as developed by the CJEU in its most recent case-law. It also considers the Portuguese implementation, particularly regarding the extension of parental liability to accessory sanctions. We will critically analyse such legislative choice, pointing out the need to harmonise coexisting legal principles and briefly underlining the key role of the CJEU and of the national courts in this regard.

2. THE CJEU'S CASE-LAW ON PARENT LIABILITY

The case-law on parental liability can be summarised in a pre and a post-*Akzo I* phases. Prior to *Akzo I*, it mainly concerned cases where the anticompetitive

1 References to the "CJEU" should be understood as referring to both the General Court of the European Union (GC) and the Court of Justice (ECJ).

2 Directive (EU) 2019/1 of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, OJ L 11 (2019), p. 3–33.

behaviour derived from orders given by the parent company to its subsidiary.[3] Likewise, the CJEU seemed to accept that the failure of the parent company to prevent the competition law infringement by its subsidiary could justify the former's liability.[4]

In *Akzo I*,[5] the now[6] General Court (GC) went a step further, holding that "it is not […] because of a relationship between the parent company and its subsidiary in instigating the infringement, or *a fortiori*, because the parent company is involved in the infringement, but because they constitute a single undertaking […] that the Commission is able to address the decision imposing fines to the parent company of a group of companies".[7] The GC then stated that "in the specific case of a parent company holding 100% of the capital of a subsidiary which has committed an infringement, there is a simple presumption that the parent company exercises decisive influence over the conduct of its subsidiary […] and that they therefore constitute a single undertaking".[8] It is thus for the parent company to rebut that presumption by adducing evidence to establish that its subsidiary acted independently.[9]

On appeal[10], the Court of Justice (ECJ or Court) fully upheld the so-called *Akzo presumption*. In subsequent case-law, it was extended to situations in which the parent company holds almost all of the capital of its subsidiary.[11] Nevertheless, the inferences made by the Court in some of those rulings, as

3 C-48/69, *ICI v Commission*, EU:C:1972:70, §§129-137.

4 T-109/02, *Bolloré v Commission*, EU:T:2007:115, §§127, 132-150; C-322/07 P, *Papierfabrik August Koehler and Others v Commission*, EU:C:2009:500.

5 T-112/05, *Akzo Nobel and Others v Commission*, EU:T:2007:381.

6 The Court of First Instance (CFI) was created in 1988. Only in 2009, with the entry into force of the Lisbon Treaty, it was renamed as General Court (GC). References to judgments of the GC should be understood as also referring to judgments released by the CFI.

7 T-112/05, *Akzo Nobel and Others v Commission*, §58. For an earlier judgment where the CJEU had already dealt with the notion of "single economic unit" for the purposes of parental liability, see, T-354/94, *Stora Kopparbergs Bergslags v Commission*, EU:T:1998:104 and, on appeal, C-286/98 P, *Stora Kopparbergs Bergslags v Commission*, EU:C:2000:630.

8 A similar conclusion, albeit without being phrased in the form of a presumption, had already been reached by the Court in C-107/82, *AEG v Commission*, EU:C:1983:293, §50.

9 T-112/05, *Akzo Nobel and Others v Commission*, §60.

10 C-97/08 P, *Akzo Nobel and Others v Commission*, EU:C:2009:536.

11 See C-520/09 P, *Arkema v Commission*, EU:C:2011:619, §§42 and 48; and T-419/14, *Goldman Sachs v Commission*, EU:T:2018:445, §§50-52.

well as the terminology used, led to some ambiguity as to whether parent company liability is "derivative" or "personal".[12]

This question was addressed by the Court in *Akzo II*.[13] Indeed, to decide whether the fact that the Commission's power to impose penalties on the subsidiaries was time-barred precluded the parent company from being held liable, the Court had to assess whether the parent company's liability should be categorised as personal or derivative.[14] Disagreeing with the Advocate-General's opinion,[15] the ECJ declared that the parent company is held personally responsible, even though its liability may be entirely based on the unlawful conduct of that subsidiary.[16] Recalling that the notion of undertaking designates an economic unit (§§46-48), that EU competition law is based on the principle of personal responsibility of that economic entity (§§49 and 57) and that, where the parent company exercises a decisive influence over its subsidiary, the latter's conduct may be attributed to the former (§§52-55), the Court clarified that "the parent company […] is held individually liable for an infringement of the EU competition rules which it is itself deemed to have infringed" (§§56-57 and 66). The Court thus concluded that the parent company can be held responsible, even though the subsidiary's liability has become time-barred (§§71, 76).

3. THE PRINCIPLE OF AUTONOMOUS INTERPRETATION OF THE CONCEPT OF "UNDERTAKING"

3.1. The Directive

The Directive was adopted to reinforce the powers of NCAs and the uniformity of their practice, in order to achieve a "truly competition enforcement area in the Union" (Recital 8). Thus, "to ensure the effective and uniform application of articles 101 and 102 TFEU, the notion of 'undertaking', […] which should be applied in accordance with the case-law of the [CJEU], designates an economic unit, even if it consists of several legal or natural

12 Kalintiri, 2018: 7 (page-number corresponds to online version). See also Opinion of Advocate General Wahl in C-516/15 P, *Akzo Nobel and Others v Commission*, EU:C:2016:1004, §§61-62.

13 C-516/15 P, *Akzo Nobel and Others v Commission*, EU:C:2017:314 (Judge Rapporteur: J. L. da Cruz Vilaça).

14 See Opinion of Advocate General Wahl in C-516/15 P, *Akzo Nobel and Others v Commission*, §50.

15 See Opinion of Advocate General Wahl in C-516/15 P, *Akzo Nobel and Others v Commission*, §§67-69.

16 C-516/15 P, *Akzo Nobel and Others v Commission*, §§52-58 and 66.

persons. Accordingly, NCAs should be able to apply the notion of undertaking to find a parent company liable, and impose fines on it, for the conduct of one of its subsidiaries, where the parent company and its subsidiary form a single economic unit" (Recital 46).

In the same vein, "Member States shall ensure that for the purpose of imposing fines on parent companies and legal and economic successors of undertakings, the notion of undertaking applies" (article 13(5) of the Directive). In a nutshell, the Directive codifies the parental liability doctrine, as established by the CJEU.

Main principles at stake

In its Communication on Ten Years of Antitrust Enforcement under Regulation 1/2003,[17] the Commission recognised that differences between NCAs concerning the ability to hold parent companies liable may compromise "the desired deterrent effect" of national competition enforcement. Indeed, to impose "deterrent fines" on undertakings, NCAs should be able to adopt an approach to parental liability that is consistent with the EU-level one (§37). The Explanatory Memorandum of the Directive's proposal similarly noted that parental liability allows "the fine to reflect the overall strength of the corporate group and not only that of the subsidiary, making it more meaningful and deterrent".

The main objective at stake hence seems to be deterrence,[18] which shall nonetheless be balanced against the principle of personal responsibility. It has been precisely in this context that the CJEU has declared that the parent company's responsibility is "a mere manifestation"[19] of the concept of undertaking and is accordingly personal.[20] Likewise, the possibility to rebut the presumption of decisive influence allows the parent company to demonstrate that, in its specific circumstances, it did not control the activity of the subsidiary and cannot be held liable. In order to strike the necessary balance

17 COM/2014/0453 final.

18 See, among others, C-408/12 P, *YKK and Others v Commission*, EU:C:2014:2153, §§85-86 and 93 (Judge Rapporteur: J. L. da Cruz Vilaça).

19 C-625/13 P, *Villeroy & Boch v Commission*, EU:C:2017:52, §150.

20 T-372/10, *Bolloré v Commission*, EU:T:2012:325, §52, C-516/15 P, *Akzo Nobel and Others v Commission*, §§56, 66, 71-74.

and to ensure that the presumption is not deprived of its useful effect (or *effet utile*)[21], it must be *de facto* rebuttable.

Hence, the ECJ's ruling in *Akzo II* clarified how the balance between the principle of personal responsibility, the parental liability doctrine and the necessary deterrence effect of competition law sanctions shall be struck at EU level.[22] Notwithstanding, the implementation of the Directive in the national legal systems is likely to raise additional questions in proceedings pending before national courts, namely as regards its compatibility with constitutional requirements and general principles of EU law. These questions shall be addressed through the preliminary ruling procedure and in light of the principles of primacy and direct effect. Indeed, while the application of the parental liability doctrine has mainly been discussed in direct actions, its codification in the Directive opens the door to the judicial dialogue between the ECJ and national courts.

3.2. The Portuguese Implementation

a. Autonomy of the notion of undertaking and extension to accessory sanctions

Our analysis is essentially focused on articles 3, 71(1)(b), 73(2)(a) and (3) of the Preliminary Draft Law, which aims at implementing article 13(5) and Recital 46 of the Directive.

Article 3 refers to the notion of "undertaking", linking it to the concept of "economic unit". Article 73(2)(a) and (3) codifies the parental liability doctrine, establishing a presumption of "decisive influence" where the parent company has a shareholding of 90% or more. For its part, article 71(1)(b) essentially extends the parental liability doctrine to accessory sanctions.

In this regard, it is important to underline that both Regulation 1/2003[23] and the Directive[24] only foresee the application of a fine and/or of periodic penalty payments as a result of an infringement of EU competition law. The application of accessory sanctions is thus a national legislative choice, which is compatible with EU law, in so far as it does not affect the effectiveness of articles 101 and 102 TFEU. *A fortiori*, its extension to parental liability is not foreseen under EU law.

21 Vilaça, 2013.

22 See also, in this context, C-408/12 P, *YKK and Others v Commission*, §§65-66.

23 See Chapter VI, articles 23 (fines) and 24 (periodic penalty payments).

24 See Chapter V, articles 13 to 15 (fines) and 16 (periodic penalty payments).

In its Explanatory Memorandum, the Portuguese Competition Authority (PCA) stressed that "the amendment to Article 71 of the Competition Act aims at adjusting the ban on the right to take part in public tenders to the notion of undertaking as an economic unity" (§102).

In the Public Consultation,[25] the stakeholders[26] underlined that extending accessory sanctions to parent companies could exclude from the market undertakings whose main activity is the participation in public tenders, leading to a manifest disproportion between the sanction, its deterrent effect and the gravity of the infringement. Albeit considering that the extension of accessory sanctions to any entity belonging to the same economic unity of the infringer undertaking is, in principle, adequate and proportionate, the PCA limited its scope to public tenders directly or indirectly related to the market affected by the infringement.[27]

b. Decision practice of the PCA

In case PRC/2009/13,[28] the PCA found the parent company liable, in so far as it controlled the activities of its subsidiary and could have avoided the infringement. This decision was nonetheless quashed by the Lisbon Appeal Court, in light of the principle of personal responsibility and despite the fact that the parent company held 100% of one of the infringing subsidiary's share capital.[29] The national court did not seem to follow the doctrine of

25 http://www.concorrencia.pt/vPT/Noticias_Eventos/ConsultasPublicas/Paginas/Consulta-p%C3%BAblica-sobre-proposta-de-anteprojeto-de-transposi%C3%A7%C3%A3o-da-Diretiva-%E2%80%9CECN--%E2%80%9D.aspx?lst=1&Cat=2019.

26 CVA was one of the stakeholders sending comments, which are available here: http://www.concorrencia.pt/vPT/Noticias_Eventos/ConsultasPublicas/Documents/ObsConsultaPublica/Cruz%20Vilac%CC%A7a%20Advogados.pdf.

27 PCA's Public Consultation Report, 31 March 2020, §§47-50, available at: http://concorrencia.pt/vPT/Noticias_Eventos/ConsultasPublicas/Documents/Proposta%20de%20Anteprojeto%20apresentada%20ao%20Governo%20%E2%80%93%20%20Relat%C3%B3rio%20da%20Consulta%20P%C3%BAblica.pdf. See also the Preliminary Draft Law, available at: http://concorrencia.pt/vPT/Noticias_Eventos/ConsultasPublicas/Documents/Proposta%20de%20Anteprojeto%20apresentada%20ao%20Governo.pdf.

28 Decision of 22 December 2015, PRC/2009/13, *Associação Nacional das Farmácias (ANF); Farminveste – S.G.P.S., S. A. (Farminveste SGPS); Farminveste – Investimentos, Participações e Gestão, S. A. (Farminveste IPG); HMR – Health Market Research, Lda.*

29 Opening statement of Maria João Melícias, International Competition Network Annual Conference 2018, p. 6.

parental liability as developed by the CJEU, which goes further than the failure to exercise vigilance.[30]

In case PRC 2016/6,[31] with regard to Somafel Group, the PCA concluded that neither the *Akzo* presumption was applicable nor was it possible to demonstrate to the requisite legal standard that the parent companies exercised decisive influence over the activity of the subsidiary. Conversely, it found that Fergrupo's parent companies were severally liable for the infringement, in so far as they held 100% of the share capital of its subsidiary and did not adduce relevant evidence to rebut the presumption (§§1084-1092).

c. Principles and challenges

The proportionality principle shall guide the activity of any public decision-maker, be it the EU legislator, the judiciary or the Member States when implementing a Directive, especially when deciding to go beyond what was prescribed therein.

In the specific context of accessory sanctions, its impact on a small market such as the Portuguese one shall be pondered. Given that EU law must be understood in its context, the Member States must also take into account the public procurement rules and principles when implementing the Directive. [32]

Finally, it is important to underline that the imposition of sanctions to parent companies for competition law infringements committed by their subsidiaries must comply with the EU Charter of Fundamental Rights and the European Convention on Human Rights. The adoption of the Directive and its implementation will thus have a significant impact on the way national courts interpret the doctrine of parental liability and reconcile it with the principle of individual responsibility. In our opinion, potential conflicts must absolutely be solved through the preliminary ruling procedure, therefore guaranteeing the uniform interpretation and application of EU law.

30 See, for example, C-231/11 P, *Commission v Siemens Österreich and Others et Siemens Transmission & Distribution and Others / Commission*, EU:C:2014:256, §45.

31 Decision of 3 March 2020, PRC 2016/6, *Fergrupo – Construções e Técnicas Ferroviárias, S.A., Somafel – Engenharia e Obras Ferroviárias, S.A.*

32 Notably Recital 101 and article 57 of Directive 2014/24/EU.

4. CONCLUSION

As this article tried to stress out, a distinction shall be drawn between parental liability for competition law infringements at the EU and at the national level. At the EU level, it has been introduced by the Commission in its decision practice upheld by the CJEU. In this regard, while the first judgments seemed to require a stronger involvement of the parent company in the infringement, subsequent case-law focused on the concept of undertaking as a single economic unit, irrespective of the entities' legal status, in order to justify the imposition of fines to parent companies for infringements committed by their subsidiaries. In *Akzo II*, the ECJ endeavoured to clarify its case-law and explained that, in situations where the parent company holds all or almost all of the capital of its subsidiary, therefore being in a position to exercise decisive influence over the latter, it is held personally and individually responsible for an infringement of competition law, even though its liability may be entirely based on the unlawful conduct of the subsidiary.

At the national level, parental liability has not been consistently applied, as national courts are often reluctant to depart from more familiar concepts of criminal and corporate law. In particular, the imposition of fines to parent companies is often said to be at odds with the principle of personal responsibility.

Against this background, the ECN+ Directive aims at achieving greater uniformity in the application of the concept of "undertaking" within the Member States. To this extent, it codifies the parental liability doctrine, as established over the years by the CJEU's case-law. According to the *travaux préparatoires*, this will not only lead to the uniform application of concepts enshrined in EU law, but will also contribute to increase the deterrence effect of fines for competition law infringements.

Due to the above-mentioned differences between the application of the doctrine at EU and at national levels, the Directive's implementation will probably be a challenge both for NCAs and for national courts. At the same time, it constitutes an opportunity to foster the judicial dialogue through the preliminary ruling procedure, guaranteeing and enhancing the uniform interpretation and application of EU law. In a nutshell, like in many other aspects of European integration, only the active participation of all the actors involved, be it the EU courts, national courts, the NCAs or the national legislator, will allow the full and consistent application of EU law.

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