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

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To my dearest sister Flora, the most supportive and wonderful person I know

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Table of Cases

Court of Justice of the European Union

- ECJ, 13.7.1962, *Klöckner & Hösch vs. Hohe Behörde*, [1962] ECR 653
- ECJ, 13.7.1966, joined Cases 56/64 and 58/64, *Consten and Grundig vs. Commission*, [1966] ECR 299
- ECJ, 13.7.1966, C-32/65, *Italian Republic vs. Council of the European Community*, [1966] ECR 457
- ECJ, 12.12.1967, C-48/72, *Brasserie de Haecht/Wilkin and Janssen*, [1967] ECR-543 (555)
- ECJ, 18.2.1971, C-40/70, *Sirena/Eda a.o.*, [1971] ECR 69
- ECJ, 25.11.1971, C-22/71, *Béguelin Import Co. vs. S.A.G.L. Import Export*, [1971] ECR 949
- ECJ, 14.7.1972, C-52/69, *J.R. Geigy AG vs. Commission of the European Community*, [1972] ECR 787
- ECJ, 21.2.1973, C-6/72, *Continental Can*, [1973] ECR-215
- ECJ, 22.1.1974, C-48/69, *ICI-CSC vs. European Commission*, [1974] ECR 223
- ECJ, 31.10.1974, C-15/74, *Centrafarm B.V. and Adriaan De Peijper vs. Sterling Drug Inc.*, [1974] ECR 1174
- ECJ, 31.10.1974, C-16/74, *Centrafarm B.V. and Adriaan De Peijper vs. Winthrop B.V.*, [1974], ECR 1138
- ECJ, 15.5.1975, C-71/74, *Frubo vs. Commission*, [1975] ECR 563
- ECJ, 16.12.1975, joined Cases C-40-48, 50, 54-56, 111, 113 and 114/73, *'Suiker Unie' a.o. vs. Commission*, [1975] ECR 1663, 1965
- ECJ, 25.10.1977, C-26/77, *Metro vs. Commission*, [1977] ECR 1875
- ECJ, 23.5.1978, C-102/77, *Hoffman La – Roche vs. Centrafarm*, [1974] ECR 1147
- ECJ, 17.11.1987, Cases 142 and 156/84, *B and Reynolds*, [1987] ECR 4487
- ECJ, 20.6.1978, C-28/77, *Tepea vs. Commission*, [1978] ECR 1391
- ECJ, 12.7.1979, Cases 32/78 and 36-82/78, *BMW*, [1979] ECR I-2507

ECJ, 29.10.1980, joined Cases C-209-215 and 218/78, *Heintz van Landewyck Sàrl a.o. vs. Commission*, [1980] ECR-3125

ECJ, 14.7.1981, C-172/80, *Züchner vs. Bayrische Vereinsbank*, [1981] ECR 2021 (2031)

ECJ, 8.11.1983, C-96/82, *IAZ a.o. vs. Commission*, [1983] ECR 3369

ECJ, 23.10.1983, C-107/82, *AEG-Telefunken AG vs. Commission*, [1983] ECR 3151

ECJ, 12.7.1984, C-170/83, *Hydrotherm Gerätebau GmbH*, [1984], ECR 2999

ECJ, 30.1.1985, C-123/83, *BNIC vs. Clair*, [1985] ECR-391

ECJ, 17.9.1985, C-25 & 26/84, *Ford*, [1985] ECR 2725, 2743

ECJ, 22.10.1986, C-75/84, *Metro*, [1986], ECR 3074

ECJ, 4.5.1988, C-30/87, *Corinne Bodson vs. SA Pompes funèbres des regions libérées*, [1988], ECR 2479

ECJ, 11.4.1989, C-66/86, *Ahmed Saeed Flugreisen and Silver Line Reisebüro GmbH vs. Zentrale zur Bekämpfung unlauteren Wettbewerbs e.V.*, [1989] ECR 803

ECJ, 18.10.1989, C-374/87, *Orkem vs. Commission*, [1989] ECR 3283

ECJ, 4.5.1988, C-30/87, *Bodson vs. Pompes funèbres*, [1988] ECR I-2435

ECJ, 5.4.1990, C-121/89, *LVM*, [1990] ECR I-1595

ECJ, 23.4.1991, C-41/90, *Höfner and Elser vs. Macroton*, [1991] ECR I-1979

ECJ, 28.2.1991, C-23/98, *Delimitis vs. Henninger Bräu*, [1991] ECR I-935

ECJ, 25.3.1996, C-137/95 P, *SPO a.o. vs. Commission*, [1996] ECR II-1611

ECJ, 24.10.1996, C-73/95 P, *Viho Europe BV vs. Commission*, [1996] ECR 5495

ECJ, 28.5.1998, C-7/95 P, *John Deree Ltd. vs. Commission*, [1998] ECR I-31111

ECJ, 9.3.1999, C-212/97, *Centros*, [1999] ECR I-1459

ECJ, 8.7.1999, C-49/92, *Commission vs. Anic Partecipazioni*, [1999] ECR I-4125.

ECJ, 21.9.1999, C-67/96, *Albany Internional BV vs. Sticing Bedriffspensionenfonds Textilindustrie*, [1999] ECR I-5751

ECJ, 18.5.2000, C-279/98 P, *Cascades vs. Commission*, [2000] ECR I-9693

ECJ, 16.11.2000, C-286/98 P, *Stora Kopparberg Bergslags AB vs. Commission of the European Community*, [2000] ECR I-9925

ECJ, 16.11.2000, C-294/98 P, *Metsä-Serla Oyj and Others vs. Commission*, [2000] ECR-I-10065

ECJ, 20.9.2000, C-390/98, *Banks/Coak Authority*, [2001] ECR I-6117

ECJ, 16.11.2000, C-248/98 P, *KNP BT vs. Commission*, [2000] ECR I-9641

ECJ, 19.2.2002, C-309/99, *Wouters*, [2002] ECR I-1577

ECJ, 5.11.2002, C-208/00, *Überseering*, [2002] ECR I-9919

ECJ, 18.9.2003, C-338/00 P, *Volkswagen vs. Commission*, [2003] ECR I-9189

ECJ, 30.9.2003, C-167/01, *Inspire Art*, [2002] ECR I-10155

ECJ, 2.10.2003, *Aristrain vs. EC Commission*, [2003] ECR I-1105

ECJ, 16.3.2004, C-264/01, C-306/01 and C-355/01, *AOK-Bundesverband u.a.*, [2004] ECR I-2493

ECJ, 7.1.2004, C-204/00 P, *Aalborg Portland vs. Commission*, [2004] ECR I-133

ECJ, 28.6.2005, joined Cases C-189/02 P a.o., *Dansk Rørindustri a.o. vs. Commission*, [2005] ECR I-5425

ECJ, 14.7.2005, joined Cases C-65/02 and C-73/02, *TKS*, [2005] ECR I-6773

ECJ, 18.7.2006, C-519/04 P, *Meca-Medina and Majcen vs. Comm.*, [2006] ECR I-6991

ECJ, 29.6.2006, C-289/04 P, *Showa Denko vs. Commission*, [2006] ECR I-5859

ECJ, 29.6.2006, C-308/04 P, *SGL Carbon vs. Commission*, [2006] ECR I-5977

ECJ, 11.7.2006, C-205/03 P, *FENIN vs. Commission*, [2006] ECR I-06295

ECJ, 11.12.2007, C-280/06, *Autorità Garante della Concorrenza e del Merco vs. Ente tabacchi italiani [ETI SpA a.o.]*, [2007] ECR I-10893

ECJ, 16.12.2008, C-210/06, *Cartesio*, [2008] ECR I-0000

ECJ, 10.9.2009, C-97/08, *Akzo Nobel NV vs. Commission*, [2009] ECR I-08237

ECJ, 27.10.2010, T-24/05, *Alliance One International vs. Commission*, [check]

General Court of the European Union

CFI, 17.12.1991, T-6/89, *Enichem Anic vs. EC Commission*, [1991] ECR II-1623

CFI, 10.3.1992, joined Cases T -68/89, T-77/89 and T-78/89, *Società Italiana Vetro SpA*, [1992] ECR-1403

CFI, 10.3.1992, T-11/89, *Shell vs. Commission*, [1992] ECR II-757

CFI, 6.4.1995, T- 145/89, *Welded Steel Mesh*, [1995] ECR II-987

CFI, 6.4.1995, T-141/89, *Tréfileurope Sales SARL vs. Commission*, [1995] ECR II-791

CFI, 4.5.1998, T-327/94, *SCA Holding vs. European Commission*, [1998] ECR II-1373

CFI, 14.5.1998, T-352/94, *Mo och Domsjö vs. Commission*, [1998] ECR II- 1989

CFI, 11.3.1999, T-143/94, *NHM Stahlwerke*, [1999] ECR II-239

CFI, 20.4.1999, joined Cases T-305/94 a.o, *Limburgse Vinyl Maschappij a.o. vs. EC Commission*, [1999] ECR II-931

CFI, 15.9.2000, T-325/01, *Daimler Chrysler vs. Commission*, [2005] ECR II-3319

CFI, 18.9.2001, T-112/99, *Métropole Télévision vs. Commission*, [2001] ECR II-2459

CFI, 13.12.2001, T-45/98 and T-47/98, *Krupp Thyssen Stainless vs. Commission*, [2001] ECR II-3757

CFI, 13.12.2001, joined cases T-45/98 a.o., *TKS and AST vs. Commission*, [2001] ECR II-3757

CFI, 20.2.2001, T-112/98, *Mannesmannröhren-Werke AG vs. EC Commission*, [2001] ECR I-4539

CFI, 20.3.2002, T-9/99, *HFB a.o. vs. Commission*, [2002] ECR II-1487

CFI, 20.3.2003, T-1/99, *ABB Asea Brown Boveri vs. Commission*, [2002] ECR II-1882

CFI, 30.9.2003, T-203/01, *Michelin*, [2003] ECR II-4071

CFI, 11.12.2003, T-66/99, *Minoan Lines*, [2003] ECR II-05515

CFI, 10.6.2005, joined Cases T-71, T-74, T-87, and T-91/03, *Tokai Carbon vs. Commission*, [2005] ECR II-10

CFI, 23.2.2006, Case T-282/02, *Cementbou*, [2006] ECR II-00319

CFI, 4.7.2006, T-304/02, *Hoek Loos*, [2006] ECR II-01887

CFI, 27.9.2006, T-314/01, *Avebe vs. EC Commission*, [2006] ECR II-3085

CFI, 7.6.2006, joined cases T-213/01 and T-214/01, *Österreichische Sparkasse und Bank für Arbeit und Wirtschaft vs. Commission*, [2006] ECR II-01601

CFI, 14.12.2006, T-439/05, *Lombard Club*, [2006] ECR II-5169
CFI, 27.9.2006, T-314/01, *Avebe BA vs. Commission*, [2006] ECR II-3085
CFI, 12.10.2007, T-474/04, *Pergan*, [2007] ECR II-4225
CFI, 12.12.2007, T-112/05, *Akzo Nobel vs. Commission*, [2007] ECR II-5049
CFI, 30.9.2009, T-161/05, *Hoechst vs. Commission*, [2009] ECR II-03555
CFI, 30.4.2009, T-12/03, *Itochu vs. Commission*, [2009] ECR II-909
CFI, 30.9.2009, T-175/05, *Akzo Nobel AB a.o vs. Commission*, [2009] ECR II-00184
CFI, 27.10.2010, T-24/05, *Alliance One International vs. EC Commission*, [2010] ECR II-05329
CFI, 12.7.2011, T-132/07, *Fuji*, and CFI of 13.7.2011, T-141/07, *Otis*, [not yet published]
CFI of 14.7.2011, Case T-190/06, *Total Elf Aquitaine vs. Commission*, [not yet reported]

European Commission Decisions

Comm. Dec., 13.3.1969, *EWA*, [1969] OJ Nr. L 69/15
Comm. Dec. 6.6.1969, *Christiani & Nielsen*, [1969] OJ Nr. 165/12
Comm. Dec., 25.6.1969, *VVVF*, [1969] OJ Nr. L 168/22
Comm. Dec., 16.7.1969, *International Chinincartell*, [1969] OJ Nr. L 192/5
Comm. Dec., 14.12.1972, *Zoja/CSC-ICI*, [1972] OJ Nr. L 299/51, 54
Comm. Dec. 29.11.1974, *Franco-Japanese Ballbearings Agreement*, [1974] OJ Nr. L 343/19
Comm. Dec., 21.12.1974, *LDPE*, [1974] OJ Nr. L 343
Comm. Dec., 17.12.1975, *Chiquita*, [1972] OJ Nr. L 95/1, 11
Comm. Dec., 8.12.1977, *Hugin vs. Lipptons*, [1978] OJ Nr. L 22/23
Comm. Dec., 10.7.1985, *French inland waterway charter traffic: EE levy*, [1985] OJ Nr. L 219/35, 41
Comm. Dec. of 23.7.1984, *Benelux Fl Glass*, [1984] OJ Nr. L 212
Comm. Dec., 23.7.1984, *Flatglass*, [1984] OJ Nr. L 212/13

Comm. Dec., 23.11.1984, *Peroxyd-Products*, [1985] OJ Nr. L 35/1

Comm. Dec., 23.4.1986, *Polypropylen*, [1986] OJ Nr. L 230/1

Comm. Dec., 17.7.1986, *Bodenfliesen*, [1986] OJ Nr. L 10/15

Comm. Dec., 25.9.1986, *Peugot*, [1986] OJ Nr. L295/19

Comm. Dec., 22.12.1987, *Eurofix-Bauco vs. Hilti*, [1987] OJ Nr. L 65/19

Comm. Dec., 18.12.1987, *Fisher Price*, [1988] OJ Nr. L 49/19, 21

Comm. Dec., 21.12.1988, *PVC*, [1988] OJ Nr. L 74/1, and *LDPE*, [1988] OJ Nr. L 74/21

Comm. Dec., 10.7.1987, *Tipp-Ex*, [1987] OJ Nr. L 222/1, 3

Comm. Dec., 13.7.1987, *Sandoz*, [1987] OJ Nr. L 222/28, 31

Comm. Dec., 18.12.1987, *Konica*, [1988] OJ Nr. L 78/34

Comm. Dec., 7.12.1988, *Flatglass*, [1989] OJ Nr. L 33/44

Comm. Dec., 21.12.1988, *PVC*, [1994] OJ Nr. L 239

Comm. Dec., 15.10.1990, *CEKACAN*, [1990] OJ Nr. L299/64

Comm. Dec., 18.10.1991, *Eirpage*, [1991] OJ Nr. L 306/22

Comm. Dec., 16.1.1991, *Ijsselcentrale*, [1991] OJ Nr. L 28/32

Comm. Dec., 16.1.1991, *Ijsselcentrale*, [1991] OJ Nr. L 28/32

Comm. Dec., 15.5.1991, *Gosme/Martell*, [1991] OJ Nr. L 185/23

Comm. Dec., 21.12.1992, *Fi/Hitachi*, [1993] OJ Nr. C 20/10

Comm. Dec., 6.6.1994, *Medeol/Elosua*, [1994] OJ Nr. C 169

Comm. Dec., 13.7.1994, *Karton*, [1994] OJ Nr. L 243/1

Comm. Dec., 27.7.1994, *BT-MCI*, [1994] OJ Nr. L 223/36

Comm. Dec., 19.9.1994, *Cartonboard*, [1994] OJ Nr. L 243

Comm. Dec., 26.6.2001 *Elkem/Sapa*, [2001] OJ Nr. C 160/49

Comm. Dec., 20.10.2004, *Raw Tobacco Spain*, [2004] OJ Nr. L 161

Comm. Dec., 11.6.2002, *Österreichische Banken* („Lombard Club“), [2004] OJ Nr. L 56/1

Comm. Dec., 26.5.2004, *Souris-Topps*, [2006] OJ Nr. L 162

Comm. Dec., 3.5.2006, *Hydrogen Peroxide*, OJ [2006] Nr. L 353

Comm. Dec., 5.12.2007, *Chloroprene Rubber*, [2008] OJ Nr. C 251/11

Comm. Dec., 20.11.2007, *Professional Videotape*, [2008] OJ Nr. C 57/07

Comm. Dec., 22.7.2009, *Calciumcarbid*, [2009] OJ Nr. C 301/12.

Abstract

The assessment of legally independent, but economically associated undertakings is one of the most contentiously debated issues of European antitrust law¹. The reasons for companies to form a corporate group vary depending on the relevant legal conditions, which are essentially determined by corporate law. In order to consider this legal phenomenon for the enforcement of the competition provisions, the European institutions have developed the concept of a 'single economic entity'. Under this doctrine, legally separate companies that have reached a certain level of economic integration are treated as a 'single entity' for the purpose of applying the competition provisions.

In relation to Art 101 (1) TFEU,² spelling out the general ban on cartels, it is vital to assess the criteria of a 'single economic entity' for two distinct legal issues. On the one hand, the concept is used to determine in which instances agreements between companies of a corporate group may be exempted from the provision's application scope. On the other hand, the concept has increasingly been applied by the competition authorities for attributing conduct and liability between companies of a corporate group.

This thesis aims to clarify under which circumstances such an attribution of conduct and liability between companies of a corporate group is appropriate under general legal principles of European Union, as well as corporate law. For this purpose, the current application of the 'single economic entity'-doctrine by the European competition authorities will be critically reviewed. Finally, this analysis intends to demonstrate how possible inconsistencies may be overcome by drawing up a framework of analysis that fosters an effective enforcement of the competition provisions and at the same time protects the concerned companies' procedural rights.

¹ Cf *Mestmäcker/Schweitzer*, *Europäisches Wettbewerbsrecht*, (2004), § 8, para. 51.

² Treaty on the Functioning of the European Union (Lisbon Treaty), Official Journal of the European Union, C 115/49.

Dissertation

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

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Introduction

The assessment of legally independent, but economically affiliated companies is one of the most contentiously debated issues of European antitrust law.¹ The reasons for companies to form a corporate group vary depending on the relevant legal conditions, which are essentially determined by corporate law. In light of the various forms of structuring corporate groups today, it is vital to assess whether group companies are to be judged by the same criteria as other market participants.² In connection with the ban on cartels, stipulated by Art 101 (1) TFEU,³ it is furthermore necessary to take into account the factual economic strength of a cartelizing company. This is not necessarily congruent with the borders of its legal incorporation. For these reasons, the European antitrust institutions⁴ have developed the concept of a 'single economic entity'. This legal concept attempts to comprehend the specific economic relation between companies of the same corporate group for the assessment of possible anticompetitive behavior. Hereby the Commission and the European Court of Justice have not always proceeded in a sufficiently coherent manner.

In order to appropriately apply the cartel ban on economically affiliated companies, the 'single economic entity' doctrine originally served the purpose of taking into account the distinct relationship of corporate group undertakings towards other market participants. In the tradition of European antitrust law, the necessity of enabling companies to compete effectively was soon recognized as an essential feature of a free market society.⁵ In light of the factual realities of conducting modern business, however, it was acknowledged that this aim could only be adequately achieved if the relation of economic dependence between a parent and a subsidiary company is appropriately taken into account. This is necessary to grant individual market participants the maximum amount of freedom of action, characteristic for the democratic model of a free market economy.⁶ The fact that companies that are subordinated to the economic policy of another company cannot decide autonomously on their own market conduct was hence taken into consideration by the concept of a 'single economic entity'. By this legal fiction it was assumed that conduct between companies that constitute such an 'economic entity' must necessarily be exempted from the application scope of Art 101 (1) TFEU.

The necessity of regarding economic affiliations when applying the cartel ban was furthermore recognized for distinguishing the correct legal entity responsible for an antitrust infringement. Given that a company does not necessarily decide on its business policy in an independent

¹ Cf. *Mestmäcker/Schweitzer*, *Europäisches Wettbewerbsrecht*, (2004), § 8, para. 51.

² Cf. *Buntscheck*, *Das „Konzernprivileg“ im Rahmen von Art 81 Abs 1 EG-Vertrag* [hereinafter: *Das Konzernprivileg*], (2001), 17.

³ Treaty on the Functioning of the European Union (Lisbon Treaty), OJ Nr. C 115/49.

⁴ The term institution refers to the public bodies (administrative authorities or courts) that have a role in the public enforcement of EU competition law. In detail, see *Frese*, *Sanctions in EU Competition law: Principles and Practice*, (2012), 137: "On an EU level, the enforcement of Art 101 and 102 TFEU is in the hands of the Commission, who derives its enforcement competence directly from the Treaties (Art 104 TFEU and Art 17 TEU). Decisions by the Commission can be appealed before the General Court (Art 256 TFEU, in conjunction with Art 263 TFEU), with a further appeal on points of law to the Court of Justice (Art 256 TFEU)".

⁵ Cf. *Buntscheck*, *ibid.*

⁶ See *Herdzina*, *Wettbewerbspolitik*, (1993), 15.

manner, it was deemed necessary to attribute the anticompetitive conduct of controlled subsidiaries to their controlling parent companies. The Treaty itself neither provides a legal basis for the attribution of responsibility nor does it answer the question which legal entity is to be considered with regard to the absolute limitation of antitrust fines. According to Art 23 (2) of Regulation 1/2003 namely, the fine may not exceed 10% of an undertaking's annual business volume.⁷

For these reasons, the concept of a 'single economic entity' was consequently employed by the Commission and the ECJ for the assessment of 'intragroup liability'. Hereby, the European institutions have nevertheless regularly refrained from a detailed analysis of the specific circumstances of consideration in favor of a holistic reference to the existence of an 'economic entity' between a parent and a subsidiary company. The exact criteria under which anticompetitive conduct could appropriately be attributed between companies of a corporate group, i.e. under which circumstances a parent company could be held liable for the antitrust violations of its subsidiary companies, had therefore repeatedly been questioned since the *Stora*-judgment of the European Court of Justice.⁸ In this case, the ECJ reinforced that a rebuttable presumption existed in European antitrust law, which postulated that wholly-owned subsidiaries necessarily follow the business policy laid out by their parent companies.

In its recent case of *Akzo Nobel*, the Court clarified its adjudication with respect to the instances in which parent companies could be held liable for their subsidiary's anticompetitive behavior.⁹ This judgment has given the parent-daughter liability debate an important input and raised once more the controversial issue of the relevant conditions for applying the European antitrust principles on a corporate group of companies. Particularly, doubts remain on the dogmatic accuracy of employing the concept of a 'single economic entity' in an undifferentiated manner for both problem issues assessed under Art 101 (1) TFEU.¹⁰ Considering the characteristics of European Union law, this fact is nevertheless of utmost priority for granting a consistent and reliable enforcement of the antitrust provisions.¹¹

Finally, the fact that corporate enterprises today are often confronted with more than one jurisdiction at a time should make it a high priority for federal agencies charged with the responsibility of enforcing antitrust law to respect pertinent principles of international law. Leaving every jurisdiction to develop and apply its competition laws and policies in a vacuum has been assessed to create a 'recipe for chaos'.¹² Therefore, the European approach to corporate group liability should be careful to respect not only the principles of holding dominant companies liable under the laws of its various member states, but also the economic policy of corporate groups on an international level. Hereby, the importance of creating appropriate incentive regimes, inducing companies to adhere to the competition principles also on a global level, should not be overlooked. Because business today is essentially international, an

⁷ See *Riesenkampf/Krauthausen*, ibid.

⁸ ECJ of 16.11.2000, Case, C- 286/98 P, *Stora Kopparberg Bergslags AB vs. Commission of the European Community*, [2000], ECR I-9925.

⁹ See ECJ of 10.9.2009, C-97/08, *Akzo Nobel NV vs. Commission*, [2009] ECR I-08237.

¹⁰ Cf. e.g. *Zimmer/ Paul*, Kartellbußgeldrechtliche Haftung und Haftungsbefreiung im Konzern, WuW 10/2007, 970 ff; *Bauer/ Reisner*: Erweiterte Zurechnung des Verhaltens Dritter bei der Festsetzung von Geldbußen im EG-Kartellrecht?, WuW 7 u 8/2007, 737; *Thomas*, Die kartellrechtliche Beurteilung konzerninterner Wettbewerbsbeschränkungen mit Gemeinschaftsunternehmen, ZWeR 3/2005, 236 ff; and *Koppensteiner*, in: FS Mailänder (2006), 465 ff;

¹¹ In detail, see point 3 of this thesis.

¹² Cf. *Tritell*, International Antitrust Convergence: A Positive View, Published in the Antitrust Magazine of the American Bar Association, (2005), 25.

enforcement of the competition rules that neglects this aspect would lead to its distorted application.

After giving a brief overview of the historical development of the 'single economic entity'-doctrine, I will outline the criticism that can be made of the European Court of Justice's current approach to imposing intragroup liability. Subsequently, the following analysis will include a dogmatic assessment of the doctrine in order to demonstrate the necessity of a more differentiated application, taking into consideration the specific policy objectives of its employment for distinct legal issues. I will conclude by drawing up a framework of analysis under which these policy considerations could be taken into account in a more accurate manner. This includes the recognition that an effective enforcement of the European competition provisions cannot ignore its implications on an international level.

1. The Single Economic Entity Doctrine as **Essential Criterion** for the Application of Antitrust Law on a Corporate Group

1.1. Issue of Discussion

According to established case-law of the European Court of Justice, subject to the interdiction of cartel activities under Art 101 (1) of the Treaty on the Functioning of the European Union¹³ are 'undertakings' and 'associations of undertakings'. The interpretation and assessment of the term 'undertaking' must be made in consideration of the Treaty's aim of granting a harmonic functioning of competition throughout the Union's Common Market. Due to the broad formulation of Art 101 (1) TFEU, it has been the task of the Commission¹⁴ and the ECJ¹⁵ since the Treaty's adoption to interpret and substantiate the application of the cartel ban, which is considered the most detrimental form of anticompetitive behavior.¹⁶

Even though the main statutory schemes of European antitrust enforcement (Articles 101 and 102 TFEU) were laid out over half a century ago, they have evolved in clearly discernable trends over time.¹⁷ In the light of a changing corporate culture, the European institutions have therefore been faced with interpretative questions that were beyond the purview of the statute's

¹³ (Ex Article 81 TEU).

¹⁴ See Art 244 and 103 TFEU, in conjunction with Regulation 1/2003 (Council Regulation (EC) No 1/2003 of 16.12.2002 on the implementation of the rules on competition laid down in Articles 101 and 102 of the Treaty, OJ L 1, 4.1.2003).

¹⁵ See Art 251 ff TFEU. The general reference to 'the Court' in the following thesis will include the Court of First Instance, which was founded as an independent tribunal in support of the ECJ on the basis of Art 256 TFEU. Together with the Commission, they will be referred to as 'the European institutions,' or simply 'the institutions'.

¹⁶ *Buntscheck*, Das Konzernprivileg, (2001), 19. On these characteristics of cartels, see furthermore the speech of Commissioner *Neelie Kroes*, Press Release of 31.5.2006, IP/06/698, 'European Commission Competition: Commission Imposes Fines of € 344.5 Million on Producers of Acrylic Glass for Price Fixing'.

¹⁷ See only recently *Eilmansberger*, How to Distinguish Good from Bad Competition Under Art 82 EC: In Search for Clearer and More Coherent Standards for Anticompetitive Abuses, in: *Common Market Law Review* 41:129-177 (2005), 129.

creators.¹⁸ One of these issues has been the application of the European antitrust provisions to the relationship between a parent and a subsidiary company. The complexity of dealing with corporate groups derives from the necessary consideration of economic principles of structuring corporate activity. This is nevertheless essential for granting an effective application of the competition rules. Hereby an appropriate balance must be found between an efficient enforcement of antitrust law and the economic rationale of conducting business by the means of a corporate group.

The parent-subsidiary debate emanates from the fact that the competition provisions are addressed to 'independent undertakings'. Due to the extensive consideration of this term by the European Courts following a distinct *functional approach*,¹⁹ the latter is generally defined as 'a unitary organization of personal, tangible, and intangible elements, which pursues a specific economic aim on a long term basis, regardless of its legal status and the way it is financed'.²⁰ Characteristic for an undertaking is therefore an independent economic conduct in the broadest sense,²¹ which includes any 'entity' carrying out such an activity, irrespective of its legal personality.²²

In the context of large corporate groups, the entire group, individual 'sub-groups', or the single subsidiary companies are treated as undertakings for the purpose of Art 101 (1) TFEU. This essentially depends on the level of integration and the amount of influence a parent company exercises or may exercise on the commercial policy of other group members.

While the concept of an 'undertaking' has therefore extensively been regarded under European case-law,²³ the existence of corporate groups still leaves unsolved questions. The inclusion of groups or 'concerns'²⁴ into the assessment of antitrust enforcement is not only essential to prevent undertakings from circumventing the antitrust provisions by forming networks that elude the facts set out in the Treaty. It also creates boundaries for permitting efficient intragroup activity that has been adopted to enhance the competitiveness of the firm at stake, in effect promoting the goals of the antitrust provisions. In this sense it has been recognized that the interdiction of coordinated conduct between a parent and a subsidiary

¹⁸ For a similar situation for the progressive interpretations of the US statutory provisions of antitrust enforcement, cf. *Meyers*, Partial Ownership of Subsidiaries, Unity of Purpose, and Antitrust Liability, 68 U. Chi. L. Rev. 1401, 1406 (2001).

¹⁹ Cf. *Schröter*, in: von der Groeben/Schwarze, Kommentar zum EU-/EG-Vertrag, (2003), preliminary remarks on Art 81-85, para. 22; *Stockmann*, in Wiedemann, Handbuch des Kartellrechts, (2008), § 7 para. 1.

²⁰ *Mestmäcker/Schweitzer*, Europäisches Wettbewerbsrecht, (2004), § 8, para. 6. For criticism of this definition, see however *Petra Pohlmann*, Der Unternehmensverbund im Europäischen Kartellrecht, (1999), 35 ff.

²¹ The characteristics of an 'undertaking' in the sense of EU competition law may therefore even be attributed to a state, its subdivisions and organizational entities respectively where it acts on the market as a 'consumer' or 'supplier'. The term 'undertakings' in the sense of European antitrust law may even apply to individuals in case they are commercially active. See *Kling/Thomas*, Kartellrecht, (2007), § 4, para. 4.

²² See ECJ of 26.6.2005, joined cases C-189/02 P, *Dansk Rørindustri a.o. vs. Commission*, [2005] ECR II-1681, para. 112.

²³ See ECJ of 23.4.1991, C-41/90, *Höfner u. Elsnér*, [1991] ECR I-1979, para. 21; ECJ of 16.3.2004, C-264/01, C-306/01 and C-355/01, *AOK-Bundesverband u.a.*, [2004] ECR I-2493, para. 46 (=WuW/E EU-R 801 = WuW 2004 p. 655 ff, *AOK Bundesverband/Ichthyol Gesellschaft*); and most recently: ECJ of 11.7.2006, C-205/03 P, *FENIN vs. Commission*, [2006] ECR I-000, paras. 25-28. See however *Wils*, The Optimal Enforcement of EC Antitrust Law, (2002), 163.

²⁴ In the following analysis the term of a 'corporate group' or 'concern' will be used interchangeably.

corporation may in fact be detrimental to consumers by prohibiting ‘pro-competitive’²⁵ conduct between economically affiliated legal entities.²⁶

In order to duly regard these concerns, the European institutions have been confronted with two issues of relevance when applying Art 101 TFEU on corporate groups of companies. On the one hand it is necessary to exempt certain agreements between a parent and a subsidiary, or several subsidiary companies that cannot be regarded as ‘conspiratorial’ from the provision’s application scope.²⁷ On the other hand, it is essential to allow an appropriate attribution of illegal conduct within a corporate group in order to effectively deter companies from future wrongdoing. In order to address these two issues of interest, it is important to investigate the different structures of organizing commercial conduct between separate legal entities under the form of a corporate group.

European practice includes different facts under the term of a corporate group: majority shareholdings, the formal concept of a ‘concern’,²⁸ associated undertakings, mutual influence, and control etc. Due to considerable differences in the substantive and adjective corporate laws of the various member states, no common definition of a ‘concern’ exists, which essentially describes a specific close affiliation of undertakings under a common leadership or strategy.²⁹ Therefore, it is helpful to use the legally undefined term of a ‘corporate group’ for discussing the differentiated treatment of affiliated undertakings in European antitrust law. For the purpose of applying the antitrust provisions appropriately the ECJ has increasingly built on the legal construct of a ‘single economic entity’. The relevance and extensive use of this term in European practice can primarily be observed in the creation of the legal concept of the ‘intra-enterprise’- or ‘group-privilege’. Accordingly, agreements between undertakings of a corporate group, which are ascertained to constitute a ‘single economic entity,’ are exempted from the application of Art 101 (1) TFEU.³⁰ The concept has also increasingly served as a standard for judging the attribution of liability between companies of a corporate group.

The exact preconditions under which such a ‘single economic entity’ can be assumed, as well as its scope and implications are nevertheless still contested.³¹ This includes the determination of ‘a parent’ and a ‘subsidiary’ corporation, and their required degree of interrelation in order to legitimately assume the existence of a ‘single economic entity’. Such an assessment must

²⁵ For this terminology, see e.g. Opinion of AG *Jacobs*, in Case C-7/97, *Oscar Bronner vs. Mediaprint*, [1998] ECR I-07791, para. 57.

²⁶ For a similar situation under US antitrust law see *Meyers*, Partial Ownership of Subsidiaries, Unity of Purpose, and Antitrust Liability, 68 U. Chi. L. Rev. 1401, 1406 (2001).

²⁷ This assessment has been made under the cue of the so-called ‘intra-enterprise’, ‘group-’, or ‘concern-privilege’. Though the latter phrase is terminologically inconsistent, it has nevertheless been adopted for reasons of practicability, especially in the German literature for the comparison of corporate group relations with the term of a concern under national law.

²⁸ For an assessment of whether the term of a concern requires to be characterized as an ‘undertaking’ in European competition law, see 3.1 of this thesis.

²⁹ See e.g. *Menz*, Wirtschaftliche Einheit und Kartellverbot, (2004), 84, and in detail, point 3.1. See however the concept of ‘uniform management’ (“Einheitliche Leitung”), defining the existence of a corporate group under § 18 of the German Stock Companies Act.

³⁰ This phenomenon has first been used by the Commission under the context of the application of Art 101 TFEU (ex. Art 81 TEU) in its decision in *Christiani & Nielsen* (Negative clearance under Art 85 EEC, [1969] OJ Nr. L 165, 1).

³¹ Differently: *Koppensteiner*, Missbrauchsverbot im Unternehmensverbund, Wbl 2007, 465; For an overview of the existent views and opinions, see *Emmerich*, in: Immenga/Mestmäcker, EG-Wettbewerbsrecht, Art 85 paras. 1 and A 43 f.

nevertheless adhere to the specific rules of the Treaty's interpretation. The lacking legal certainty in this area of European antitrust law is furthermore reflected in the Court's recent case law, which has been strongly criticized in literature.³² Therefore, a critical evaluation of this issue is necessary in order to determine whether the current practice amounts to an appropriate and comprehensive application of the aims and purposes of an effective antitrust enforcement.

1.2. Problem Assignment: The Contested Facts of a 'Single Economic Entity'

The European institutions have used the concept of a 'single economic entity' in various contexts when dealing with corporate groups in competition law, deriving specific legal consequences from its existence.³³ In this way, the conduct of one undertaking is attributed to another member of the corporate group,³⁴ their market shares added for the determination of a concentration,³⁵ the exemption of group or concern-internal agreements justified,³⁶ and a reason given for treating several undertakings of a corporate group as a 'single undertaking' under the Block Exemption Regulation.³⁷

The following thesis will focus on the subject matter of attributing antitrust liability between group companies under the notion of a 'single economic entity'. As this doctrine has nevertheless originally been established for the issue of exempting group-internal conduct from Art 101 TFEU, the analysis will include aspects of the latter issue in order to assess whether the Commission's application of this doctrine may be considered dogmatically appropriate.

Although the term of an undertaking in the sense of Articles 101 and 102 TFEU does not require legal personality, the Commission has yet to determine a juridic person that it holds responsible for the enforcement of the fine.³⁸ Such a specification is indispensable as the enforcement of Decisions by the Commission is effected under the rules of national procedural law³⁹ and therefore requires a debtor vested with legal capacity.⁴⁰

For this purpose, the Commission and the European Courts pursue a two-step approach. They distinguish between an 'undertaking' in the sense of Art 101 and 102 TFEU, and the natural or juridic person to which the alleged conduct may consequently be attributed to.⁴¹ While in a

³² See Judgment of the ECJ of 10.9.2009 in Case C-97/08, *Akzo Nobel NV vs. Commission*, [2009] ECR I-08237; [2009] 5 C.M.L.R. 23., assessed in detail under 2.2.2.2, §2.4 below.

³³ Cf. *Petra Pohlmann*, *Der Unternehmensverbund im Europäischen Kartellrecht*, (1999), 74.

³⁴ Constitutive, ECJ judgment of 14.7.1972, Case 48/69, *Imperial Chemical Industries Ltd. (ICI) vs. European Commission*, [1972] ECR 619.

³⁵ Commission decision of 14.12.1972, *Zoja/CSC-ICI*, OJ 1972 L299/51, 54; and ECJ judgment of, 22.1.1974, C-48/69, *ICI-CSC vs. European Commission* [1974] ECR 223, 255f.

³⁶ Constitutive: Commission Decision 69/195, *Christiani & Nielsen* [1969], OJ L165/12.

³⁷ ECJ, 12.7.1984, Case 170/83, *Hydrotherm/Compact*, [1984] ECR 2999, paras. 10–12; Cf. *Pohlmann*, *ibid*, 75.

³⁸ *Steinle*, 'Lassen sich Kartellverstöße "ausgliedern"? Unternehmensumstrukturierungen und die Bußgeldhaftung nach EG-Kartellrecht', [hereinafter: Unternehmensumstrukturierungen und Bußgeldhaftung], in: *Festschrift für Rainer Bechtold* (2006), 541.

³⁹ See Art 299 TFEU.

⁴⁰ CFI of 20.4.1999, joined cases T-305/94 a.o., *Limburgse Vinyl Maschappij a.o. vs. EC Commission*, [1999] ECR II-931, para. 978.

⁴¹ *Steinle*, *ibid*.

first step a culpable ‘economic entity’ is identified, the responsible legal person against whom the fine may be enforced is determined in a second step.⁴²

This clear-cut distinction has, however, not always been applied consistently in practice. Rather, the European institutions have drawn on the concept of a ‘single economic entity,’ holding either a subsidiary company, its parent or even the entire group ‘jointly and severally’ liable for illicit conduct detected in only one of the companies.⁴³ This has regularly been assumed necessary where a parent company essentially determined its subsidiary’s market conduct.⁴⁴ Hereby, the notion of a ‘single economic entity’ has increasingly been equaled with that of ‘an undertaking’ in the sense of European competition law.

1.2.1. The ‘Group, or Concern Privilege’ under Art 101 (1) TFEU

Regarding the first issue of assessing group-internal conduct, the pivotal question is whether agreements between undertakings of a corporate group are in fact ‘distortive’ under the principles of European antitrust law. For the general application of Art 101 (1) TFEU it is primarily important to note that a corporate affiliation does not alter a company’s legal independence.⁴⁵ Therefore, the companies of a corporate group are able to autonomously engage in anticompetitive agreements infringing Art 101 (1) TFEU with third parties.⁴⁶ According to its wording, Art 101 (1) TFEU nevertheless remains principally applicable for agreements between undertakings of the same corporate group.⁴⁷ Though it might be conceptually difficult to think of a parent and subsidiary company to ‘conspire’, it has been ascertained that in some situations economically affiliated companies may well be liable for an antitrust infringement where their coordinated activity is in fact detrimental to competition within the common market.⁴⁸

Some voices in literature have assessed the case of a parent company explicitly instructing one or several subsidiaries to engage in anticompetitive practices to the detriment of competitors as an allegedly obvious instance of this practice.⁴⁹ In this constellation it has been deemed unquestionable that the cartel ban remains applicable, with the consequence that all undertakings participating in the illegal conduct must automatically be held liable.⁵⁰

⁴² See Commission Decision of 27.7.1994, *PVC II*, [1994] OJ No. L 239/14, para. 44; CFI of 17.12.1991, T-6/89, *Enichem Anic vs. EC Commission*, [1991] ECR II-1623, para. 237, and later confirmed by ECJ of 8.7.1999, C-49/92 P, *Commission vs. Anic Participazioni*, [1999] ECR I-4125, as cited in this regard by *Steinle*: in FS Bechtold (2006), 543.

⁴³ Cf. already *Emmerich* in: Immenga/Mestmäcker, EG- Wettbewerbsrecht, Art 85 (1), para. 47.

⁴⁴ ECJ, Judgment of 4.5.1988, Case 30/87, *Bodson vs. Pompes funèbres*, [1988] ECR I-2435, 2475.

⁴⁵ See judgment of the Court of Justice of 12.7.1979 in Cases 32/78 and 36-82/78, *BMW*, [1979] ECR I-2507, 2513.

⁴⁶ *Emmerich* in: Immenga/Mestmäcker, EG- Wettbewerbsrecht, Art 85 (1), para. 50.

⁴⁷ See *Emmerich*, *ibid*, stepping in for a ‘strict formal interpretation’.

⁴⁸ See *Emmerich*, *ibid* and for a comparable approach under U.S. antitrust law: *Meyers*, 68 U. Chi. L. Rev. 1401, (2001), 1406. It will be assessed that this necessarily depends on the determination of the structural relationship between the two legal entities. In detail, see point 3 below.

⁴⁹ Thus *Emmerich* in: Immenga/Mestmäcker, EG- Wettbewerbsrecht, Art 85, para. 51. This is of course only possible where a parent company is entitled to this authority under (national) corporate law (see for instance § 308 of the German Stock Corporation Act [AktG]).

⁵⁰ In this regard *Emmerich*, *ibid*, acknowledging however that this practice is questionable where the discretionary power of the company is binding under national law. See also *Schröter* in:

As will be shown, this reasoning lacks of essential differentiation. For the application of Art 101 TFEU, the various possibilities and means of structuring corporate groups under corporate law, as well as the scope and intensity of the economic ‘control’ a parent corporation is entitled to exercise must namely be considered. This involves assessing the effect the respective agreement may have on the market as a whole.⁵¹ European case law has shown to be ambivalent in this respect.⁵² Due to the strict formal interpretation of Art 101 (1) TFEU, its inapplicability on group-intern agreements nevertheless requires a precise justification. This is necessary to clearly delineate the provision’s application scope.

In this regard, specifically two conditions have regularly been asserted. On the one hand, the lack of a subsidiary’s economic ‘autonomy’ towards its controlling parent corporation has been emphasized. This has been deemed to exclude the presumption of an ‘agreement’ in the sense of Art 101 (1) TFEU. On the other, the absence of competition between these entities has been relied on, with the consequence that group-intern agreements can no longer be qualified as ‘distortive’ in the sense of Art 101 (1).⁵³ Since the latter feature draws on the potential of a parent corporation to determine the conduct of its subsidiary, these two references outline the decisive factors of ‘control’ and ‘corporate autonomy’, which pervade the assessment of affiliated undertakings in European antitrust law.⁵⁴ In assessing the facts of a case, the concept of ‘control’ has often been determined in reference to the exertion of ‘*decisive influence*’ by the parent company. The existence of this degree of control has nevertheless only been deemed the case where the undertakings in question constitute a ‘**single economic entity**’.⁵⁵

1.2.2. The Determination of a ‘Single Economic Entity’

As stated above, the exact determination of a ‘single economic entity’ in European antitrust law remains unclear. Initially, the concept had been established to merely characterize the necessary level of integration allowing for a distinguished treatment of corporate groups. The term itself, however, does not account for the exact criteria of its implementation, but merely paraphrases them.⁵⁶ It has therefore been described as a blanket term, derived from other areas of law, notably tax law, which was consequently picked up and refined by the European institutions for the purposes of antitrust law.⁵⁷ This was essentially done in an effort of finding a common

Groebe/Thiesing/Ehlmann, Art 85 Abs 1, para 54, nevertheless asserting European case-law to be ambivalent in this regard; See also *Emmerich*, Kartellrecht, C.H. Beck, (2008), 414.

⁵¹ Cf. also *Buntscheck*, Konzernprivileg, 86.

⁵² Cf. Commission Decision of 18.12.1987, IV-31.503, *Konica*, [1988] OJ Nr. L 78/34, p 40, para. 35; and ECJ of 17.9.1985, joined Cases 25 and 26/84, *Ford Werke AG and Ford Europe Inc. vs. Commission*, [1985] OJ Nr. L 2725, p. 2743, para. 21, in contrast to IV/24055, *Kodak*, [1970] OJ Nr. L 147/24.

⁵³ See *Emmerich* in: Immenga/Mestmäcker, EG- Wettbewerbsrecht, Art 85 para. 52; *Goldman, Lyon-Caen et Vogel*, Droit commercial européen. Paris: Dalloz, 1994. On a discussion of the ECJ’s case-law in this respect, see 2.1. below.

⁵⁴ For general corporate law, see originally *Berle, Jr.*, The Theory of Enterprise Entity, 47 Colum. L. Rev. 343, and in detail point 3.

⁵⁵ Cf. *Emmerich*, *ibid*, para. 54.

⁵⁶ The precise criteria must accordingly be developed by means of interpreting the rules on competition under the Treaty. Cf. *Petra Pohlmann*, Unternehmensverbund, (1999), 75; *Menz*, Wirtschaftliche Einheit und Kartellverbot, (2004), 120.

⁵⁷ *Petra Pohlmann*, *ibid*; Likewise *Steindorff*, Wettbewerbsliche Einheit, 65 ff, who particularly assesses the term to differentiate on a case-by-case basis.

concept for the treatment of corporate groups in competition law.⁵⁸ Hence the previous use of the term encompasses a combination of criteria from various areas of the law.

In its case-law, the Court has drawn on all three facts of Art 101 (1) TFEU in an alternative fashion for determining a 'single economic entity'.⁵⁹ Hereby it often seemed to draw on this concept by interpreting it to 'fit the decision'. This practice regularly disregarded the essential requirements of consistency and continuity of European case-law. Even though the assessment of the criteria assigned to an 'economic entity' must be left for a later stage of discussion⁶⁰, some contested issues regarding this term should already be mentioned at this point.

In search for a common basis for the treatment of corporate groups in antitrust law, some authors have relied on principles of national corporate law.⁶¹ In this fashion, *Emmerich* has ascertained the primary precondition for the indemnity of affiliated undertakings from the cartel ban to be that these constitute a "*single economic entity, i.e. a concern in the sense of § 18 of the German Stock Companies Act.*"⁶² This assessment, however, evidently depends on the definition of a 'concern' under national law. Hereby the application of the 'single economic entity doctrine' would rely on the appropriateness of the determination and use of the term under the company law systems of the member states.⁶³ This approach therefore bears the danger of using precast concepts of national law for assessing issues of European competition law. The latter nevertheless not only depends on different facts, but also requires the consideration of the specific objective of European antitrust law, i.e. granting undistorted competition throughout the area of the Common Market.⁶⁴

In this context it has sometimes been stated that the inapplicability of Art 101 (1) TFEU on agreements between affiliated undertakings essentially remains the 'exception', which requires to be justified in each specific case.⁶⁵ The proponents of this view consider the concept of a 'single economic entity' to be a 'summary term' under which the different criteria of assessing affiliated undertakings are to be evaluated on a case by case-basis.⁶⁶ According to this opinion, the exact criteria, which must be taken into account for the individual case, can only be evaluated by the means of assessing the rules of European competition law 'in their entirety'.⁶⁷ Despite the fact that a certain case-by case assessment is inevitable, this view has rightly been criticized for its result-orientated application of the law, which bears the danger of arbitrary decisions.⁶⁸ In a democratic legal system, essentially ascribed to the rule of law, elements that are not open to a rational review must be repelled.⁶⁹ To prevent the inclusion of such elements,

⁵⁸ For a detailed assessment of a lacking common basis for a corporate group, see *Menz*, above, 84 ff.

⁵⁹ Cf. *Buntscheck*, Konzernprivileg, 77 f.

⁶⁰ See 3.3.1. of this thesis.

⁶¹ On the effects of the lack of a common base of reference of corporate groups, see essentially *Forum Europaeum Konzernrecht*, ZGR 1998, 672-772.

⁶² Cf. *Emmerich* in: Immenga/Mestmäcker, EG- Wettbewerbsrecht, Art 85 (1), para. 55.

⁶³ National competition law is nevertheless admittedly strongly determined by European Union law. For a detailed analysis: see e.g. *Menz*, Wirtschaftliche Einheit, 50 ff, who nevertheless also draws on the reference of a concern under (German) corporate law for the assessment of the concept of a 'single economic entity' in European competition law.

⁶⁴ In detail, see 2.2.

⁶⁵ Cf. *Emmerich* in: Immenga/Mestmäcker, EG- Wettbewerbsrecht, Art 85 (1), para. 52.

⁶⁶ *Emmerich*, ibid, para. 55; *Pohlmann*, Unternehmensverbund, 75.

⁶⁷ *Pohlmann*, Unternehmensverbund, 76.

⁶⁸ *Buntscheck*, Konzernprivileg, 78, citing: *Larenz/Canaris*, Methodenlehre, 140.

⁶⁹ Likewise *Anweiler*, Auslegungsmethoden, 76; *Everling*, Spannungsfeld, 442; *Idem*, Rechtsanwendungs- und Auslegungsgrundsätze, 72; *Oppermann*, Europarecht, para. 688.

laws must be construed according to generalized but definite criteria, granting a comprehensible and accordingly verifiable ruling.

Some contested issues regarding the *scope and intensity* of the term of a 'single economic entity' have explicitly been ruled out by the ECJ, while others remain open to further discussion. It had been unclear, for instance, whether the application of the so-called 'group-privilege' depended on the fact that an agreement between affiliated undertakings served the 'internal assignment of tasks and responsibilities'.⁷⁰ This view had been expressed by the ECJ in its *Centrafarm* decision⁷¹ and consequently constituted an intensely debated issue in literature.⁷² It was specifically questioned whether the additional criteria mentioned by the Court represented a precondition for the inapplicability of Art 101 TFEU or whether they had merely been stated for declaratory purposes.⁷³ The reasoning behind this argumentation was apparently the prevention of an unnecessary intervention in the position of third parties by the means of artificially splitting up national markets by the means of subsidiary companies.⁷⁴ In the following analysis it will be shown however that this concern may duly be considered under a differentiated analysis of a 'distortion' to competition under Art 101 (1) TFEU.⁷⁵

Regarding the above-mentioned notion of 'control', which essentially determines the existence of a 'single economic entity', it is unclear whether a parent company is required to have exercised 'decisive influence' on its subsidiary in the particular case, or whether the mere possibility to do so is sufficient.⁷⁶ Moreover, it has been debated whether the exemption of group-internal agreements from Art 101 (1) TFEU could likewise be applied to agreements between two or more companies that are controlled by the same parent corporation.⁷⁷ Except for a sole decision⁷⁸ in which several subsidiaries had coordinated their practices (under the active exertion of influence by their common parent company) neither the Commission nor the ECJ have deliberately decided on this matter. It has thus been contended whether the so-called 'group, or concern-privilege' could only be applicable to the relationship between a parent and its subsidiary company, or whether it comprised conduct between subsidiaries of the same parent corporation.⁷⁹

⁷⁰ See *Buntscheck*, Konzernprivileg, 20.

⁷¹ See 2.1.1. below.

⁷² See ECJ, judgment of 31.10.1974, Case 15/74, *Centrafarm B.V. and Adriaan De Peijper vs. Sterling Drug Inc.*, [1974] ECR 1174, as well as ECJ judgment of 31.10.1974 Case 16/74, *Centrafarm B.V. and Adriaan De Peijper vs. Winthrop B.V.*, [1974], ECR 1138.

⁷³ For this latter interpretation *Gleiss/Hirsch*, EG-Kartellrecht, Art 85, para. 199 ff; *Emmerich* in: Immenga/Mestmäcker, EG-Wettbewerbsrecht, Art 85 (1), para. 58; differently however *Schröter* in: Groeben/Thiesing/Ehlermann, Art 85 para. 1, who refers to the ECJ's alleged abandonment of these factors.

⁷⁴ *Emmerich*, *ibid.*

⁷⁵ See 3.1.1.3. See also ECJ, 24.10.1996, Case C-73/95P, *Viho* [1974], ECR I-5457, 5459.

⁷⁶ In favor of a 'de facto' exertion of decisive influence see e.g. *Koch* in: Grabitz/Hilf, Art 85 (1), para. 44, referring to existent case-law on this matter. Likewise *Schroeder* in Wiedemann, Handbuch (1999), § 8 para. 5; differentiated *Gleiss/Hirsch*, EG-Kartellrecht, Art 85, para. 196.

⁷⁷ Against this, *Schröter*, in: Groeben/Thiesing/Ehlermann, Art 85 (1), para. 100; unclear *Müller-Graff*, in: Hailbronner/Klein/Magiera/Müller-Graff, Art 85, para. 74. For this possibility: *Gleiss/Hirsch*, EG-Kartellrecht, Art 85, para. 193; *Schroeder* in Wiedemann, Handbuch, § 8, para. 10; *Roth/Ackermann* in Frankfurter Kommentar, Grundfragen Art 81 Abs 1 EG-Vertrag, para. 218; *Grill*, in: Lenz, EG-Vertrag, preliminary remarks to 81- 86, para. 36; *Pohlmann*, Unternehmensverbund, 417.

⁷⁸ Commission Decision of 30.7.1970, IV/24055, *Kodak*, OJ 1970, Nr. L 147/24.

⁷⁹ *Buntscheck*, Konzernprivileg, 136.

1.2.3. The Application of the Concept of a 'Single Economic Entity' for the Attribution of Liability

Even though the concept of a 'single economic entity' had originally been developed for the application of the so-called 'group-privilege', this term has, as already mentioned, consequently been employed for assessing the attribution of conduct and liability between companies of the same group. Under the objective of an 'effective enforcement' of the antitrust provisions, the Commission, as well as the European Courts have hereby considered existing economic interrelations to an increasing degree, including not only wholly-owned subsidiaries, but also majority shareholdings.⁸⁰

The case of a 100%-shareholding may certainly indicate that a parent company exerts 'control' over the conduct of its subsidiary. In its previous case law, the Court therefore held that the existence of such a high level of ownership gives rise to a legal presumption that the parent actually exercised 'decisive influence' on the market-conduct of its subsidiary.⁸¹

This view seemed to be 'relativized' by the Court's assertions in the case of *Stora* however,⁸² since the Court in this judgment relied not only on the fact that the subsidiary was wholly-owned, but mentioned further indicia for the assumption of 'decisive influence'. As a result it had been contentious until only recently,⁸³ whether this reference to 'additional criteria' constituted a precondition for the attribution of conduct, and thus the application of the 'economic entity doctrine'. Accordingly, various appellants have claimed the Commission's Decision to be unlawful due to the lack of providing 'additional criteria' apart from the existence of a subsidiary's ownership. The CFI and the ECJ have therefore affirmed in some decisions that full ownership is not sufficient per se to attribute illicit conduct and accordingly liability between undertakings of a corporate group.⁸⁴ This view seems furthermore in line with general principles of corporate law, which require a certain amount of domination by the controlling undertaking before disregarding the main statutory principle of '*legal separation*'.⁸⁵

As the level of proof required for the assumption of anticompetitive conduct has susceptibly been lowered by recent case law, special attention needs to furthermore be paid to the *general legal principles* of European Union law when assessing the reference to a 'single economic entity'.⁸⁶ The cartel ban as applied today seems to favor a strong presumption of a parent company's liability in the light of full ownership and mechanically extends this assessment for

⁸⁰ See e.g. ECJ of 22.1.1974, joined cases C-6 & 7/73, *Istituto Chemioterapico Italiana S.p.A. [hereinafter 'Istituto'] and Commercial Solvents vs. Commission of the European Community*, [1974] ECR 223. In detail see 2.1.2. below.

⁸¹ Particularly, ECJ of 23.10.1983, Case C-107/82, *AEG-Telefunken AG vs. Commission*, [1983] ECR 3151.

⁸² ECJ of 16.11.2000, Case C-286/98 P, *Stora Kopparbergs Bergslags AB vs. Commission*, [2000] ECR I-9925, para. 29.

⁸³ See point 2.2.2.2., § 2.4 below.

⁸⁴ In detail, see 3.1.1.3., § 3.3.

⁸⁵ See e.g. *Antunes*, Liability of Corporate Groups: Autonomy and Control in Parent-Subsidiary Relationships in US, German and EU Law, (1994); *idem*, The Liability of Polycorporate Enterprise, 13 Conn.J.Int'l L. (1999), 197; *Meredith Dearborn*, Enterprise Liability, Reviewing and Revitalizing Liability for Corporate Groups, 97 California Law Review, (2009), 195; *Blumberg*, The Law of Corporate Groups, (1987), Vol III, Substantive Law.

⁸⁶ Also referred to as 'fundamental procedural guarantees'. These have been established not only by ECJ case-law, but also by the European Convention of Human Rights, [hereinafter ECHR, as amended by Protocol No.11, Rome, 4.11.1950] and by the European Charter of Fundamental Rights [hereinafter referred to as 'the Charter']. In detail, see 2.2.2.2.

majority shareholdings as well.⁸⁷ This practice has been criticized to essentially deviate from the principle of ‘*personal responsibility*’, postulated by Art 23 (2) of Regulation No. 1/2003. The Court’s formulations in recent case-law have therefore been regarded with an increasing amount of concern.⁸⁸

In this respect, the imposition of fines on parent companies has regularly been challenged on the basis of the principle of *nulla poena sine lege* under Art 7 ECHR.⁸⁹ Liability has hereby often been found insufficiently predictable upon the respective steps of the investigation. Since the determination of a ‘single economic entity’ does not halt at the EU’s borders,⁹⁰ a significant number of claims have furthermore been invoked alleging a breach of the ban of ‘double penalization’ under Article 4 of the Protocol No. 7 amending the ECHR. Due to their high practical relevance for the future development of attributing responsibility, these claims will be assessed after giving a comprehensive outline of European case-law on the matter.

In the context of attributing responsibility between a ‘controlled’ and a ‘controlling’ corporation, particular difficulties arise in regard to **joint ventures**⁹¹ and corporate reorganizations.⁹² Particularly cases involving joint venture companies, which are characterized by a certain ‘three-party- relationship’, have been treated ambivalently by the European institutions.⁹³ Previously, a joint venture subsidiary’s anticompetitive conduct had mainly been attributed to one of the parent companies. In recent times, however, European antitrust practice increasingly holds both parent companies of a joint venture liable for enforcing an antitrust fine against the latter.

Similar difficulties arise for the application of the ‘group- or concern-privilege’, i.e. the exemption of group-intern agreements from the cartel ban of Art 101 (1) TFEU. This particularly concerns agreements with an enterprise that is jointly governed by two or several parent companies, i.e. where no majority shareholdings exist between the participating undertakings.⁹⁴

In this regard it is questionable, whether such a form of integration is sufficient to exempt agreements between affiliated companies from the application scope of Art 101 (1) TFEU. Even though the lack of ‘exclusive control’ by a single parent company would suggest this

⁸⁷ *Scordamaglia*, Cartel Proof, Imputation and Sanctioning in European Competition Law, *CompLRev* (2010) Vol 7, Issue 1, p. 5 (21).

⁸⁸ In detail, see 2.2.2.2. below. Cf. *Scordamaglia*, *ibid*, asserting that specifically the ‘*presumption of innocence*’ could constitute a contentious issue of discussion in the future of antitrust enforcement.

⁸⁹ Cf. *Scordamaglia*, *ibid*.

⁹⁰ Thus possibly including undertakings of a foreign jurisdiction; see initially the ECJ’s *Dyestuffs* decision (ECJ of 14.7.1972, Case 48/69, *Imperial Chemical Industries Ltd. vs. Commission of the European Community*, [1972] ECR 619).

⁹¹ See e.g. *Kling*, Die Haftung der Konzernmutter für Kartellverstöße ihrer Tochterunternehmen, *WRP* 4/2010, 506 (517); *Steinle*, in: *Festschrift für Rainer Bechtold* (2006), 541; and for the issue of the so-called ‘concern-privilege’ see *Thomas*, Konzernprivileg und Gemeinschaftsunternehmen, *ZWeR* 3/2005, 236.

⁹² On this topic issue see just below.

⁹³ Generally, see e.g. *Schroeder*, in: *Wiedemann, Handbuch des Kartellrechts*, (1999), § 8, para. 11; *Idem*, in: *Grabitz/Hilf, Das Recht der Europäischen Union*, Vol. II (2004), Art 81 EGV, para. 416; *Hirsch/Burkert*, in: *Gleiss/Hirsch, EG-Kartellrecht*, 4th edition, Vol. I, Art 85, para. 194; *Pohlmann*, *Der Unternehmensverbund im Europäischen Kartellrecht*, (1999), p. 414 ff; *Brinker* in: *Schwarze, EU-Kommentar*, (2000), Art 81, para. 47; *Ritter/Braun*, *European Competition Law*, 3rd ed., 47 and 617 f; *Menz*, *Wirtschaftliche Einheit und Kartellverbot*, (2004), 320 f. Note that most of these authors assess the situation of joint ventures in the context of the ‘group- or concern-privilege’.

⁹⁴ *Buntscheck*, *Konzernprivileg*, 20.

not to be the case under principles of current case-law,⁹⁵ some opinions in literature have stepped in for a different approach.⁹⁶ It will be shown that under an appropriate assessment of the 'control' - relationship between undertakings of a corporate group this criticism is well justified.

The remaining contentiousness of this issue may also be observed in the Commission's most recent Notice on Horizontal Cooperation Agreements.⁹⁷ In this notification the Commission sets out principles for the assessment of agreements between undertakings on the level of a 'horizontal cooperation'.⁹⁸ For the purpose of applying Art 101 TFEU the Commission generally proceeds in a two-tier approach: In a first step, it assesses whether an agreement affecting trade between the member states has at its 'object or effect the actual or potential restriction of competition'.⁹⁹ In a second step, the Commission examines whether certain agreements, which would normally be restrictive in the meaning of Art 101 (1) TFEU, may in fact produce pro-competitive effects. In case that these effects substantially outweigh the restrictive consequences on competition in the Common Market, these agreements are consequently exempted from the cartel ban on the basis of Art 101 (3) TFEU.

On the topic of joint ventures, the Guidelines originally stated that "*Art 101 TFEU does not apply to agreements between parent companies and a joint venture on which they jointly exercise decisive influence, i.e. effective control*".¹⁰⁰ In the final notification however, this passage is not included. The Commission rather asserts that the assessment of joint ventures is to be carried out along the same lines as the general analysis of horizontal cooperation agreements. The Commission holds, that "*there is often a thin line between 'full-function joint ventures' that fall under the Merger Regulation and joint ventures that must be assessed upon Art 101 (1) TFEU*".¹⁰¹ Hence the authority asserts that agreements between companies of a joint venture are to be evaluated along the same lines as (horizontal cooperation) agreements between independent undertakings. This includes the two-step approach of delineating the application scope of Art 101 (1) and (3) TFEU.

The guidelines do not state however, whether the existence of 'joint control' is sufficient for exempting group-internal agreements from the application scope of Art 101 (1) TFEU. European practice still lacks of decisive case-law in this respect.¹⁰² Conversely, this degree of influence has regularly been deemed sufficient for the attribution of 'intra-group' liability.¹⁰³ Therefore, it is necessary to consider the topic of 'joint control' for both issues of assessing the

⁹⁵ See e.g. Commission Decision of 16.1.1991, *Ijsselcentrale*, [1991] OJ Nr. L 28/32; Commission Decision of 15.5.1991, *Gosme/Martell*, [1991] OJ Nr. L 185/23; and CFI of 6.4.1995, Case T-145/89, *Baustahlgewerbe*, [1995] ECR II-987, para. 107.

⁹⁶ Cf. *Brinker*, in: Schwarze, EU-Kommentar, Artikel 81 EGV, para. 47; *Schroeder*, in: Wiedemann, Handbuch, § 8, para. 11.

⁹⁷ See Commission Notification 2011/C 11/ 01, Guidelines on the Applicability of Art 101 of the Treaty on the Functioning of the European Union to Horizontal Cooperation Agreements, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:011:0001:0072:EN:PDF>.

⁹⁸ See 1.1. of the Notification 2011/C 11/01. The purpose of the newly formulated guidelines is to give undertakings assistance for reviewing whether their (cooperative) practice complies with the pertinent rules of European antitrust law.

⁹⁹ See Art 101 (1) TFEU.

¹⁰⁰ See American Chamber of Commerce on the proposed new rules for horizontal cooperation agreements in the EU (AmCham EU) of 25 June 2010, available at: http://ec.europa.eu/competition/consultations/2010_horizontals/amcham_en.pdf, p. 5.

¹⁰¹ See Notification 2011/C 11/01.

¹⁰² The Community institution's grounds for objecting the existence of a 'single economic entity' between joint ventures and their parent corporations have always been exceedingly curt. Cf. *Buntscheck*, Konzernprivileg, 20.

¹⁰³ Cf. *Mayer*, *ecolex* 2011, 836, and in detail, 3.1.1.3., § 3.3.

application of Art 101 (1) TFEU on a corporate group of companies. Especially the question whether the existence of a joint venture between independent (parent) companies enables the Commission to hold all companies ‘jointly and severally’ liable for illegal conduct committed by only one of them must be assessed in regard to the appropriate determination of a ‘single economic entity’.¹⁰⁴

A further issue that must be taken into account when assessing the application of the ‘single economic entity’ doctrine on corporate groups concerns the topic already referred to of **‘corporate reorganizations’**.

Often, undertakings that have been involved in so-called ‘hard-core cartels’ are subsequently restructured.¹⁰⁵ The measures reach from the mere change of the firm to the sale of certain business divisions or even the acquisition of the entire undertaking by the means of an asset or share deal. Sometimes, these restructurings are the consequence of an overdue consolidation of a specific branch of trade or industrial sector.¹⁰⁶ Irrespective of their purpose, these corporate reorganizations raise complicated questions in the case of a ‘mere’ succession, or even a conscious transfer of antitrust liability.¹⁰⁷

A legal or organizational transformation of an entity, which has breached competition law, namely, does not mean that a new undertaking free from liability of its predecessor is created.¹⁰⁸ Rather, it must be decided to whom the collective responsibility for this new establishment may appropriately be attributed. This requires taking a strict ‘economic point of view’. Past adjudication has not always been able to unambiguously answer this question and can still be seen in a state of flux.¹⁰⁹

In this regard it is crucial that an undertaking should not have the possibility to rid itself from liability just because the legal person responsible at the time of the anticompetitive conduct does not exist anymore.¹¹⁰ Thus, even if a firm has reorganized itself long before the purchase, the new company taking over its business conduct must still be attentive to the former’s past behavior in order to avoid ‘unwelcome surprises’ later on.

This assessment likewise holds true for the acquisition of a company. If an undertaking is purchased, the assets and liabilities, including responsibility for possible antitrust breaches, merge with those of the acquirer.¹¹¹ It is, for instance, questionable whether the innocent acquirer of a firm that has been involved in an antitrust infringement may be held responsible

¹⁰⁴ In this regard problematically see e.g. ECJ of 7.1.2004, joined cases C-204/00 P a.o., *Aalborg Portland A/S a.o. vs. EC Commission*, [2004] ECR I-123, paras. 59 and 345 ff.

¹⁰⁵ See e.g. Commission Decision of 23.4.1986, 86/398/EEC, *Polypropylen*, [1986] OJ No. L 230/1, paras. 96 ff; Comm. Decision of 13.7.1994, 94/601/EC, *Karton*, [1994] OJ No. L 243/1, para. 11, as cited by *Steinle*, *Lassen sich Kartellrechtsverstöße “ausgliedern”? Unternehmensumstrukturierungen und die Bußgeldhaftung nach EG-Kartellrecht* [hereinafter: *Unternehmensumstrukturierungen und Bußgeldhaftung*], in: *Festschrift für Rainer Bechtold* (2006), 541.

¹⁰⁶ Cf. *Steinle*, *ibid.*

¹⁰⁷ See *Steinle* in: *FS Bechtold* (2006), 541f.

¹⁰⁸ Cf. CFI in Cases T-29/83 & 30/83, *CRAM und Rheinzinke vs. Commission*, [1984] ECR 1679, para. 9 ff.

¹⁰⁹ *Christian Steinle*, *ibid.*; see for instance the most recent decisions of ECJ of 24.9.2009, joined cases C-125/07 P, C-133/07 P, C-135/07 P, C-137/07 P, *Erste Bank der österreichischen Sparkassen vs. Commission* [Lombard-Club Decision]; CFI of 30.9.2009, T-161/05, *Hoechst vs. Commission*; and CFI of 30.9.2009, T-175/05, *Akzo Nobel AB a.o. vs. Commission*; and ECJ of 10.9.2009, C-97/08 P, *Akzo Nobel NV vs. Commission*; [2009] ECR I-08237. In detail, see 2.2.2.2., §2.4.

¹¹⁰ CFI of 20.4.1999 in joined Cases T- 305/94 a.o., *Limburgse Vinyl Maschappij and others vs. European Commission*, [1999] ECR II-931, paras. 961 and 984 (*LVM*) as cited by *Christina Hummer*, *Kartellrechtliche Haftung von Muttergesellschaften*, *ecolx* 2010, 64 (65).

¹¹¹ See *Hummer*, *ibid.*, 65.

and consequently fined for a violation of competition law prior to the acquisition.¹¹² As long as the legal person managing the company at the time of the breach still exists, it may, according to previous case-law, be held fully accountable for this past illicit behavior, even if the 'material and personal' factors involved in the infringement have already passed onto a third party.¹¹³

According to settled case law, the purchaser is thus not accountable for breaches of the acquired undertaking for the time before the acquisition, as long as the respective company maintains its legal personality.¹¹⁴ In case an antitrust inquiry is induced shortly after the acquisition, the parent corporation had sometimes not been held responsible. This was justified by the short amount of time available to the head of the corporate group for analyzing the commercial policy of the target firm.¹¹⁵ It is questionable however, whether this line of reasoning can still be upheld with respect to the strict approach to liability in recent case law.¹¹⁶ It has therefore been argued that companies will in the future see themselves confronted with a much more stringent assessment of antitrust responsibility. At least in cases of a 100% shareholding, the ECJ has sometimes confirmed the company's accountability for previous breaches of the acquired subsidiary.¹¹⁷ In regard to the Court's ambiguous line of attributing a subsidiary's antitrust liability, it must therefore be ascertained to what extent this assertion is legitimate from a general principles point of view.

Finally, attention should be drawn to the fact that it has sometimes been argued in literature that the exemption of group-internal conduct from Art 101 (1) TFEU and the attribution of intra-group liability must essentially be judged upon the same criteria of assessment. According to this view, the standard of a 'single economic entity' must be the same for both issues of assessment.¹¹⁸ This is deemed essential for judging corporate groups or concerns in a consistent and coherent fashion for the purposes of antitrust law. Whether the assessment of these two issues of discussion is in fact accurate under general principles of European antitrust law will therefore constitute an essential part of the following analysis. Before giving an outline of the views of assessing corporate affiliations in European case law, some main terms of reference must be defined for the purpose of the subsequent inquiry.

1.3. Terminological Determinations

¹¹² Cf. *Steinle* in: FS Bechtold (2006), 541.

¹¹³ See originally Commission Decision of 23.4.1986, *Polypropylen*, [1986] OJ No. L 230/01, para. 96; See furthermore Case T-327/94, *SCA Holding vs. European Commission*, [1998], ECR II-1373, para. 63, confirmed by C- 297/98 P, *SCA Holding vs. Commission*, [2000] ECR I-10101, para. 25, cited by *Christina Hummer*, *ibid*, 65.

¹¹⁴ See ECJ of 5.4.1990, in Case C-121/89, *LVM*, [1990] ECR I-1595, paras. 957 ff; and furthermore ECJ of 18.5.2000, C-279/98 P, *Cascades vs. Commission*, [2000] ECR I-9693, para. 79.

¹¹⁵ See Commission Decision of 23.7.1984, IV/30.988, *Benelux Fl Glass*, [1984] OJ Nr. L 212, para. 54.

¹¹⁶ See in particular ECJ of 10.9.2009, C-97/08 P, *Akzo Nobel vs. EC Commission*, [2009] ECR I-08237.

¹¹⁷ Cf. Rechtsprechung zum Wettbewerbs- und Kartellrecht, EG Art 81; Vo 1/2003, Art. 23, ZIP 8/2010, para. 61.

¹¹⁸ See particularly *Menz*, Wirtschaftliche Einheit, 121. For a further discussion on this see also: *Emmerich* in: Immenga/Mestmäcker, Art 85, para. 61; *Burkert*, in: Gleiss/Hirsch, Art 85, para. 195; *Schröter* in: Groeben/Schwarze, Vorbem. zu Art 81-85, paras. 32 f; *Stockenhuber* in: Grabitz/Hilf, Art 81, para. 78; *Lipowsky*, Die Zurechnung von Wettbewerbsverstößen zwischen verbunden Unternehmen im EWG-Wettbewerbsrecht, (1987), 54 ff; *Pohlmann*, Der Unternehmensverbund im Europäischen Kartellrecht, (1999), 414 ff; *Koppensteiner*, Kartellrecht im Unternehmensverbund, in: FS Mailänder (2006), 125; *Mestmäcker*, Europäisches Wettbewerbsrecht, (2004), § 14; *Thomas*, Unternehmensverantwortlichkeit und Umstrukturierungen nach EG-Kartellrecht, (2005), 131 ff.

1.3.1. Affiliated Undertakings, Corporate Groups, Concerns

European practice regards corporate affiliations under a variety of different subject matters, ascribing distinct legal consequences depending on the specific purposes and objectives of the legal area of consideration. Thus, specific regulations on corporate groups exist for the areas of accounting, as well as for banking and insurance law.¹¹⁹ Likewise, corporate associations are taken into account for the purpose of regulating the stock market,¹²⁰ or in order to grant the necessary legal protection under labor and public procurement law.¹²¹ Due to the lack of a definition of a 'corporate group' in European law, efforts to reach a common understanding of this concept on the level of European Union law have been made by attributing to it certain generalized characteristics as a base of reference for the judgment of a particular case.¹²²

When evaluating the various considerations of corporate groups in European practice, it should nevertheless be kept in mind that the whole purpose of such a general base of reference is achieving a better understanding of the various possibilities of undertakings to cooperate under a common economic strategy or guidance.¹²³ It should therefore be reviewed strictly whether this effort serves a more precise assessment of corporate groups for the respective field of consideration. The final aim of such an assessment should always be clarity for the law's application.

It is not helpful to 'create' a common understanding of a corporate group, while acknowledging at the same time a number of necessary exceptions in order to adhere to the objectives and aims of certain legal areas of European law. Rather, the extensive consideration of corporate groups in the various sectors of regulation shows that this phenomenon is already 'de facto' part of European law. Therefore, a distinction of mere 'associations of undertakings' from the comprehension of several legally independent undertakings under a common economic strategy must only be carried out where the aims and objectives of the respective legal subject matter require this. The necessity of considering corporate affiliations hereby derives from the requirement of determining appropriate legal consequences of their existence. Legal regulations should be careful not to discriminate the economic rationales of their creation, while at the same time prevent the possibility of undertakings to abide the law by forming corporate connections which are not encompassed by its specific legal provisions.

These considerations suggest that a common definition of a corporate group on the basis of mere structural criteria is nevertheless dispensable for European Union law in general. Certain comparisons with existing regulations or adjudication under national law may

¹¹⁹ See originally the Seventh Council Directive 83/349/EEC on Consolidated Group Accounts, (most recently Commission Regulation of 15.10.2008, (EC) No. 1004/2008, as well as the Directive 2006/46/EC of the European Parliament and the Council of 14.6.2006). In detail see e.g. *Hopt*, Modern Company Law Problems: A European Perspective, published by the Max Planck Institute for Foreign Private and Private International Law, Stockholm (2000), available at: <http://www.oecd.org/dataoecd/21/28/1857275.pdf>.

¹²⁰ Hereby the consideration of concerns specifically refers to the respective tax laws of the various member states.

¹²¹ For a detailed analysis of the legal basis for considering corporate groups under these sectors of European law enforcement see *Menz*, Wirtschaftliche Einheit, 84 ff.

¹²² See e.g. *Menz*, Wirtschaftliche Einheit, 92 ff; *Forum Europaeum Konzernrecht*, ZGR 1998, 627; *Hommelhoff*, Zum revidierten Vorschlag einer Europäischen Konzernrichtlinie, in: FS Fleck (1984), 125 ff; *Blaurock* in: FS Sandrock, 79 (82).

¹²³ For the term of 'unified control' (einheitliche Leitung) used in German law see just below.

sometimes be helpful, especially when specific legal situations have so far not been considered under the Union's legal body. As the legal traditions of the various member states constitute an important base of reference, they may provide useful inputs for the interpretation and development of new principles under European law.¹²⁴ Under the system of the national laws, the assessment of the specific structure and the possibilities of companies to exert 'control' within a corporate group is nevertheless essential for the application of the antitrust provisions. For this reason, the following assessment of corporate groups under Art 101 (1) TFEU will sometimes refer to the specificities of affiliated undertakings or concerns that exist in the member states' legal orders.

As indicated above, the regulations of the various member states on the matter of corporate groups vary substantially.¹²⁵ A (partially) systematic approach to group structures exists solely in some member states, including for instance Germany,¹²⁶ Portugal,¹²⁷ and Italy¹²⁸. In other member states both the necessity as well as the possibility of a systematic regulation of corporate groups in the area of company law have been questioned.¹²⁹ It must be noted in this regard, that due to significant decision by the European Court of Justice in the past decade however,¹³⁰ an essential evolution has taken place in regard to the approximation of laws of the national member states. In confirming the freedom of establishment of companies throughout the Union, the Court has established the freedom of jurisdictions as an essential right for European companies.¹³¹ Subsequent to this adjudication, a certain 'competition' of national forms of corporate organizations has sometimes been asserted to follow, inducing national lawmakers to modernize and partly revise their company law acts.¹³² Even if this process has so far primarily focused on small and medium sized companies, which have so far not experienced much harmonization, it also becomes visible for international corporate groups on the basis of the progressively reinforced 'corporate governance' debate.¹³³

Nevertheless, a true harmonization of group undertakings for instance in the form of a European Regulation, has failed.¹³⁴ Persisting efforts in this direction, especially under the influence of German law, have encountered strong resistance, specifically in regard to the

¹²⁴ This is particularly the case because certain legal concepts are in fact derived from national jurisdictions.

¹²⁵ Cf. *Forum Europaeum Konzernrecht*, ZGR 1998, 627; *Hommelhoff* in: Lutter, *Konzernrecht im Ausland*, 55.

¹²⁶ §§ 15- 21 of the German Stock Companies Act for all forms of enterprises, as well as § 291 ff for the association of incorporated companies; see *Druey*, in: *Ständige Deputation des deutschen Juristentages* (Hrsg.), *Gutachten für den 59. Deutschen Juristentag* (1992), *Gutachten H 31* referring to the typology of concerns in Germany, as well as *Menz*, *Wirtschaftliche Einheit*, 34 ff.

¹²⁷ See *Lutter/Overath* in: Lutter, *Konzernrecht im Ausland*, 310, 341; and *Mestmäcker/Behrens*, *Gesellschaftsrecht der Konzerne*, 203 ff.

¹²⁸ *Carl-Heinz Witt*, *Modernisierung der Gesellschaftsrecht in Europa*, ZGR 6/2009, 918, 922, acknowledging that Italy has hereby reacted to the concentration process, which is unmistakably taking place in all market-based economies.

¹²⁹ See *Blaurock* in: *FS Sandroock*, 79, 80; *Druey* in: Lutter, *Konzernrecht im Ausland*, 310, 341; *Forum Europaeum Konzernrecht*, ZGR 1998, 627, 676; *Guyon* in: Lutter, *Konzernrecht im Ausland*, 76, 92; *Hommelhoff*, in: Lutter, *Konzernrecht im Ausland*, 55, 63 and 68; *Immenga*, *RabelsZ* 1984, 48, 52; *Prentice* in: Lutter, *Konzernrecht im Ausland*, 93, 95; *Menz*, *Wirtschaftliche Einheit*, 85.

¹³⁰ ECJ of 9.3.1999, Case C-212/97, *Centros*, [1999] ECR I-1459; ECJ of 5.11.2002, C-208/00, *Überseering*, [2002], ECR I-9919; and ECJ of 30.9.2003, C-167/01, *Inspire Art*, [2002], ECR I-10155.

¹³¹ On the restrictive regulation of the 'expropriation' of companies see however see ECJ of 16.12.2008, C-210/06, *Cartesio*, [2008] ECR I-0000, para. 46.

¹³² *Witt*, ZGR 6/2009, 873;

¹³³ *Witt*, *ibid*.

¹³⁴ *Forum Europaeum Konzernrecht*, ZGR 1998, 627; *Hommelhoff* in: *FS Fleck*, 1984, 125.

existence of 'factual groups or concerns'.¹³⁵ Apart from various terminological differences, the difficulty of harmonization can be perceived upon the existence of two distinct regulatory approaches to corporate groups. While particularly in German law the predominant doctrine is the existence of 'uniform control',¹³⁶ comprising a number of companies under an integrated management, the reference of mere 'dominance' is used a.o. in Belgian, British, French, Italian and Spanish law.¹³⁷

The current efforts of a harmonized codification of corporate groups on the level of European law have attempted to combine these two concepts in the sense of a Union-wide approval. It must be emphasized once more, that any harmonization of corporate groups should solely serve the better understanding of existent entity structures for the application of the law in a specific case. The precise rationale of a structured legal concept should therefore be the appropriate recognition of the 'control' relation between a parent and a subsidiary company.

For the area of antitrust law this means that the term of 'control' should be clear and practically convenient in order to perceive the various forms of corporate affiliations without drawing precast conclusions from their classification. A consistent methodological approach upon the facts of the Treaty is necessary in order to grant a consistent and insofar reviewable assessment. The following analysis will outline such an approach on the basis of the specific objectives pursued in antitrust law.

1.3.2. Joint Ventures

In recent times, the question of the applicability of the 'single economic entity doctrine' has been contentiously debated in the context of joint venture subsidiaries. As mentioned above, this concerns both the inapplicability of Art 101 (1) TFEU for agreements between members of a corporate group as well as the attribution of responsibility for undertakings belonging to the latter.¹³⁸ As the term indicates, the concept of a joint venture is used to characterize various forms of economic cooperation in different fields of business. Thus, an abstract general definition of this term is neither possible nor required. Rather, the term's content must be defined with regard to the respective area of application.¹³⁹ In economic literature, for instance, it refers to every form of cooperation in which legally independent companies agree to cooperate for a certain amount of time in order to pursue specific economic objectives.¹⁴⁰ In law,

¹³⁵ See part II Art. 33 I of the preliminary draft of the EU's Ninth Directive ('Corporate Group Directive') of 1974 (Part I; doc. nr. XI/328 74-D) and 1975 (Part II; doc nr. XI/593 75-D), printed a.o. in: *Lutter*, *Europäisches Gesellschaftsrecht*, 2nd edition (1984), 187 ff. For German law, see e.g. *Immenga*, *RabelsZ* 48 (1984), 48, 60f; and for Italian law *Dens*, *Giurisprudenza commercial* (1986), 846, 848.

¹³⁶ This is a form of uniform (not necessarily centralized) management known under the term of 'einheitliche Leitung' in German company law.

¹³⁷ Without existing or being implemented in the purest form in each respective case, *Forum Europaeum Konzernrecht*, ZGR 1998, 672; see *Menz*, *Wirtschaftliche Einheit*, 91.

¹³⁸ For the latter issue cf. *Buntscheck*, *Konzernprivileg*, 22, and in 3.1.1.2, § 3.

¹³⁹ Cf. *Buntscheck*, *ibid*; and *Gansweid*, *Gemeinsame Tochtergesellschaften im Konzern- und Wettbewerbsrecht*, (1976), 1.

¹⁴⁰ Hereby it is possible to take advantage of a risk reducing mechanism for the penetration of new markets as well as pooling resources for particular projects; see e.g. *Buckley/Casson*, *An Economic Model of International Joint Venture Strategy*, in: *Journal of International Business Studies*, Vol. 27, No. 5, *Global Perspectives on Cooperative Strategies*, (1996), 849.

on the other hand, a joint venture applies to cooperations, which result in a mutual participation of two or more independent undertakings in a subsidiary company. A joint venture is thus characterized as a business undertaking of two or more parties in which profits, losses and control are shared.¹⁴¹ According to this approach, joint ventures are regularly commonly owned subsidiaries, which are founded for the purpose of fulfilling specific economic or managerial functions for the benefit of their parent companies.¹⁴² Mere contractual cooperation in the form of strategic alliances for instance does not fulfill the criteria of this term.¹⁴³ This is also reasonable for the purposes of antitrust law. The typical difficulties for the assessment of joint ventures in competition law therefore result from their ambivalent characteristics. While acting as independent market actors towards other market participants, they constitute a mere means of cooperation for the different founding companies of the joint venture.¹⁴⁴

In **European competition law** one generally speaks of joint ventures as undertakings that are commonly controlled by two or more undertakings.¹⁴⁵ For the purposes of antitrust law, it must principally be distinguished between ‘concentrative’ and ‘cooperative’ joint ventures. This is not only a necessary delineation for the applicability of the EC Merger Regulation, but also relevant for the applicability of Art 101 (1) TFEU between the parent companies and the joint venture.¹⁴⁶ Only cooperative joint ventures are tested against the facts of Art 101 (1) TFEU. The latter are negatively defined as all forms of joint ventures, which are not considered to be ‘concentrative’.

Joint ventures are ‘concentrative’ under the following two conditions:¹⁴⁷ on the one hand, they must fulfill all functions of an autonomous economic entity (i.e. a ‘full-function’ joint venture) on a lasting basis. In this case their formation represents a merger in the sense of Art 3 (2) ECMR.¹⁴⁸ On the other, their establishment should not entail a ‘coordinative effect’ between the founding companies.¹⁴⁹ In all other cases, joint ventures are considered to be ‘cooperative’. This is particularly the case where the joint venture subsidiary merely takes over certain specific functions of the parent companies’ business activities without a separate access to the market¹⁵⁰ or where the parent companies simply coordinate their commerce by the means of this subsidiary. Assessing agreements between these undertakings under Art 101 (1) TFEU is necessary since in the latter case the parent companies remain actual or potential competitors on the respective product market.

¹⁴¹ See Barron’s Law Dictionary, by *Steven H. Gifis* (ed.), New York (2003), 274.

¹⁴² Cf. *Emmerich* in *Emmerich/Habersack, Konzernrecht*, 47. Further for the legal aspects see e.g.: *Braun, Joint Ventures im amerikanischen und deutschen Internationalem Privrecht*, (2000).

¹⁴³ *Emmerich/Habersack, Konzernrecht*, (2008), 47; *Gansweid, Gemeinsame Tochtergesellschaften*, 22.

¹⁴⁴ *Buntscheck, Konzernprivileg*, 23.

¹⁴⁵ Cf. *Wiedemann, Handbuch*, § 8, para. 17; Commission Communication of 2.3.1998 on the term of full-function joint ventures, OJ 1998 C 66/1, para. 3; Art. 3 (1) and (2) of the Merger Regulation, Council Regulation (EC) No 139/2004 of 20.1.2004 (ECMR).

¹⁴⁶ Cf. *Wiedemann, Handbuch* § 8, para. 19. Until the year 1998, only concentrative joint ventures were subsumed under the Merger Regulation. Since then also cooperative joint ventures fall under this Regulation in case they constitute ‘full-function’ joint ventures. In the latter case the cooperative aspects of these undertakings must still be tested against Art 101 (1) TFEU.

¹⁴⁷ Cf. *Wiedemann, ibid*, para. 21.

¹⁴⁸ This provision requires a structural change of the undertakings.

¹⁴⁹ Cf. *Emmerich*, in: *Immenga/Mestmäcker, EC-Competition Law*, Art 85 (1), para. 297. In this case the joint venture is not to be assessed on the basis of Art 101 TFEU, but to be judged solely upon Art 2 (1) ECMR.

¹⁵⁰ This is respectively the case where the joint venture is limited to R & D, production, or where it is limited to the distribution or sales of its parent companies’ business products. In all these cases, the joint venture principally administers an auxiliary function for the parent companies’ business activities. See Commission Communication, OJ 1998 C 66/1, para. 13.

Thus, the essential criterion of a joint venture is the feature of 'joint control', exercised by two or more parent companies on a separate entity. The parent companies must hereby be in a position to exercise 'decisive influence' on the strategic market conduct of the joint venture. This is determined upon both legal and factual elements.¹⁵¹ From the Commission's point of view, 'joint control' exists where two or more undertakings have the power to block strategic decisions concerning their common subsidiary company.¹⁵² In order to avoid stalemate-situations, the shareholding companies must be able to determine the business policy of the joint venture on a mutual basis.¹⁵³

For the purpose of the following thesis, the focus will therefore lie on 'cooperative' joint ventures that fall in the application range of Art 101 (1) TFEU.¹⁵⁴ It will be assessed whether the Commission's increasing application of the concept of a 'single economic entity' for the relation of a joint venture and its parent companies is really appropriate. In order to permit a comprehensive approach, a preferably wide interpretation of a 'joint venture' will be used.¹⁵⁵ The amount of the share capital held by each parent should nevertheless not be significant for the question, whether a 'cooperation' in the latter sense is taking place between the respective companies.¹⁵⁶

1.3.3. Topic Delineation

As mentioned above, the European institutions have referred to the concept of a 'single economic entity' quite extensively, using it to assess the existence of corporate groups in various situations under distinct substantive aspects. The following analysis will concentrate on the application of this concept under the principles of Art 101 (1) TFEU, specifically on the attribution of antitrust liability between a parent and a subsidiary. Because the term of an 'economic entity' has originally been created for the assessment of group-intern conduct, aspects of this legal issue must be included in the assessment of corporate group liability.

The 'single entity-doctrine' has also been used for judging a company's dominance under Art 102 TFEU, taking into account the factual financial force of a concern by the inclusion of its corporate affiliations.¹⁵⁷ Hereby, the assessment of Art 102 TFEU addresses the determination of corporate groups for the calculation of the pertinent market share, a delineation of possible addressees of the Commission's decision, and the effects of group-intern agreements towards third parties.¹⁵⁸

¹⁵¹ Commission Communication, OJ 1998 C 66/1, para. 9.

¹⁵² See *Pohlmann*, *Der Unternehmensverbund*, 184 ff.

¹⁵³ Commission Communication, OJ 1998 C 66/5, para. 9.

¹⁵⁴ For a clear overview of the application of the Treaty provisions on the different form of joint ventures under EC competition law see *Wiedemann*, *Handbuch* (1999), § 8, para. 20.

¹⁵⁵ As mentioned above, a 'joint venture' includes every economic entity owned by least two distinct parent corporations with an essential economic or strategic interest in the latter.

¹⁵⁶ *Buntscheck*, *Konzernprivileg*, 24.

¹⁵⁷ See e.g. *Pohlmann*, *Unternehmensverbund* (1999), 94 ff.

¹⁵⁸ *Koppensteiner*, *Missbrauchsverbot und Unternehmensverbund*, Wbl 2007, 465.

Art 101 and 102 TFEU are principally characterized by a concurrence of offenses, entailing however essentially different legal consequences.¹⁵⁹ In regard to the application of the ‘single economic entity doctrine’ it has sometimes been contentious whether the adverse effects that group-intern agreements may have on the position of third parties should be considered. For the assessment of these agreements under Art 102 TFEU, the pivotal question is to what extent the existence of group structures justifies the preferential treatment of affiliated undertakings in regard to third parties. Hereby, the assessment of a possible market abuse is characterized by the relationship of at least two undertakings of the same corporate group and an external third company.

An issue of contentious debate has been to what extent the non-discrimination rule of Art 102 TFEU may justify the exclusive conduct between affiliated undertakings in case their behavior confines competitors from operating on the respective product market. Sometimes it has been proposed to apply the cartel ban of Art 101 TFEU in all cases in which group-intern agreement significantly restrict the competitive position of other market participants.¹⁶⁰

In the following assessment I try to show that this approach leads to a distorted application of Art 101 TFEU under the system of the Treaty.¹⁶¹ Such an undifferentiated application of a ‘single economic entity’ essentially blurs the application range of Articles 101 and 102 TFEU. While the objective of the former is to grant an effective level of competition in the area of the common market by averting distortive accords between independent market participants, the latter aims at the prevention of an abuse of a dominant position.

For the application of Art 102 TFEU, the most important criterion of reviewing an undertaking’s market dominance is the assessment of its respective market share.¹⁶² Even though European antitrust law does not comprise a positive legal basis for the addition of the market shares of affiliated undertakings, it would be economically incorrect to treat the members of a corporate group independently in this respect.¹⁶³ Therefore, the market shares of a controlling and a controlled undertaking are to be added for the determination of the pertinent market portion.¹⁶⁴ This holds true regardless of whether the head of the group permits the subsidiary to act on the market as an independent provider.¹⁶⁵

As the exact criteria for the attribution of market shares in the context of Art 102 TFEU have been left open by the European institutions, the term of a ‘**single economic entity**’ has

¹⁵⁹ ECJ of 21.2.1973, C-6/72, *Continental Can*, [1973] ECR-215, and CFI 6.10.1994, T-83/91, *Tetra Pak*, [1994] ECR II-755. This means that the denial of applying Art 101 (1) TFEU on agreements between corporate groups may still leave open their assessment under an abuse of a dominant position.

¹⁶⁰ This position would refer to the ECJ’s *Centrafarm* decision (in detail, see 2.1.1.) in which the Court had still demanded the agreement to serve the internal distribution of tasks and responsibilities; Cf. *Emmerich*, EuR 1971, 295 (311); *Mestmäcker*, *Europäisches Wettbewerbsrecht*, 1974, 409; *Gansweid*, *Gemeinsame Tochtergesellschaften*, 1976, 242; *Groeben/Thiesingen/Ehlermann*, 3rd ed. (1983), Art 85 (1), para. 84; and *Spörrmann* AWD 1970, 156, 161.

¹⁶¹ Cf. *Schroeder*, *Verbundene Unternehmen*, WuW 4/1988, 278; and *Herdzina*, *Wettbewerbspolitik*, 14, and in detail 3.1. below.

¹⁶² *Schröter* in: *Schröter/Jakob/Mederer*, *Kommentar zum Europäischen Wettbewerbsrecht*, Art 82, para. 93; *Eilmansberger* in: *Münchener Kommentar zum Europäischen und Deutschen Wettbewerbsrecht I*, Art 82, para. 104; *Koppensteiner*, *Österreichisches und Europäisches Wettbewerbsrecht*, 3rd edition, § 18, para. 17.

¹⁶³ Cf. *Koppensteiner*, *Missbrauchsverbot*, 466.

¹⁶⁴ Commission decision of 14.12.1972, *Zoja/CSC-ICI*, [1972], OJ Nr. L 299/51, 54; ECJ of 22.1.1974, C-6 and 7/73, *ICI-CSC vs. Commission*, [1974] ECR 223, 255 f, paras. 36-41; Cf. *Pohlmann*, *Verbundene Unternehmen*, 75.

¹⁶⁵ *Koppensteiner*, *ibid.*

likewise regularly been employed for the purpose of this issue. To define the term in this regard it has sometimes been suggested to use the notion of ‘control’ under the European Merger Regulation, which is used to systematically draw out the facts of a merger.¹⁶⁶ The rationale behind this approach is that the notion of ‘market dominance’ cannot depend on the ways in which a concern structures its possibilities of exerting control. This has specifically been justified under substantive law by the aim of the Merger Regulation to prevent the creation of market power distortive to an effective level of competition. The latter must be prevented irrespective of whether this entity represents an (economically) independent legal person or a ‘polycorporate’ group. The exact determination of the notion of ‘control’ in this regard must, however, be left for a later stage of discussion.¹⁶⁷

For the purpose of the following analysis it is sufficient to note that the preferential treatment of affiliated undertakings can only be prohibited under Art 102 TFEU in case their common conduct amounts to an abusive restriction of their competitor’s market autonomy. Even market dominators are entitled to structure their distribution system, as they prefer.¹⁶⁸ The existence of other (minority) shareholders in a subsidiary company does not alter this consequence. This means that in case the parent company supplies its services under unconfined conditions and at appropriate prices on the market, third parties cannot object to the favored treatment of the affiliated undertakings.¹⁶⁹

2. The Implementation of Art 101 (1) TFEU on a Corporate Group of Companies: **Practice** of the Commission and the European Courts

As already mentioned, there is a consensus on the necessity to consider economic affiliations when assessing a company’s anticompetitive conduct. Thus, it is generally accepted that Art 101 TFEU is primarily not applicable to agreements between a parent company and its subsidiary (-ies) in the case they constitute a ‘single economic entity’. Nevertheless it seems almost impossible to give a structured systematic account of the opinions and views on this so-called ‘intra-enterprise’ or ‘group privilege’ when regarding the facts of Art 101 (1) TFEU.¹⁷⁰ European case-law essentially lacks of consistency since it draws on different facts of the Treaty and avoids a structural classification of the term of an ‘economic entity’. In literature it has often been relied on singular formulations of the European institutions, sometimes without considering the specific facts of a case or their general context. Some of the most frequently used phrases are:¹⁷¹

¹⁶⁶ See *Koppensteiner*, *ibid.* For this respective interpretation under Art 101 TFEU see originally *Gleiss/Hirsch*, EG-Kartellrecht, Art 85, para. 197, and in detail under 3.1. below.

¹⁶⁷ See in detail, 3.1.1.3.

¹⁶⁸ See *Eilmansberger* in: Münchner Kommentar zum Europäischen und Deutschen Wettbewerbsrecht I, Art 82, para. 429. See also ECJ of 22.10.1986, C-75/84, *Metro*, [1986], ECR 3074.

¹⁶⁹ For a detailed assessment, see *Koppensteiner*, Missbrauchsverbot und Unternehmensverbund, Wbl 2007, 465 ff.

¹⁷⁰ See *Buntscheck*, Konzernprivileg, 27; *Pohlmann*, Unternehmensverbund, 75.

¹⁷¹ Cf. *Buntscheck*, Konzernprivileg, 27 f.

- Affiliated undertakings constitute a 'single economic entity' where the subsidiary has no decision-making authority, respectively no economic autonomy;¹⁷²
- In the actual case, there has been a legally binding instruction by the parent company;¹⁷³
- In the concrete domain of the agreement, the parent company possesses the power to decide on the respective subsidiary's business conduct;¹⁷⁴
- The parent company holds all, or a majority of the subsidiary's shares and can thus exert decisive influence on the decision-making process and business management of the subsidiary;¹⁷⁵
- The parent company is able to exercise 'exclusive control' on the company participating in the anticompetitive agreement in terms of the EC Merger Regulation.¹⁷⁶
- The term of a 'single economic entity' is a blanket term only generally circumscribing the preconditions of its applicability, which must conversely be assessed upon a detailed interpretation of the Treaty's rules;¹⁷⁷
- The flow of information between the undertakings in question can be identified as 'group-internal' due to the fact that it could also have been provided in the form of a legally binding instruction by the respective parent company.¹⁷⁸

As stated above, the assessment of these criteria, as well as their dogmatic classification is of high practical importance. For the coherence and consistency of European law it is essential to grant decisions a certain amount of predictability, or verifiability.¹⁷⁹

As already indicated, there are various forms and reasons for undertakings to affiliate under the common economic guidance of a corporate group or concern. The legal quality or intensity of these alliances nevertheless depends on the individual case.¹⁸⁰ It can be very strong in the case of a directive authority or affiliation agreement, but quite loose in cases of 'mere dependency' in the context of simple majority shareholdings.¹⁸¹ All these factors are to be taken into account when assessing the exemption of group-internal agreements from Art 101 (1) TFEU on the one hand, and the attribution of antitrust responsibility, on the other hand. For this reason, the following procedure seems practicable in order to assess the relevance of corporate affiliations in cases of a possible anticompetitive agreement.

First, the specific form of corporate integration of the respective group should be identified. Secondly, the intensity of this interrelation should be judged by looking at the possibilities of exerting 'control' by the management of the parent corporation under the respective (national) corporate law. Next, it should be examined in which ways the parent

¹⁷² *Stockenhuber* in: Grabitz/Hilf, Das Recht der Europäischen Union; *Roth/Ackermann* in: Frankfurter Kommentar, Grundfragen Art 81 Abs 1 EG-Vertrag, para. 213.

¹⁷³ *Emmerich* in: Immenga/Mestmäcker, Art. 81 Abs 1, para. 51; *Koch* in: Grabitz/Hilf, Art 85, para. 40.

¹⁷⁴ *Emmerich* in: Immenga/Mestmäcker, Art. 81 Abs 1, para. 55; *Schroeder*, in: Wiedemann, Handbuch, § 8, para. 5; *Müller-Graff* in: Heilbronner/Klein/Magiera/Müller-Graff, Art 85 para. 73; *Schröter* in: Groeben/Thiesingen/Ehlermann, Art 85 Abs 1, para. 98.

¹⁷⁵ *Koch* in: Grabitz/Hilf, Art 85, para. 43; *Roth/Ackermann* in: Frankfurter Kommentar, Grundfragen Art 81 Abs 1 EG-Vertrag, para. 194.

¹⁷⁶ *Schroeder*, in: Wiedemann, Handbuch des Kartellrechts, § 8, para. 7; *Stockenhuber* in: Grabitz/Hilf, Das Recht der Europäischen Union, Art 81 EGV, para. 166; and *Pohlmann*, Unternehmensverbund, 413 and 419.

¹⁷⁷ *Pohlmann*, Unternehmensverbund, 75.

¹⁷⁸ *Potrafke*, Konzerninterne Vereinbarungen, 235.

¹⁷⁹ In detail, see 3.1.

¹⁸⁰ Cf. e.g. *Dreher*, Kartellrechtscompliance, ZWeR 1/2004, 75, (101).

¹⁸¹ *Dreher*, *ibid*, 101.

company exerts 'control' under the factual realities of the case. Upon this assessment, the specific objectives of the respective antitrust provision should be considered in order to decide on its application in the particular case. The term of a 'single economic entity' should merely support the respective analysis.

In order to treat equal situations equally and apply legal constructions under consistent preconditions it is essential to test them against a common legal framework. European case-law should thereby strictly adhere to the objectives of the Treaty.¹⁸² For this purpose, it is crucial to critically evaluate the dogmatic analysis and reasoning of the term of a 'single economic entity' by the Commission and the ECJ in previous case-law.

In short, the respective facts of Art 101 (1) TFEU against which the concept of a 'single economic entity' must be tested comprise:

- Agreements and concerted practices;
- The term of an 'undertaking'; and
- Restrictions or distortions to competition.

While respectable authors favor applying the term of a 'single economic entity' upon the fact of a 'distortion of competition',¹⁸³ the Commission and ECJ have increasingly drawn on the term of an 'undertaking'. Proponents of the latter view argue for a classification of corporate groups as 'economic entities' in case they feature a sufficient level of integration which justifies their understanding as an 'undertaking'.¹⁸⁴ For this purpose, some authors draw on the concept of this term under national law.¹⁸⁵ While the single companies of a corporate group thus maintain their characterization as an 'undertaking' towards third parties, their internal relation is sometimes deemed similar to that of an undisclosed partnership.¹⁸⁶

Other authors negate the existence of 'agreements or concerted practices' where affiliated undertakings coordinate their market conduct on the basis of an instruction issued by the head of the corporate group.¹⁸⁷ Sometimes, already the existence of this fact of Art 101 (1) TFEU is ruled out when a subsidiary must expect a direct instruction by its parent company in case it fails to fulfill the general strategy of the group.¹⁸⁸ In this respect it has furthermore been claimed that the instruction issued by the parent company must be binding under the rules of national corporate law.¹⁸⁹

Sometimes it has even been argued that a subsumption of a 'single economic entity' under the facts of Art 101 (1) TFEU is altogether dispensable, because all relevant evaluations in this regard suffer from certain deficits. Rather, the differentiated treatment of corporate groups was deemed accurate for mere 'teleologic' reasons, which are allegedly sufficient for its application in practice.¹⁹⁰

¹⁸² In detail, see 3.1.

¹⁸³ *Gleiss/Hirsch*, EG-Kartellrecht, Art 85, para. 190; *Emmerich* in: Immenga/Mestmäcker, Art 81 (1), para. 53; *Schroeder* in: Wiedemann, Handbuch § 8, para. 3; *Schröter* in: Groeben/Thiesingen/Ehlermann, Art 85 (1), para. 97; *Heitzer*, Konzerne, 197; *Pohlmann*, Unternehmensverbund, 399; and *Buntscheck*, Konzernprivileg, 115 (139).

¹⁸⁴ For German law cf. *Menz*, Wirtschaftliche Einheit, 77.

¹⁸⁵ In detail, see 3.1.

¹⁸⁶ Cf. *Harms*, Konzerne im Recht der Wettbewerbsbeschränkungen, FIW- Schriftenreihe, Heft 45, 1986, 158. For further examples see *Buntscheck*, Konzernprivileg, 26.

¹⁸⁷ *Roth/Ackermann*, in: Frankfurter Kommentar, Grundfragen Art 81 (1) EG-Vertrag, para. 211; similarly *Bunte*, in: Langen/Bunte, Art 85- Generelle Prinzipien, para. 113.

¹⁸⁸ *Potrafke*, Konzerninterne Vereinbarungen, 260; Cf. *Buntscheck*, Konzernprivileg, 26.

¹⁸⁹ *Emmerich* in: Immenga/Mestmäcker EG-Wettbewerbsrecht, Art 85, para. 51; similarly *Potrafke*, *ibid.*

¹⁹⁰ See *Koppensteiner*, Kartellrecht im Unternehmensverbund, in: FS Mailänder (2004), 136.

For the assessment of group-intern agreements, the predominant views in literature negate the applicability of Art 101 (1) TFEU due to the lack of a ‘prevention, restriction or distortion of competition’ in the area of the internal market.¹⁹¹ The authors alluding to the fact of ‘agreements or concerted practices’ in the case of a (concrete) instruction of the parent company likewise hold no distortion of competition to be possible where such an instruction has not been issued.¹⁹²

The main focus of European case-law in regard to this ‘group or concern-privilege’,¹⁹³ was regularly on the unsuitability of the respective agreement to restrict a subsidiary’s competitive autonomy.¹⁹⁴ In most cases, the application of Art 101 (1) TFEU on agreements between companies of a corporate group was negated because one of them lacked the required amount of ‘autonomy’¹⁹⁵ or ‘independence’.¹⁹⁶ Therefore, the characteristics defining this feature of economic dependence constitute an essential issue of discussion when applying the concept of a ‘single economic entity’ in this context.

For the **attribution of liability** between companies of a corporate group, different accounts of the criteria and nature of this accountability exist. The Commission generally proceeds in two steps when assessing the attribution of liability between legally separate undertakings. After identifying the respective ‘economic entity’, the authority assesses in a second step which legal person of this entity should serve as the final addressee of the antitrust fine.

Principally, the attribution of liability is subject to the condition that the legal entity in question must have taken part in the breach of competition law or at least exercised some form of influence in regard to the conduct in question.¹⁹⁷ As a base of reference for determining this influence, the delegation of administrative powers to the subordinated legal entity has sometimes been mentioned. The exact criteria determining whether the parent company has participated in the respective breach are nevertheless contested.

To solve this legal uncertainty, some authors suggested to draw on the criteria used to determine the inapplicability of Art 101 TFEU for group-intern agreements.¹⁹⁸ Despite different legal backgrounds, this was deemed necessary in order to grant a consistent application of the concept of a ‘single economic entity’.

¹⁹¹ See *Buntscheck*, Konzernprivileg, 27, supra note 52.

¹⁹² *Roth/Ackermann* in: Frankfurter Kommentar, Grundfragen Art 81 Abs 1 EG-Vertrag, para. 212; *Bunte* in: *Langen/Bunte*, Art 85, Generelle Prinzipien, para. 113; *Leo*, Konzerninterne Marktregelungen, 40; Cf. *Buntscheck*, Konzernprivileg, 27.

¹⁹³ In the following analysis, the term of the ‘intra-enterprise doctrine’ and the ‘group, or concern’-privilege will be used alternatively. In practice, all of these terminologies have been used for the description of the same substantive concept.

¹⁹⁴ Cf. *Buntscheck*, Konzernprivileg, 118.

¹⁹⁵ ECJ of 23.5.1978, Case 102/77, *Hoffman La – Roche vs. Centrafarm*, [1974] ECR 1147; ECJ of 4.5.1988, Case 30/87, *Corinne Bodson vs. SA Pompes funèbres des régions libérées*, [1988], ECR 2479, 2513, para. 19; and ECJ of 24.10.1996, Case 73/95 P, *Viho Europe BV vs. Commission*, [1996] ECR 5495, para. 16.

¹⁹⁶ See originally Commission of 18.8.1969, IV/22.548, *Christiani and Nielsen*, [1969], OJ Nr. L 165/12, 14; furthermore IV/24055, *Kodak* [1970], OJ Nr. L 147/24, para. 12.

¹⁹⁷ See e.g. *Koppensteiner*, *ibid*, 137, and in detail under 3.1.

¹⁹⁸ Cf. *Emmerich* in: *Immenga/Mestmäcker EG-Wettbewerbsrecht I* (1997) Art 85 Art 1, para. 61; *Menz*, *Wirtschaftliche Einheit und Kartellverbot*, Berlin, (2004), 120 ff; *Potrakfe*, *Kartellrechtswidrigkeit Konzerninterner Vereinbarungen*, 259 ff.

It is important to note, that under the rules of European procedural law, the Commission has to prove the facts upon which it holds a company liable. This is irrespective of whether the company is assessed to be directly or indirectly responsible.¹⁹⁹

As it is a prerequisite that the legal entity held responsible has somehow participated in the breach of competition law, different opinions exist as to whether this only refers to an active initiation or also includes cases of a mere 'passive toleration' of an infringement. Even though respectable voices in literature argue that the 'mere conscience' of an affiliate's conduct cannot be considered as an implied approval of the latter,²⁰⁰ the ECJ has sometimes ruled the opposite to be the case.²⁰¹

However, the proponents of this view appropriately base their assessment on the fact that an 'actual contribution' of a controlling company in the sense of a criminally relevant behavior is necessary for an attribution of intra-group liability.²⁰² Likewise, the imputation of responsibility on the basis of a mere delegation of administrative powers has been denied, because 'a contribution' to the antitrust breach could not be justified by this mere 'internal allocation' of duties and responsibilities. At times, this view has been underlined by arguing that the opposite position could not explain why the top management is virtually not held responsible for conduct in which it is factually not involved.²⁰³

Despite strong reasons in favor of this view, such a reasoning now faces the impasse that the ECJ has clarified that at least in the case of a 100% shareholding it does not hesitate to hold a parent company responsible for areas of business that it has not factually controlled.²⁰⁴ Furthermore, the argument of a lacking contribution to a subsidiary's anticompetitive conduct requires a differentiated assessment. A possible solution to this dilemma must be discussed on the basis of the means the Commission currently possesses to objectively consider a parent company's responsibility under the principles and objectives of European antitrust law. In order to determine whether the authority makes appropriate use of these means under current practice, a review of existing case-law on the concept of a 'single economic entity' is useful.

2.1. The Intra Enterprise Doctrine or 'Group Privilege' as Original Basis for the Assumption of an 'Economic Entity'

As outlined above, there is a considerable amount of legal uncertainty involved in the application of the concept of a 'single economic entity' in European antitrust law. In order to denote the remaining legal inconsistency in the use this concept under current EU case-law it is indispensable to give a summary of the most important decisions in this respect. Nevertheless,

¹⁹⁹ The latter is precisely assumed to be the case where an undertaking is made responsible for conduct of a separate legal entity, which it has determined on the basis of 'decisive influence'.

²⁰⁰ See *Emmerich* in Immenga/Mestmäcker, EG-Wettbewerbsrecht I (1997) Art 85 Art 1, para. 51; *Mestmäcker/Schweitzer*, Europäisches Wettbewerbsrecht, 2. Aufl. (2004), 236 f; *Holoubek/Potacs*, (eds.) Öffentliches Wirtschaftsrecht, Springer Verlag, (2007) 647 ff; Cf. *Koppensteiner*, in: FS Mailänder (2004), 138.

²⁰¹ Cf. ECJ of 16.11.2000, C-286/98 P, *Stora Kopparbergs Bergslags vs. Commission*, [2000] ECR I-09925, paras. 27 ff.

²⁰² Cf. *Koppensteiner*, in: FS Mailänder (2004), 138; *Buntscheck*, Konzernprivileg, 101.

²⁰³ See *Koppensteiner*, *ibid.*

²⁰⁴ See e.g. Case 97/08 P, *Akzo Nobel NV vs. Commission*, [2009] ECR I-08237, assessed in detail under 2.1.2.

the different methodological considerations concerning the assessment corporate groups under Art 101 (1) TFEU must also be taken into account. The following discussion will therefore first outline the original creation of this doctrine for the exemption of group-internal conduct and subsequently concentrate on the decisions concerning the attribution of illicit conduct. Distinguishing between these two topics is necessary to assess the distinct treatment of corporate groups under the objectives of antitrust law, as well as general principles of European law.

2.1.1. Initial Decisions Recognizing the Distinctiveness of Group-Internal Agreements

2.1.1.1. The Primary Decision of ‘*Christiani & Nielsen*’

A starting point for the development of the concept of a ‘single economic entity’ under European antitrust law was the Commission’s decision in the case of ***Christiani & Nielsen***.²⁰⁵ In this case, a Danish construction business by the name of *Christiani & Nielsen* established a number of wholly-owned subsidiaries in several European member states and contractually restricted their business activities to the respective domestic market. Its Dutch subsidiary, ‘*Christiani and Nielsen Den Haag*’, was thereby obliged to

- inform the parent company of its daily operative business and human resource management on a regular basis;
- follow the instructions issued by this parent company, and to
- pay the parent a certain fee for the management of its assignments and activities including a reimbursement for expenditures made in the interest of the subsidiary.

In return, the parent company provided the subsidiary with its operating experience, patents, innovations, and technical ‘know-how’.²⁰⁶ Furthermore, it restricted itself from engaging in any business activity in the Netherlands.²⁰⁷ Apart from its controlling shareholding in the subsidiary, the head of the group had the power to appoint the latter’s executive board.²⁰⁸

Upon the request of these two companies, the Commission granted their exemption from the cartel ban on the basis of Art 2 of Regulation Nr. 17.²⁰⁹ Considering the facts of the case, the authority found no reason to intervene on the basis of Art 101 (1) TFEU.

In this precise case, the Commission held that the applicability of this provision presupposes that ‘actual competition’ between the undertakings in question exists.²¹⁰ This condition was not already seen to be fulfilled where the undertakings concerned each possess a separate legal personality. Rather, it was deemed essential to assess whether the subsidiary is capable of taking independent actions on a purely ‘economic level’, namely irrespective of its integration under a different general strategy.

²⁰⁵ Commission Decision of 18.8.1969, IV/22.548, *Christiani and Nielsen*, [1969], OJ Nr. L 165/12, 13.

²⁰⁶ IV/22.548, *Christiani and Nielsen*, [1969], OJ Nr. L 165/12, 13.

²⁰⁷ Cf. *Buntscheck*, Konzernprivileg, 31.

²⁰⁸ IV/22.548, *Christiani and Nielsen*, [1969], OJ Nr. L 165/12, 13.

²⁰⁹ EEC Council: Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty, OJ Nr. 013, 21/02/1962 P. 0204 – 0211.

²¹⁰ IV/22.548, *Christiani and Nielsen*, [1969], OJ Nr. L 165/12, 13.

This means that the Commission did not question the legal personality of the respective subsidiary or its characterization as an ‘undertaking’ for determining the scope of Art 101 (1) TFEU.²¹¹ For the authority it was rather decisive that the companies taking part in the agreement were ‘economically independent,’ meaning that ‘competition’ between them was factually possible.²¹² Where one of the concerned undertakings could nevertheless determine the conduct of the other, the Commission assumed that no ‘restrictable competition’ existed.

To substantiate this conclusion, the Commission held that the parent company of *Christiani & Nielsen Copenhagen* had, by the establishment of its subsidiary, merely been enabled to provide its services under the most favorable conditions on Dutch territory. This business policy was seen legitimate upon mere strategic considerations and did not lead to the necessary qualification of the subsidiary as an independent economic entity.²¹³ The existence of a ‘single economic entity’ between the parent and the subsidiary company was finally underlined by the already mentioned fact of ‘*the exchange of information, innovation, patents and technical know-how, as well as the permanent cooperation between these two undertakings.*’²¹⁴

Finally, the Commission found the division of markets in the respective agreements to merely constitute an internal distribution of tasks between the companies of the same economic entity. This last point indicates that the Commission had drawn on precise facts denoting the actual exercise of influence on a subsidiary company.²¹⁵ The systematic assessment of the Commission’s decision nevertheless suggests that the aspect of an ‘internal distribution of tasks’ did not (yet) amount to an independent prerequisite for the concept of a ‘single economic entity’ under community case law.²¹⁶ Rather, the authority emphasized the lacking possibility of the agreement to restrict ‘competition’ on the basis of the existing control relationship between the affiliated companies.

2.1.1.2. Further Cases Substantiating the ‘Group- or Concern Privilege’

The following decisions, in which the question of exempting certain group-internal agreements from the Art 101 (1) TFEU arose, are characterized by attempts to substantiate this approach in form and content. As a base of reference, the European institutions alternatively drew on the facts of ‘agreements or concerted practices,’²¹⁷ and on the fact of ‘distortions to competition’. This practice already illustrates a certain amount of incertitude regarding the scope and content of the necessary differentiated treatment of corporate groups under Art 101 (1) TFEU.

§ 1. The Kodak Case

²¹¹ Likewise *Spormann*, Die Entwicklung der Europäischen Wettbewerbspolitik, in: Außenwirtschaftsdienst des Betriebs-Beraters (AWD), 1970, 161; *Emmerich*, Europarecht 1971, 310; *Harms*, Entwicklung des Wettbewerbsrecht, 166; *Huber*, AWD 1969, 429.

²¹² Cf. *Buntscheck*, Konzernprivileg, 32.

²¹³ IV/22.548, *Christiani and Nielsen*, [1969], OJ Nr. L 165/12, 13.

²¹⁴ Commission, *ibid.*

²¹⁵ *Buntscheck*, Konzernprivileg, 33.

²¹⁶ *Buntscheck*, *ibid.*

²¹⁷ In this case it was sometimes scrutinized to what extent the respective agreement influenced the position of third parties, or the general market conditions. On a critical assessment of this approach, see 3.1.1.3., § 2.

In *Kodak*, the Commission considered the existence of corporate group structures for the purpose of applying Art 101 (1) TFEU for a second time. This decision did not concern an agreement between a parent and a subsidiary company, but instead related to the parallel market conduct between several subsidiaries of the same parent company. The Commission was hereby asked to deal with the question whether the use of standardized ‘general conditions’ for the market conduct of several subsidiaries²¹⁸ could infringe Art 101 (1) TFEU.²¹⁹ The subsidiaries in question operated on the basis of common instructions issued by the parent company of ‘*Eastman Kodak*,’ which they were bound to comply with under the rules of corporate law.²²⁰

The decision is noteworthy from a systematic perspective for two reasons. First, the Commission - in contrast to its decision in *Christiani and Nielsen* - did not allude to the fact that no competition existed between the parent and its subsidiary companies.²²¹ Rather, it assessed that this was in fact true for the relation of the subsidiaries themselves, because they were commonly controlled by the same parent company.²²² This was nevertheless only deemed the case for the areas, which were factually governed by the parent company. The Commission’s assertion indicates that it hereby referred to the necessity of an actual exertion of ‘control’ in the precise case. The Commission concluded that for such a form of direct control, no ‘agreement or concerted practice’ in the sense of Art 101 (1) TFEU could be found to exist between the concerned undertakings.

Even though the *conditions* of sale were thus not judged to constitute an ‘agreement’, the Commission nevertheless assessed them to infringe Art 101 (1) TFEU upon the fact that they were “*necessarily the subject of a contract between the Kodak companies and the independent purchasers.*”²²³

The respective standards of the sale were thus deemed discriminatory, because they were not accessible to other purchasers. As they artificially segmented the national markets into distinct geographic product markets they were seen to constitute a ‘distortion to competition’ for the area of the Internal Market.

The dilemma of the Commission’s decision may be perceived upon the fact that the purchasers were nevertheless not restricted by the uniform conditions of sale, but by contracting with the respective subsidiary company. These contracts were nevertheless not part of the request for a negative clearance upon Art 101 (1) TFEU by the *Kodak* companies.²²⁴ The communicated general conditions contained provisions upon which a separate purchaser, which had acquired the products of one of the *Kodak* companies in a different member state, was obliged to pay the local subsidiary a certain fee. This fee was assessed upon a price list issued to the respective subsidiary by their common parent company.²²⁵ In a strict sense, however, this conduct nevertheless constitutes a mere coordination of the respective parent company’s pricing policy in structuring its sale and product distribution throughout the area of the common market.

²¹⁸ This particularity concerned the sales of products and services on the European market.

²¹⁹ [Ex Art 85 EEC]. Cf. *Buntscheck*, Konzernprivileg, 33.

²²⁰ Cf. IV/24055, *Kodak*, OJ [1970] L 147/24, para. 11.

²²¹ Cf. *Buntscheck*, Konzernprivileg, 34.

²²² Cf. IV/24055, *Kodak*, [1970], OJ Nr. L 147/24, para. 12.

²²³ IV/24055, *Kodak*, OJ [1970] L 147/24, para. 14.

²²⁴ The previous notification system has nevertheless been abolished by the Regulation 1/2003. In detail, see *Wils*, The Optimal Enforcement of EC Competition Law, (2002).

²²⁵ IV/24055, *Kodak*, [1970] OJ Nr. L 147/24, para. 16.

This shows that the Commission at this time, had not yet accepted the ‘group or concern-privilege’ to a full extent. Rather, it still judged the agreement by regarding the position of third parties on the common market. As mentioned above, this assessment conceals the different conditions of Art 101 and Art 102 TFEU. By reflecting on the conditions of distribution and sale the Commission found itself in an impasse.²²⁶ On the one side, it acknowledged that competition was also possible between companies of a corporate group. On the other side, it had asserted that the instructions issued by the parent company did not constitute ‘an agreement’ in the sense of Art 101 (1) TFEU. The ambiguity of the Commission’s decision is finally apparent given that in the present case the ascertained ‘distortion of competition’ was not seen as the purpose or consequence of the agreement.

Rather, the ‘agreement’ was seen to be *caused* by the instruction issued by the parent company. The Commission thereby attempted to solve the dilemma outlined above by considering the contracts between the subsidiaries and the independent dealers to be the consequence of a previous ‘distortion’ to competition.

This is questionable on systematic grounds. Not every ‘restriction’ of competition namely, is interdicted by the cartel ban *per se*.²²⁷ Rather, the provision’s application depends on the fact that the parties involved²²⁸ are actual or potential competitors.²²⁹ Upon this recognition it becomes evident that the Commission had not yet recognized the telos of exempting group-intern agreements from Art 101 (1) TFEU in its entirety.

§ 2. Béguelin Import Co. vs. S.A.G.L. Import Export

In the decision that followed, the ECJ, for the first time, had the chance to rule on the application of Art 101 (1) TFEU on agreements between members of a corporate group. The Court was asked to decide on an exclusive dealing and parallel import agreement between affiliated undertakings.

In the particular case,²³⁰ the district court of Nice had filed for a preliminary ruling on the compatibility of a contractual agreement between the Belgian company ***Béguelin Import Co.*** and its French subsidiary. By the means of this agreement, the Belgian parent company conferred upon its subsidiary an exclusive right of distributing firelighters, which the parent company had in turn received from the Japanese producer of these products. Because the French subsidiary had consequently also concluded an agreement with the Japanese producer, it filed suits as several German and French competitors engaged in parallel imports. The French Court concluded its request for a preliminary reference questioning whether the conditions of the initial agreement were even permissible under the Community rules on competition.²³¹ While the Commission held that the conferral of an exclusive distribution right by a parent company did not constitute an ‘*agreement*’ in the sense of Art 101 (1) TFEU, the Court

²²⁶ Cf. *Buntscheck*, Konzernprivileg, 36.

²²⁷ Cf. *Gleiss/Hirsch*, Kommentar zum EG-Kartellrecht, Vol I, Art 85 (1), para. 137; and ECJ of 30.6.1966, Case 56/65, *Société Technique Minière vs. Maschinenbau Ulm GmbH*, [1966] ECR 234, para. 281.

²²⁸ The term of ‘contracting’ parties should be avoided, as particularly the affiliation between a parent and a subsidiary company is determined by a relationship of dependence, precluding any voluntary activity.

²²⁹ *Gleiss/Hirsch*, Kommentar zum EG-Kartellrecht, Vol I, Art 85 (1), para. 138.

²³⁰ ECJ of 25.11.1971, Case 22/71, *Béguelin Import Co. vs. S.A.G.L. Import Export*, [1971] ECR 949, para. 17.

²³¹ ECJ of 25.11.1971, Case 22/71, *Béguelin Import Co. vs. S.A.G.L. Import Export*, [1971] ECR 949, para. 4 [Grounds].

emphasized instead the subsidiary's lacking economic independence. It specifically asserted that:

"The relationship between two companies and one of which is economically wholly dependent from the other cannot be taken into account in determining the validity of an exclusive dealing agreement entered into between the subsidiary and a third party".²³²

The ECJ commenced its assessment by holding that Art 101 (1) TFEU prohibits agreements that have as their object or effect an impediment to competition in the area of the Common Market. This was nevertheless seen to be lacking

"in the case of an exclusive sales agreement when in fact the concession granted under that agreement is in part transferred from the parent company to a subsidiary which, although having a separate legal personality, enjoys no economic independence".²³³

Consequently, it ruled that the relationship between affiliated companies could not be taken into account in determining the validity of an exclusive dealing agreement entered into between a subsidiary company and a third party.²³⁴

In contrast to the view of the Commission, which had primarily denied the existence of an 'agreement' in the sense of Art 101 (1) TFEU,²³⁵ the Court negated the fact of a 'distortion to competition'²³⁶ on the basis of the existent relationship of control between the parent and its wholly owned subsidiary. This is furthermore reinforced by the fact that the Court explicitly dismissed the statement of the Advocate General, who had ascertained the absence of an 'agreement' upon the lack of a 'distortion' to competition.²³⁷

§ 3. Centrafarm I & II

In the following (combined) cases²³⁸ the ECJ was challenged by the question whether the concerted application of industrial property rights by several undertakings of a corporate group was compatible not only with Art 101 (1) TFEU, but also with the free movement of goods. The basis of this decision was again a preliminary reference issued by a Dutch court, which had been confronted with the following case:

An American drug company of the name *Sterling Drug Inc.* held patents for the method of developing a certain pharmaceutical product called 'Negram' in several European member states. Its British subsidiary, *Sterling Winthrop Group Ltd.*, had conferred its trademark for this

²³² ECJ of 25.11.1971, Case 22/71, *Béguelin Import Co. vs. S.A.G.L. Import Export*, [1971] ECR 949, para. 4 [Operative part].

²³³ ECJ of 25.11.1971, Case 22/71, *Béguelin Import Co. vs. S.A.G.L. Import Export*, [1971] ECR 949, para. 8.

²³⁴ ECJ of 25.11.1971, Case 22/71, *Béguelin Import Co. vs. S.A.G.L. Import Export*, [1971] ECR 949, para. 9.

²³⁵ The Commission had addressed the aspect of a 'distortion to competition' only in an alternative manner.

²³⁶ ECJ of 25.11.1971, Case 22/71, *Béguelin Import Co. vs. S.A.G.L. Import Export*, [1971] ECR 949, para. 7.

²³⁷ For a critical analysis of the lacking dogmatic accuracy of this position, see *Buntscheck*, Konzernprivileg, 41.

²³⁸ ECJ of 31.10.1974, Case 15/74, *Centrafarm B.V. and Adriaan De Peijper vs. Sterling Drug Inc.*, [hereinafter *Centrafarm I*], [1974] ECR 1147; and ECJ of 31.10.1974, Case 16/74, *Centrafarm BV and Adriaan De Peijper vs. Winthrop BV*, [hereinafter *Centrafarm II*], [1974] ECR 1183 ff.

product on to its wholly-owned subsidiary, *Winthrop BV*, in the Netherlands. According to this business policy, any use of the product in the respective member state necessarily had to be coordinated with the Dutch subsidiary.

Nevertheless, another Dutch company by the name of '*Centrafarm*' went on to import products some of which bore the name of 'Negram' from England (where they had been properly put on the market by subsidiaries of *Sterling Drug Inc*) and Germany, thereby profiting from a considerable price differential.²³⁹ Consequently, *Sterling Drug Inc.* and the Dutch subsidiary of *Winthrop BV* each brought actions before the District Court of Rotterdam, requesting an interim relief against this conduct of *Centrafarm* and an injunction against any further infringement of the patent right belonging to *Sterling Drug Inc.*²⁴⁰

The Court began its assessment in reviewing whether the Treaty rules on the free movement of goods prevented a patentee from opposing the conduct of third parties to import the respective patented product from another member state. After clarifying once more that the purpose of the Treaty provisions on the free movement of goods was to prohibit measures restricting imports, as well as all measures of equivalent effect between the member states it held that:

*"By Art 36 [EEC] these provisions do not, however, prevent prohibitions or restrictions on imports justified on grounds of protection of industrial and commercial property".*²⁴¹

According to this holding it seemed clear that the provisions of the Treaty did not principally disturb the existence of industrial and commercial property rights. However, the Court went on to state that the exercise of such exclusive rights could be well be 'affected' by the rules of the Treaty.²⁴²

Insofar, an 'abusive' use of industrial property rights existing under national law could well constitute an obstacle to the free movement of goods.²⁴³ Thus, the Court ruled that a proprietary right should not be used to seal off national markets. It held that a patentee would otherwise be allowed to

*"prevent the import of protected products which had been marketed in another member-state [...] and thereby restrict trade between the member states in a situation where no such restriction was necessary to guarantee the essence of the exclusive rights flowing from the parallel patents."*²⁴⁴

Subsequent to this assessment, the Court turned to the question whether the conferral of these rights to affiliated undertakings could infringe Art 101 (1) TFEU in case that such a conferral has been used to seal off the various national markets.²⁴⁵

In line with the assessment mentioned above, the Court held that while industrial property rights recognized by the law of a member state are not affected by the existence of Art 101 (1) TFEU, the way in which they are *exercised* may be subject to the prohibition of this provision.²⁴⁶ This was particularly judged to be the case where such a right had the object or

²³⁹ ECJ of 31.10.1974, Case 15/74, *Centrafarm I*, [1974] ECR 1147.

²⁴⁰ ECJ of 31.10.1974, Case 15/74, *Centrafarm I*, [1974] ECR 1147.

²⁴¹ ECJ of 31.10.1974, Case 15/74, *Centrafarm I*, [1974] ECR 1147, para. 6.

²⁴² ECJ of 31.10.1974, Case 15/74, *Centrafarm I*, [1974] ECR 1147, para. 7.

²⁴³ Cf. ECJ of 31.10.1974, Case 15/74, *Centrafarm I*, [1974] ECR 1147, para. 10.

²⁴⁴ ECJ of 31.10. 1974, Case 15/74, *Centrafarm I*, [1974] ECR 1147, para. 12.

²⁴⁵ Cf. *Buntscheck*, Konzernprivileg, 43.

²⁴⁶ Cf. ECJ of 31.10.1974, Case 15/74, *Centrafarm I*, [1974] ECR 1147, para. 39.

consequence of an ‘agreement’ in the sense of Art 101 (1) TFEU. Consequently, the Court went on to formulate the most frequently cited formula of the so-called ‘group or concern privilege’²⁴⁷ by holding that:

*“Art 85 [now Art 101 TFEU], however, does not apply to agreements or concerted practices between undertakings belonging to the same group in the form of parent company and subsidiary, if the undertakings form an economic unit within which the subsidiary does not have real autonomy in determining its line of conduct on the market and if the agreements or practices have the aim of establishing an internal distribution of tasks between the undertakings.”*²⁴⁸

Hence, two preconditions must be met in order to exempt a contractual relationship between a parent company and its subsidiaries from the application of Art 101 (1) TFEU.²⁴⁹ Apart from the subsidiary’s lacking economic autonomy, the agreement was seen to necessarily serve the purpose of defining an ‘internal allocation of tasks’ between them.

The first of these two qualifications can be recognized as consistent with the Court’s formulation in the case of *Béguelin Import and Co.*²⁵⁰ and the previous practice of the European Commission,²⁵¹ according to which a subsidiary’s economic independence was decisive for the application of the cartel ban. The second criterion, namely that of an ‘internal allocation of tasks,’ had nevertheless been introduced as a new element and subsequently caused much discussion in literature.

It was particularly debated whether a subsidiary’s lacking decision-making autonomy could solely be assumed in case the parent company factually decided on its conduct,²⁵² or whether already the subsidiary’s inclusion into the corporate group was sufficient.²⁵³ Furthermore it was unclear, whether the two conditions had to be fulfilled cumulatively and whether such an ‘internal’ aspect to the agreement was even required for the purpose of Art 101 (1) TFEU.

By introducing this element, the Court did not exactly contribute to the creation of certainty regarding the appropriate scope of exempting group-internal conduct from the cartel ban. The ECJ even seemed particularly undecided on the delineation of group-internal conduct towards the position of third parties on the market. This is explicitly confirmed by the fact that the Court felt compelled to ‘correct’ the far-reaching effect of exempting conduct from Art 101 (1) TFEU by adding an internal confinement to the respective agreement.

²⁴⁷ See e.g. *Koch* in: Grabitz/Hilf, Art 85, para. 41; *Gleiss/Hirsch*, EG-Kartellrecht, Art 85, para. 192, as cited by *Buntscheck*, Konzernprivileg, 43.

²⁴⁸ ECJ of 31.10.1974, Case 15/74, *Centrafarm I*, [1974] ECR 1147, para. 41.

²⁴⁹ Cf. *Gleiss/Hirsch*, Kommentar zum EG-Kartellrecht, Art 85, para. 192.

²⁵⁰ ECJ of 25.11.1971, Case 22/71, *Béguelin Import Co. vs. S.A.G.L. Import Export*, [1966] ECR 949, 959, para. 8, which was furthermore consistent in its assessment on the prerequisite of the subsidiary’s lacking economic autonomy with the Commission’s conclusions in *Kodak*.

²⁵¹ In its statement on *Centrafarm I and II* it was nevertheless the Commission, which had first introduced the term of an ‘internal distribution of tasks’. See Case 15/74, *Centrafarm I*, [1974] ECR 1147, p. 1160, and *Centrafarm II* - [1974] ECR 1183, 1192 ff. This has been used to show that this criterion, already mentioned in its previous rulings, was to hereinafter constitute a qualification for the assessment of the issue of group-internal agreements. Cf. *Buntscheck*, Konzernprivileg, 44.

²⁵² This could, for instance, be done by means of an instruction.

²⁵³ Cf. *Gleiss/Hirsch*, Kommentar zum EG-Kartellrecht, Art 85, para. 193.

2.1.1.2. Subsequent Adjudication Leading to the Current Position of Assessing Agreements between Affiliated Companies

2.1.2.1. The Classification of a 'Single Economic Entity'

§ 1. Hydrotherm Gerätebau GmbH vs. Ing. Mario Andreoli

Ten years after *Centrafarm I and II* another preliminary ruling coined the dogmatic discussion around the so-called 'group-privilege'. In the case of ***Hydrotherm Gerätebau GmbH vs. Compact de Dott. Ing. Mario Andreoli & C.sas***, the German Federal Supreme Court referred to the ECJ the question whether an agreement between four legally independent undertakings could be comprised by the application scope of the Block-, or Group Exemption Regulation²⁵⁴ and therefore be exempted from the ban of Art 101 (1) TFEU.²⁵⁵ According to its wording, the Regulation was only applicable to agreements between no more than two undertakings. The Court was called to decide on whether the existence of corporate affiliations affected the possibility of applying Art 101 (3) TFEU.²⁵⁶

The facts of the case can be summarized in the following way: An Italian engineer by the name of *Dr. Mario Andreoli* manufactured and sold radiators, registered in Italy under the trade mark of 'Ghibli', by the limited partnership of '*Compact*' of which *Mr. Andreoli* possessed 100% of the share capital.²⁵⁷ On 10 October 1975, *Dr. Andreoli* contractually granted the German *Hydrotherm Gerätebau GmbH*²⁵⁸ an exclusive manufacturing and distribution license for his product, according to which the latter took over the responsibility for the sales and distribution of this product in large parts of Western Europe. In return, the German company obliged itself not to introduce competitive products in this area. However, since the parties could not agree on the price of this licensing agreement, the contract was suspended soon afterwards.²⁵⁹

Upon terminating the contract, *Dr. Andreoli* claimed damages on behalf of himself as well as on behalf of '*Compact*'. The company of '*Hydrotherm*' asserted the marketing agreement not to be comprised by the Block Exemption Regulation and therefore to be void according to Art 101 (2) TFEU.²⁶⁰

In its advisory opinion, the Commission explicitly referred to the wording of Art 1 Regulation Nr. 67/67 EEC restricting the scope of its application to agreements between no more than two undertakings.²⁶¹ In reference to its previous decisions, the Commission nevertheless emphasized that in European competition law a strict *economic approach* was necessary. In cases of corporate affiliations, several legally independent undertakings were

²⁵⁴ At the time Nr. 67/67 EEC, [1967] OJ Nr. 10, 849.

²⁵⁵ ECJ of 12.7.1984, C-170/83, *Hydrotherm Gerätebau GmbH vs. Compact de Dott. Ing. Mario Andreoli & C.sas*, [1984] ECR 2999.

²⁵⁶ This provision constitutes a positive legal basis for exempting certain agreements from Art 101 (1) TFEU. In detail, see e.g. *Faull/Nikpay*, The EC Law of Competition, 179 ff.

²⁵⁷ Cf. ECJ of 12.7.1984, C-170/83, *Hydrotherm Gerätebau GmbH vs. Compact de Dott. Ing. Mario Andreoli & C.sas*, [1984] ECR 2999, 226.

²⁵⁸ [Hereinafter *Hydrotherm*].

²⁵⁹ Cf. ECJ of 12.7.1984, C-170/83, *Hydrotherm Gerätebau GmbH vs. Compact de Dott. Ing. Mario Andreoli & C.sas*, [1984] ECR 2999, 227.

²⁶⁰ [Previously Art 85 (2) EEC].

²⁶¹ ECJ of 12.7.1984, C-170/83, *Hydrotherm Gerätebau GmbH vs. Compact de Dott. Ing. Mario Andreoli & C.sas*, [1984] ECR 2999, 3009; Cf. *Buntscheck*, Konzernprivileg, 46.

henceforth assessed to possibly constitute ‘a single economic entity’, and thus a ‘single undertaking’ for the purpose of antitrust law.²⁶² This was deemed the case where the respective undertakings were characterized by ‘personal identity’ of their management, or where one of them was entirely dependent of the other, thus making any form of competition between them impossible.²⁶³

Even though the Commission’s emphasis on the subsidiary’s lacking economic independence was in line with its previous assessment of qualifying affiliated undertakings as a ‘single economic entity’, it is interesting that the authority this time clearly referred to the term of an ‘undertaking’ for evaluating the conformity of their conduct with the antitrust rules. This reference was nevertheless termed by the exact wording of the Block Exemption Regulation, which explicitly required the participation of at least two ‘undertakings’.²⁶⁴

Advocate General *Lenz* consequently followed the Commission on insisting on an ‘economic, and not a purely legal approach’ for assessing the competition rules.²⁶⁵ He therefore stated that a parent company and its subsidiaries form a ‘single economic unit’ in so far as

“the subsidiary does not decide independently on its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company (if the parent company held the majority of the shares or had complete control of the subsidiary)”.²⁶⁶

Again, the existence of an economic entity was explained by the aspect of ‘control’ justifying their exemption from Art 101 (1) TFEU by the lack of competition between them. Consequently, the Advocate General argued that the same approach was necessary for the application of Regulation 67/67, holding that:

“It therefore seems logical to apply the regulation to agreements in which several legally independent persons are involved on the one side, if they act as a single entity for the purposes of the agreement, because they are closely linked to one another and no competition between them exists [...]”.²⁶⁷

In contrast to the assessment of the Commission, the Advocate General did not see the necessity to refer to the term of an ‘undertaking’ for the qualification of a corporate group as a ‘single economic entity’. The Advocate General therefore concluded that Regulation Nr. 67/67 EEC was thus applicable to the agreement between the companies of ‘*Hydrotherm*’ and ‘*Compact*’.

The ECJ nevertheless followed the Commission’s line of argumentation stating that:

²⁶² OJ 1984, 2999, *ibid*.

²⁶³ ECJ of 12.7.1984, Case 170/83, *Hydrotherm Gerätebau vs. Compact de Dott. Ing. Mario Andreoli & C.sas*, R-67/67, [1984], ECR 02999, 3009; Cf. *Buntscheck*, Konzernprivileg, 47.

²⁶⁴ Cf. *Buntscheck*, Konzernprivileg, 47. This did not stop the Commission from repeatedly citing this assessment in subsequent cases dealing with the existence of corporate groups under Art 101 (1) TFEU. See e.g. Commission of 21.12.1988, IV/30.979, *Decca Navigator System*, [1989], OJ Nr. L 43, 27, 39, para 82; and Commission of 21.12.1988, IV/31. 865, *PVC*, [1989], OJ Nr. L 74 of 17.3.1989, 21, 35, para. 49.

²⁶⁵ See Opinion of the AG in C-170/83, *Hydrotherm Gerätebau GmbH vs. Compact de Dott. Ing. Mario Andreoli & C.sas*, [1984] ECR 2999, 3024.

²⁶⁶ Opinion of the AG in C-170/83, *Hydrotherm Gerätebau GmbH vs. Compact de Dott. Ing. Mario Andreoli & C.sas*, [1984] ECR 2999, 3024.

²⁶⁷ See Opinion of the AG in C-170/83, *Hydrotherm Gerätebau GmbH vs. Compact de Dott. Ing. Mario Andreoli & C.sas*, [1984] ECR 2999, 3025.

*“In competition law, the term ‘undertaking’ must be understood as designating an economic unit for the purpose of the subject-matter of the agreement in question, even if in law that economic unit consists of several persons, natural or legal.”*²⁶⁸

The Court then went on to determine the preconditions of such an ‘economic entity’. An ‘economic entity’ was particularly seen to exist where the affiliated undertakings had identical interests and were controlled by the same legal or natural person. The Court held that in those circumstances competition between them was impossible.

Because the aspect of a ‘common interest’ of the members of a corporate group is an essential element of every corporate group, it seems astonishing that the ECJ drew on this fact in order to determine a subsidiary’s lacking ‘economic dependence’ despite its corporate affiliation. The new reference to the term of an ‘undertaking’ in determining the exemption of corporate groups from Art 101 (1) TFEU is furthermore constitutive for the Court’s temptation to formulate an all-encompassing concept of a ‘single economic entity’.²⁶⁹

§ 2. Corinne Bodson vs. SA Pompes Funèbres des Régions Libérées

In the case of **Corinne Bodson vs. SA Pompes funèbres des régions libérées**²⁷⁰ the Court was called to decide on the legal conferment of exclusive concession rights to an undertaking named *Pompes Funèbres Générales* by French communes.²⁷¹ The Court was asked to rule on the compliance of this exclusive assignment for the provision of certain funeral services with principles of Community law, respectively with Articles 31, 81, 82 and 86 of the Treaty. This question had arisen due to a dispute between one of *Générale*’s subsidiaries, *Pompes funèbres des Régions Libérées SA* [hereinafter PFRL] and Ms. *Corinne Bodson*, who had engaged in certain services, also forming part of the legally defined ‘external services’ for funerals by French law.

Upon the demand of the French ‘Cour de Cassation’ the Court held that Art 101 (1) TFEU applied to agreements “*between undertakings*”, and “*not to contracts for concession concluded between communes acting in their capacity as public authorities and undertakings entrusted with the operation of a public service*”.²⁷² The Court declared that it was for the national authorities to decide on this differentiation.

In regard to the applicability of Art 101 (1) TFEU between owners of the concession belonging to the same corporate group, the Court reminded of the fact that:

“the provision is not concerned with agreements or concerted practices between undertakings belonging to the same concern and having the status of parent company and subsidiary, if the undertakings form an economic unit within which the subsidiary has no real freedom to determine

²⁶⁸ See ECJ of 12.7.1984, C-170/83, *Hydrotherm Gerätebau GmbH vs. Compact de Dott. Ing. Mario Andreoli & C.sas*, [1984] ECR 2999, para. 11.

²⁶⁹ Cf. *Buntscheck*, Konzernprivileg, 48; and *Kling*, Die Haftung der Konzernmutter, WRP 4/2010, 505 (515).

²⁷⁰ ECJ of 4.5.1988, C-30/87, *Corinne Bodson vs. SA Pompes funèbres des régions libérées*, [1988] ECR 2479.

²⁷¹ Cf. *Buntscheck*, Konzernprivileg, 49.

²⁷² ECJ of 4.5.1988, C-30/87, *Corinne Bodson vs. SA Pompes funèbres des régions libérées*, [1988] ECR 2479, para. 18.

its course of action on the market, and if the agreements or practices are concerned merely with the internal allocation of tasks between the undertakings".²⁷³

This assertion, though not new in substance, demonstrates that the ECJ attempted to maintain a certain consistency in its case-law, by drawing once more on the disputed precondition of an 'internal allocation of tasks'.²⁷⁴ Nevertheless, the Court then appropriately stated that the mere fact that the holders of the concession belonged to the same corporate group could not already be decisive for exempting their conduct from Art 101 (1) TFEU. Rather, this was seen to depend on the specific *nature* of their relationship.²⁷⁵ Even though this ruling of the Court constituted a noteworthy reference to the requirement of a certain level of integration for the application of a 'single economic entity', the Court refrained from a substantiation of this fact in the concrete case. In particular, the Court held that it was not apparent that the undertakings in question pursued the same market strategy under the aegis of their common parent company.²⁷⁶ Apart from this additional qualification of a single 'economic entity', the judgment's programmatic wording and its concise reference to 'previous decisions' did not provide a concluding assessment of this concept.²⁷⁷

2.1.2.2. The Decision of Viho Constituting the Status Quo of European Case Law on Intra-group Agreements

The final decisive ruling on the application of the so-called 'group- or concern-privilege' followed in the much cited case of ***Viho Europe BV vs. Commission of the European Communities***.²⁷⁸ In his Opinion, Advocate General *Otto Lenz* already indicated that this case would give the Court of Justice "*an opportunity to expand its case-law concerning the applicability of the competition rules - in particular Article 101 (1) TFEU - to agreements or concerted practices by undertakings within a group of companies*".²⁷⁹

The basic facts of the case can be summarized in the following way: An undertaking of the name *Parker Pen Ltd.* (hereinafter '*Parker*'), incorporated under British law, manufactured writing utensils, which it sold on the European market on the one side by the means of its wholly owned

²⁷³ ECJ of 4.5.1988, C-30/87, *Corinne Bodson vs. SA Pompes funèbres des régions libérées*, [1988] ECR 2479, para. 19.

²⁷⁴ See also ECJ of 22.10.1986, C-75/84, *Metro SB-Großmärkte GmbH & Co. KG vs. Commission ("Metro")*, [1986] ECR 3094, referring to the Group Exemption Regulation under Art 101 (3) and Art 101 (1) as in '*Hydrotherm*'.

²⁷⁵ Cf. ECJ of 4.5.1988, C-30/87, *Corinne Bodson vs. SA Pompes funèbres des régions libérées*, [1988] ECR 2479, para. 20.

²⁷⁶ This reference of a 'common marketing strategy' by the Court for the assessment of a 'single economic entity' has been ascertained to indicate that a form of 'factual influence' was required for the application of this concept. Cf. *Buntscheck*, Konzernprivileg, 50, and in detail under 3.1.

²⁷⁷ Cf. General Advocate *Lenz* in his concluding remarks in the case of '*Viho*' [ECJ of 24.10.1996, C-73/95-*Viho Europe BV vs. Commission of the European Community*, [1996] ECR I-5457, 5472 para. 50].

²⁷⁸ ECJ of 24.10.1996, C-73/95, *Viho Europe BV vs. Commission of the European Community*, [1996] ECR I-5457, 5472.

²⁷⁹ ECJ of 24.10.1996, C-73/95, *Viho Europe BV vs. Commission of the European Community*, [1996] ECR I-5457, para. 1.

subsidiaries, and on the other hand side by drawing on independent distributors.²⁸⁰ An area team consisting of three directors, one of whom was also a member of the parent company's executive board, controlled the sale and marketing of its products. Upon a customer's request for supply, it was habitually referred to the subsidiary company situated in its own state of residence or establishment.²⁸¹

The appellant of the case was a Dutch company called *Viho Europe BV* (hereinafter '*Viho*'), which had unsuccessfully attempted to enter the market by obtaining *Parker's* products on the same terms as the latter's subsidiary companies and independent distributors. In the two administrative procedures that followed, the Commission was primarily asked to decide upon the agreements between *Parker* and its independent distributors. The Commission concluded its assessment in finding that *Parker* and the *Herlitz AG*, one of these distributors, had infringed Art 101 (1) TFEU and imposed a fine on both companies.²⁸²

The appellant's second assertion, however, in which *Viho* claimed *Parker's* distribution policy of restricting its subsidiaries to the supply of a specific geographic territory to be incompatible with Art 101 (1) TFEU, was rejected by the Commission. By referring to pertinent case law of the European Court of Justice, the Commission denied the application of the cartel ban to *Parker's* subsidial distribution system arguing that these companies formed a 'single economic unit' in which the subsidiaries possess no autonomy to independently determine their course of action on the market. The Commission particularly found this to be the case "*because the assignment of a specific distribution area to each of the subsidiaries was within the bounds of what could normally be regarded as necessary for the purpose of the proper allocation of tasks within a group*".²⁸³

This constitutes an obvious modification of the view the Commission had still adopted in its advisory opinion in the case of *Centrafarm*.²⁸⁴ In this case, the Commission had introduced the precondition of an 'internal allocation of tasks' for the purpose of delineating the market conduct between undertakings of a corporate group towards the position of third parties.²⁸⁵

In its appeal, the company of *Viho* had still relied on this element, bringing forward that the mere possibility of the parent company to control its subsidiaries could not automatically entail that any agreement between them served the purpose of an 'internal allocation of tasks'.²⁸⁶

Therefore the company of *Viho* had claimed that '*Parker*' was to be prohibited from restricting its subsidiaries to a certain territory of the common market and to provide other market participants with its products upon the same conditions as its subsidiaries or

²⁸⁰ Cf. ECJ of 24.10.1996, C-73/95, *Viho Europe BV vs. Commission of the European Community*, [1996] ECR I-5457, para. 4.

²⁸¹ Cf. ECJ of 24.10.1996, C-73/95, *Viho Europe BV vs. Commission of the European Community*, [1996] ECR I-5457, para. 6.

²⁸² The actions brought by '*Parker*' and '*Herlitz AG*' were dismissed in substance by the Court of First Instance on 14.7.1994, (See ECJ of 24.10.1996, C-73/95, *Viho Europe BV vs. Commission of the European Community* [1996] ECR I-5457, para. 8).

²⁸³ ECJ of 24.10.1996, C-73/95, *Viho Europe BV vs. Commission of the European Community*, [1996] ECR I-5457, para. 10.

²⁸⁴ Cf. *Buntscheck*, Konzernprivileg, 53.

²⁸⁵ See Case C-15/74 *Centrafarm I*, [1974] ECR 1147, 1160; and *Centrafarm II*, [1974] ECR 1183, 1192.

²⁸⁶ ECJ of 24.10.1996, C-73/95, *Viho Europe BV vs. Commission of the European Community*, [1996] ECR I-5457, para. 35.

independent distributors.²⁸⁷ Claiming that the Commission's decision was inconsistent with its previous opinion on the matter, *Viho* appealed to the European Court of Justice.

In its judgment of 12 January 1995, the **Court of First Instance** nevertheless dismissed the applicant's claim in its entirety, stating that Art 101 (1) TFEU was not applicable to concerted action between companies of a corporate group, in case those undertakings form "*one economic unit within which the subsidiaries do not enjoy real autonomy in determining their course of action on the market*".²⁸⁸

The CFI then referred to the ECJ's decision in the case of *Hydrotherm*,²⁸⁹ and its own judgment in the case of *Shell*,²⁹⁰ from which it deduced that "*unified conduct on 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*".²⁹¹

It is important to note however, that the case of *Shell* concerned the essentially distinct issue of an attribution of conduct between different companies of a corporate group. This already denotes the CFI's increasing tendency to understand the term of a 'single economic entity' as an all-encompassing legal concept in European competition law.

The Court of First Instance concluded its judgment by stating:

"It follows that, where there is no agreement between economically independent entities, relations within an economic unit cannot amount to an agreement or concerted practice between the undertakings which restricts competition within the meaning of [Art 101 (1)]²⁹² of the Treaty. Where, as in this case, the subsidiary although having a separate legal personality, does not freely determine its conduct on the market, but carries out the instructions given to it directly or indirectly by the parent company by which it is wholly controlled, [Art 101 (1)] does not apply to the relationship between the subsidiary and the parent company with which it forms an economic unit".²⁹³

This means that even though the CFI recognized the conduct of '*Parker*' to primarily be incompatible with the principles of the common market, it attributed the freedom of the latter to independently structure its distribution policy priority over these principles. Furthermore, it is interesting to note that the CFI ascertained the Treaty provisions to be in need of further interpretation in this regard. This may be deduced from its assertion that it was "*not for the Court, [...], to apply Art 101 (1) TFEU to circumstances for which it is not intended in order to fill a gap which may exist in the system of regulation laid down by the Treaty*".²⁹⁴

²⁸⁷ See ECJ of 24.10.1996, C-73/95, *Viho Europe BV vs. Commission of the European Community*, [1996] ECR I-5457, para. 11.

²⁸⁸ ECJ of 24.10.1996, C-73/95, *Viho Europe BV vs. Commission of the European Community*, [1996] ECR I-5457, para. 49.

²⁸⁹ ECJ of 12.7.1984, C-170/83, *Hydrotherm Gerätebau GmbH vs. Compact de Dott. Ing. Mario Andreoli & C.sas*, [1984] ECR 2999.

²⁹⁰ See CFI of 10.3.1992, Case T-11/89, *Shell vs. Commission*, [1992] ECR II-757, para. 311.

²⁹¹ ECJ of 24.10.1996, C-73/95, *Viho Europe BV vs. Commission of the European Community*, [1996] ECR I-5457, para. 50.

²⁹² Ex Art 85 (1).

²⁹³ ECJ of 24.10.1996, C-73/95, *Viho Europe BV vs. Commission of the European Community*, [1996] ECR I-5457, para 51.

²⁹⁴ ECJ of 24.10.1996, C-73/95, *Viho Europe BV vs. Commission of the European Community*, [1996] ECR I-5457, para. 54.

In emphasizing the essential criterion of an ‘economic entity’ to be based on a parent company’s exertion of economic ‘control’, the Court concluded its assessment by stating that the conduct of *Parker* and its subsidiaries could thus not constitute a ‘distortion to competition’.

In its assessment of the case, the European Court of Justice principally followed the Commission’s approach of differentiating between the relation of *Parker Pen* and its independent retailers and the relation towards its wholly-owned subsidiaries. Regarding the appellant’s assertion that the conduct between companies of the same corporate group could not preclude the application of Art 101 (1) TFEU, the Court held that:

“[15] It should be noted, first of all, that it is established that Parker holds 100% of the shares of its subsidiaries in Germany, Belgium, Spain and the Netherlands and that the sales and marketing activities of its subsidiaries are directed by an area team appointed by the parent company and which controls, in particular, sales targets, gross margins, sales costs, cash flow and stocks. The area team also lays down the range of products to be sold, monitors advertising, and issues directives concerning prices and discounts.

*[16] Parker and its subsidiaries thus form a single economic unit within which the subsidiaries do not enjoy real autonomy in determining their course of action on the market, but carry out the instructions issued to them by the parent company controlling them”.*²⁹⁵

The Court went on to state that in these circumstances, *Parker’s* conduct, essentially existing in the partitioning and the foreclosure of national markets between its subsidiaries, could not lead to the application of Art 101 (1) TFEU, regardless of the capability of this conduct to affect the competitive position of third parties. It nevertheless clarified that such a form of unilateral conduct could fall under Art 102 of the Treaty, where the preconditions for its application were fulfilled.²⁹⁶ It concluded by stating that the Court of First Instance had therefore been “*fully entitled to base its decision solely on the existence of a single economic unit in order to rule out the application of [Art 101 (1) TFEU] to the Parker group*”.²⁹⁷

In its emphasis on the parent corporation’s *instruction* in the concrete case, the Court reinforced the discussion around the necessity of the parent company’s degree of control in order to justifiably rely on the ‘group’, or ‘concern-privilege’.²⁹⁸ It nevertheless clarified that the aspect of an ‘internal allocation of tasks’ could not constitute a precondition for the latter concept in regard to the purpose of Art 101 (1) TFEU, namely to protect a company’s economic autonomy.²⁹⁹

²⁹⁵ ECJ of 24.10.1996, C-73/95, *Viho Europe BV vs. Commission of the European Community*, [1996] ECR I-5457, paras. 15-16. (Citing Case 48/69, *ICI vs. EC Commission*, [1972] ECR 619, paras. 133 and 134; Case 15/74, *Centrafarm vs. Sterling Drug*, [1974] ECR 1147, para. 41; Case 16/74 *Centrafarm vs. Winthrop* [1974] ECR 1182, para. 32; Case 30/87 *Bodson vs. Pompes Funèbres* [1988] ECR 2479, para. 19, and Case 66/86, *Ahmed Saeed Flugreisen and others vs. Zentrale zur Bekämpfung unlauteren Wettbewerbs*, [1989] ECR 803, para. 35).

²⁹⁶ Because the applicant had nevertheless not “*supplemented its legal argumentation*” with facts in support of an infringement of the latter norm, the Court dismissed the applicants appeal in its entirety.

²⁹⁷ See ECJ of 24.10.1996, C-73/95, *Viho Europe BV vs. Commission of the European Community*, [1996] ECR I-5457, para 18.

²⁹⁸ Cf. *Buntscheck*, Konzernprivileg, 56; In detail, see 3.1.1.3., § 3.3.

²⁹⁹ Cf. *Micklitz*, EuGH EWIR Art 85 EGV 1/97, 219, 220, para. 3; *Pohlmann*, EuG, EWIR Art 85 EGV 1/96, 307, 308, para. 3.

Even though the Court avoided a direct reference to the term of ‘an undertaking’, the strong emphasis of a ‘a single economic unit’ between the companies of the *Parker Pen* group indicate that the Court had well considered the approach increasingly favoured by the Commission and the CFI of equalizing economic units with the term of ‘an undertaking’.³⁰⁰ In its following analysis, however, the Court explicitly left open whether the concept of an ‘economic entity’ in European antitrust law derived from the necessity of treating corporate groups differently than an undertaking in the juridical sense, or whether it implied a structural understanding of this term under Art 101 (1) TFEU.³⁰¹

In this context, attention should be drawn to the statement of Advocate General *Lenz*, who attributed a ‘distinct significance’ to the concept of a ‘single economic entity’.³⁰² Citing the decisions of ‘*ICI*’³⁰³, ‘*Ahmed Saeed Flugreisen*’³⁰⁴ and ‘*Hydrotherm*’³⁰⁵ the Advocate General underlined the distinction between Art 101 and 102 TFEU for the determination of group-internal conduct towards the position of third parties. Since these cases nevertheless concerned the specific issues of the Block-exemption Regulation and the attribution of conduct, he went on to state that they did not have “*any great conclusive force for the purpose of this decision*”.³⁰⁶ The Advocate General reasoned that the judgment of these cases could therefore not be drawn on to assess whether agreements between undertakings of a corporate group had infringed Art 101 (1) TFEU.³⁰⁷

The Advocate General then paved the grounds for the ECJ’s rejection of the precondition of an ‘internal allocation of tasks’, but interestingly argued for a restriction of this view to wholly owned subsidiaries.³⁰⁸ Referring to the fact that Art 101 (1) TFEU does not protect competition in an absolute manner,³⁰⁹ the Advocate General consequently emphasized that Art 101 (1) TFEU was only applicable to “*agreements between undertakings, decisions by associations of undertakings and concerted practices [...] which have as their object or effect the restriction of competition*”.³¹⁰

He went on arguing that such agreements or concerted practices presuppose a ‘concurrence of wills’ between two or more independent undertakings. Since the Treaty provisions nevertheless demand a purely economic approach, this could not be the case for agreements between a

³⁰⁰ Cf. *Buntscheck*, Konzernprivileg, 56.

³⁰¹ In detail, see 3.1.

³⁰² See Opinion of the AG in Case C-73/95, *Viho Europe BV vs. Commission of the European Community*, [1996] ECR I-5457, CMLR [1997] 4, 435, hereby referring to Advocate General *Tribucchi*’s Opinion in the case of ‘*Centrafarm*’ (Case 15/74, *Centrafarm I*, [1974] ECR 1147).

³⁰³ ECJ of 14.7.1972, Case 48/69, *Imperial Chemical Industries Ltd. vs. Commission of the European Community*, [1972] ECR 619, in detail, see below under 3.1.

³⁰⁴ ECJ of 11.4.1989, C-66/86, *Ahmed Saeed Flugreisen and others vs. Zentrale zur Bekämpfung unlauteren Wettbewerbs*, [1989] ECR 803, in detail, see below under 3.1.

³⁰⁵ ECJ of 12.7.1984, C-170/83, *Hydrotherm Gerätebau GmbH vs. Compact de Dott. Ing. Mario Andreoli & C.sas*, [1984] ECR 2999.

³⁰⁶ Opinion of the AG in, C-73/95, *Viho Europe BV vs. Commission of the European Community*, [1996] ECR I-5457, CMLR [1997] 4, 435.

³⁰⁷ Cf. Opinion of the AG in, C-73/95, *Viho Europe BV vs. Commission of the European Community*, [1996] ECR I-5457, CMLR [1997] 4, 436.

³⁰⁸ ECJ of 24.10.1996, C-73/95, *Viho Europe BV vs. Commission of the European Community*, [1996] ECR I-5457, para. 61; *Micklitz*, EuGH, EWiR Art 85 EGV 1/97, 219, 220, para. 3.

³⁰⁹ In detail, see 2.2.1. § 1.3.

³¹⁰ ECJ of 24.10.1996, C-73/95, *Viho Europe BV vs. Commission of the European Community*, [1996] ECR I-5457, para. 66.

parent and a subsidiary company.³¹¹ The General Advocate concluded his assessment in stating that for the specific relation of legally separate undertakings, no competition worth protecting existed.

Even though the Advocate General's assessment did not contain a final statement on the question of whether a parent's *mere possibility* to control its subsidiary was sufficient for the application of the so called 'group-privilege',³¹² the Advocate General clearly stepped in for the necessity of considering the specific objectives of competition law when applying Art 101 (1) TFEU.

Due to the fact that the scope of the 'group'-, or 'concern privilege' was seen to be limited by such an economic point of view, the Advocate General argued for the adoption of a consistent 'legal method' in order to determine the existence of a 'single economic entity'. This was deemed indispensable for producing 'reasonable and appropriate results' for the assessment of a specific case.³¹³

Regarding the appellant's concern that this approach could induce undertakings to avoid the application of the antitrust provisions by artificially dividing their market conduct through several subsidiary companies, the Advocate General explained that the result of such a distribution policy could well be achieved by other means. For the marketing of their products, the respective companies could, for instance, engage business premises without a separate legal personality.³¹⁴ Finally, he revised the delineation of Art 101 and Art 102 TFEU in stating that it was not disputed that the conduct of 'affiliated undertakings' was principally subject to a review under Art 102 TFEU.

Though the judgment has not cleared all questions on the matter of group-intern agreements,³¹⁵ it constitutes an important orientation for the principle scope of Art 101 (1) TFEU in the light of corporate affiliations. Given the remaining ambivalence of the concept of a 'single economic entity' in European competition law, the Advocate General's request for a consistent legal method must be approved of.

2.2. The Concept of a 'Single Economic Entity' and the Attribution of Antitrust Responsibility

The concept of a 'single economic entity' not only comprises the assessment of group-intern agreements, but is furthermore decisive for the attribution of conduct and liability between undertakings of a corporate group. The European institutions, as I have tried to show, have not always kept the two different uses of the term apart. Sometimes they have cited decisions relevant for the former issue to support rulings on the attribution of conduct and liability without a precise distinction on the different legal problems underlying these two issues of assessment. The accuracy of this practice should therefore be ascertained in more detail.

³¹¹ ECJ of 24.10.1996, C-73/95, *Viho Europe BV vs. Commission of the European Community*, [1996] ECR I-5457, para. 67.

³¹² Sporadic remarks of the Advocate nevertheless indicate that he regarded the (actual) exertion of control as the essential feature for the application of the 'group- or concern' privilege. Cf. *Buntscheck*, Konzernprivileg, 58.

³¹³ ECJ of 24.10.1996, C-73/95, *Viho Europe BV vs. Commission of the European Community*, [1996] ECR I-5457, para. 68.

³¹⁴ ECJ of 24.10.1996, C-73/95, *Viho Europe BV vs. Commission of the European Community*, [1996] ECR I-5457, para. 69.

³¹⁵ For an assessment of the remaining inconsistencies, see 3.1.

2.2.1. The Employment of the Concept of a 'Single Economic Entity' for the Issue of Attributing Conduct between Companies of a Corporate Group

As mentioned above, the concept of a 'single economic entity' constitutes a 'blanket term,' which requires to be substantiated by an interpretation of the conditions of its application.³¹⁶ For specifying its appropriate use in practice, it is therefore essential to reflect on the underlying legal preconditions of its employment in previous adjudication. This also requires a discussion of the cases in which it has been applied in the context of an attribution of conduct between affiliated companies.

Interestingly, the application of the 'single economic entity'- doctrine to this specific problem has undergone a considerable evolution in practice. While it originally had been employed to expand the territorial application range of Community law by holding foreign parent companies liable for their subsidiary's anticompetitive conduct within the common market,³¹⁷ it was subsequently applied to situations in which 'practical hindrances' prevented an enforcement of the fine against the subsidiary.³¹⁸ Initially, the Commission hereby pursued the aim of preventing companies from eluding the competition provisions by a corporate reorganization of the firm.³¹⁹ Recently, however, the concept of a 'single economic entity' seems to have turned into an instrument for attributing liability on the basis of mere structural relations between companies of a corporate group.

Hereby, the Commission has not hesitated to hold companies liable upon mere shareholding criteria. This arguably strict approach to antitrust liability, which has recently also been confirmed by the ECJ,³²⁰ has led to substantial criticism in practice. After outlining the development of this practice upon previous adjudication, the reasons for the questionability of this approach will be outlined in regard to pertinent legal principles.³²¹

2.2.1.1. The Development of this Practice in European Competition Law

§1. Imperial Chemical Industries Ltd. and Others

The ECJ's ruling in the *Dye-stuffs* case³²² constitutes the first in which the Court explicitly formulated certain principles for attributing conduct between companies of a corporate group in

³¹⁶ Cf. *Pohlmann*, Unternehmensverbund, 75. On the principle appropriateness of the use of this term in regard to the Merger Regulation see e.g. *Fischer*, Wettbewerbsliche Einheit und Fusionskontrolle, (1986), 184 ff.

³¹⁷ See *Emmerich*, in: Immenga/Mestmäcker EG-Wettbewerbsrecht, Art 81 (1), para. 55.

³¹⁸ Most cases hereby involved a firm's insolvency. See e.g. *Wils*, The Optimal Enforcement of EC Antitrust Law, 176 f.

³¹⁹ On the appropriateness of this practice, see 3.1.1.3., § 3.3 below.

³²⁰ See ECJ of 10.9.2009, C-97/08P, *Akzo Nobel vs. Commission*, [2009] ECR I-08237.

³²¹ The discussion of the ECJ's case-law further helps to denote possible inconsistencies or even contradictions of this doctrine in practice.

³²² IV/26.267, *Dyestuffs*, [1969] OJ Nr. L 195/11.

reference to the concept of a 'single economic unit'.³²³ Grounds for the judgment had been an action for annulment by several companies, which had been found guilty of anticompetitive practices in the dyestuff sector. This conduct was assessed to lead to uniform price increases for these products between the years 1964 and 1967.

The British undertaking of *Imperial Chemical Industries Ltd.* (hereinafter 'ICI'), objected to the Commission's ruling by asserting that it had neither been actively engaged in the Common Market itself, nor had its place of business in this area. It retorted to the Commission's appeal by stating that it had supplied and governed its subsidiaries in the Community under contracts subjected to English law.³²⁴

Likewise, the undertakings of *Geigy* and *Sandoz*, which had also been accused for taking part in the antitrust infringement by the means of their subsidiary companies, opposed the Commission's decision asserting furthermore that the latter's finding contravened the principles of international law. Hereby, the companies invoked the so-called 'effects'-doctrine,³²⁵ which required not only a 'substantial effect' of their conduct on the territory of the Common Market, but furthermore a 'reasonable link' between this behavior and any distortion to competition in this area.³²⁶

In its decision, the Commission based its justification for fining the foreign parent companies on two considerations:³²⁷

On the one hand side, it ascertained that the existence of concerted practice had been proven with regard to the various producers and not with regard to their subsidiaries for the reason that "*the orders to make the increases sent to the latter were imperative*".³²⁸ The Commission went on to state that even in the case that the subsidiaries had been able to freely determine their prices on the market, it would have been impossible for them to realize the respective price increase without passing on at least a large part to consumers. Consequently, the subsidiaries were assessed to constitute mere instruments of their parent companies' business conduct, which could consequently be made responsible for the respective price increases.³²⁹

On the other hand, the Commission based its assessment on the fact that:

"under Art 101 (1) TFEU [ex Art 85 (1)], all agreements between undertakings, all decisions by associations of undertakings and all concerted practices which may affect trade between member-States, and the object or effect of which is to prevent, restrict or distort competition within the Common Market shall be prohibited as incompatible with the Common Market".³³⁰

Because of the above-mentioned effects of the undertaking's conduct on competition in the internal market, the Commission found that there was "*no need to examine whether the*

³²³ ECJ of 14.7.1972, C-48/69, *Imperial Chemical Industries Ltd. vs. Commission of the European Community*, [1972] ECR 619, CMLR, [1972] Vol II, 594.

³²⁴ ECJ of 14.7.1972, C-48/69, *Imperial Chemical Industries Ltd. vs. Commission of the European Community*, [1972] ECR 619, CMLR, [1972] Vol II, 625 f.

³²⁵ Assessed in detail under 4.2.1. below.

³²⁶ ECJ of 14.7.1972, C-48/69, *Imperial Chemical Industries Ltd. vs. Commission of the European Community*, [1972] ECR 619, CMLR, [1972] Vol II, 595.

³²⁷ Cf. *Buntscheck*, Konzernprivileg, 60.

³²⁸ IV/26.267, *Dyestuffs*, [1969] OJ Nr. L 195/11, para. 11.

³²⁹ IV/26.267, *Dyestuffs*, [1969] OJ Nr. L 195/11, *ibid.*

³³⁰ IV/26.267, *Dyestuffs*, [1969] OJ Nr. L 195/11, para. 28.

undertakings which are the cause of these restrictions of competition have their place of business within or outside the Community".³³¹

This assessment shows that the Commission had primarily based its decision on the issuance of an illicit instruction by their common parent companies. Hereby, it regarded their wholly owned subsidiaries as part of the 'internal sphere' of the respective undertakings.³³² According to the Commission, *ICI* and its subsidiaries constituted an 'economic unit', because the parent company was able to restrict the latter's corporate independence. It is interesting to note that the Commission found the parent companies to have therefore participated in the concerted practices by at least *negligently* infringing Art 101 (1) TFEU. The Commission referred to this aspect by explaining that ignorance to European competition law could not lead to impunity.³³³ In regard to the companies' objection to the jurisdiction of the Commission the **European Court of Justice** held that:

"[126] In a case of concerted practice, it is first necessary to ascertain whether the behavior of the applicant manifested itself in the Common Market.

[127] It follows from what has been said that the increases in question took effect in the Common Market and concerned competition between manufacturers operating therein".³³⁴

From this the ECJ deduced that the actions for which the fines had been imposed "*constitute practices carried on directly within the Common Market*".³³⁵

According to the Court, this was due to the fact that *ICI* had made use of its power of direction over its subsidiaries in order to ensure the application of its decision, namely to raise prices in this area.

In this way, the Court avoided a concrete statement on the conflict between the 'principle of territoriality' and the so-called 'effects'- doctrine' for the extension of the Commission's jurisdiction to undertakings incorporated in third countries.³³⁶

In subsequent decisions, however, the ECJ notably did refer to the *effects* of anticompetitive conduct in the area of the Common Market, but supplemented this criterion by the precondition of its direct *enforcement* within the latter.³³⁷ Even though the ECJ had not yet endorsed this approach in the concrete case, a reference to this last condition can already be perceived in the Court's emphasizing that the parent companies had administered their decision in the Common Market by the means of their wholly-owned subsidiaries.

By clarifying that the conduct in question had directly taken place within the Community, the Court seemed to disregard the 'effects'-doctrine and instead rely upon the actual exertion of control by the foreign parent companies.

In light of the applicant's objection that this behavior could only be attributed to the individual subsidiaries the Court substantiated this position, clarifying [*that*]:

³³¹ IV/26.267, *Dyestuffs*, [1969] OJ Nr. L 195/11, *ibid*.

³³² IV/26.267, *Dyestuffs*, [1969] OJ Nr. L 195/11, para. 29.

³³³ Arg. - „The conditions for applying Art 15 (2) of Regulation 17 are consequently met", IV/26.267, *Dyestuffs*, [1969] OJ Nr. L 195/11, para. 21.

³³⁴ ECJ of 14.7.1972, Case 48/69, *Imperial Chemical Industries Ltd. vs. Commission of the European Community*, [1972] ECR 619, CMLR, [1972] Vol II, 628.

³³⁵ ECJ of 14.7.1972, Case 48/69, *Imperial Chemical Industries Ltd. vs. Commission of the European Community*, [1972] ECR 619, CMLR, [1972] Vol II, *ibid*.

³³⁶ Cf. *Rehbinder* in: Immenga/Mestmäcker, EG-Wettbewerbsrecht, Einleitung: Geltungs-und Anwendungsbereich, para. 56.

³³⁷ Cf. *Rehbinder*, *ibid*.

“[132] the fact that the subsidiary has a distinct legal personality does not suffice to dispose of the possibility that its behavior might be imputed to the parent company.

[133] Such may be the case in particular when the subsidiary, although having a distinct legal personality, does not determine its behavior on the market in an autonomous manner but essentially carries out the instructions given to it by the parent company.”³³⁸

By referring to its initial decision on the ‘single economic entity’ doctrine,³³⁹ the Court went on to ascertain that:

“[135] in view of the unity of the group thus formed, the activities of the subsidiaries may, in certain circumstances, be imputed to the parent company”.³⁴⁰

The existence of an ‘economic unit’ was thus based on the fact that *ICI* had influenced its subsidiaries’ business conduct in a *decisive* manner. This was demonstrated by *ICI*’s factual exertion of ‘control’ by the issuance of a binding instruction, which consequently led to three substantial price increases of the products in question.

With respect to this assessment of a ‘single economic entity’ it has sometimes been asserted that the Court attempted to judge the attribution of conduct between group companies upon the same principles as exempting agreements between them from the application scope of Art 101 (1) TFEU.³⁴¹

In regard to the undertakings of *Sandoz and Geigy* the Court first acknowledged that in consideration of the differences of opinions on the principle of jurisdiction, the applicant had been entitled to assume that the Commission was not competent to take action against and had consequently made an excusable mistake, by stating that *“any infringement of [Art 101 (1)] were not imputable to an offence on its part”*.³⁴²

At the bottom line, however, the Court confirmed the Commission’s decision, holding that:

“[51] It appears from the examination of the submission concerning the jurisdiction of the Commission that jurisdiction is based not only on the effects arising from a course of conduct pursued outside the Community, but also on an activity pursued within the Common Market and imputable to the applicant.”³⁴³

This last statement reinforces the Court’s view of extending the Commission’s jurisdiction not solely on the basis of the ‘effects’-doctrine, but by the means of holding (foreign) parent companies liable by imputing to them their affiliates’ conduct.³⁴⁴

³³⁸ ECJ of 25.11.1971, C-22/71, *Béguelin Import Co. vs. S.A.G.L. Import Export* [1971], ECR 949.

³³⁹ ECJ of 25.11.1971, C-22/71, *Béguelin Import Co. vs. S.A.G.L. Import Export* [1971], ECR 949.

³⁴⁰ ECJ of 14.7.1972, C-48/69, *Imperial Chemical Industries Ltd. vs. Commission of the European Community*, [1972] ECR 619.

³⁴¹ Cf. *Buntscheck*, Konzernprivileg, 62.

³⁴² See ECJ of 14.7.1972, C-52/69, *J.R. Geigy AG vs. Commission of the European Community*, [1972] ECR 787, para. 50.

³⁴³ ECJ of 14.7.1972, C-48/69, *Imperial Chemical Industries Ltd. vs. Commission of the European Community*, [1972] ECR 619.

³⁴⁴ In detail, see 4.2 of this thesis.

§ 2. Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents

In the case of *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents vs. EC Commission*³⁴⁵ it was essentially debated whether the concept of a 'single economic entity' could also be employed for the attribution of shares and conduct of a European subsidiary to its foreign parent company under Article 102 TFEU. Dealing with this preliminary question was necessary for determining whether the foreign parent company was in a dominant position in the area of the Common Market and whether it accordingly abused this position towards third parties on this market.

Commercial Solvents Corp. [hereinafter '*Commercial Solvents*'], a company incorporated under the law of the State of Maryland and having its principal office in the city of New York, was the producer of a specific pharmaceutical product called 'aminobutanol',³⁴⁶ employed as a remedy against tuberculosis.³⁴⁷

In 1962, *Commercial Solvents* acquired 51 % of the voting stock of an Italian company named *Istituto* and a 50 % representation on the company's executive committee. Until 1970, *Istituto* acted as a reseller of this product, produced by *Commercial Solvents* in the United States, and provided, amongst others, the Italian business *Laboratorio Chimico Farmaceutico Giorgio Zoja S.p.A.* [hereinafter '*Zoja*'] with these products.³⁴⁸

At the end of the year 1962, however, *Commercial Solvents Corp.* decided that it would no longer distribute this product in the area of the Common Market and thus informed *Istituto* that it would exclusively supply it with 'dextro-aminobutanol', a basic product of a higher level of production. Accordingly, *Istituto* rejected an order for the previous product by *Zoja*, referring the latter to the business policy of its American parent company.

As *Zoja* failed to obtain the product from other producers since *Commercial Solvents* had not only been the sole producer, but had additionally imposed an export ban on its purchasers outside the Common Market, it appealed to the European Commission, alleging that the American company was abusing its dominant position.

In its initial decision, the Commission found *Commercial Solvents* to have infringed Art 102 TFEU and demanded the continued supply of *Zoja* with the original basic product.³⁴⁹ It held that *Commercial Solvents* and *Istituto* could be seen to constitute a unitary undertaking in regard to the application of Art 102 TFEU, because the former was able to decisively determine the business administration of the latter. This was specifically justified upon the American parent company's majority shareholding and extensive voting rights, enabling it to exert permanent control in this regard. By the means of its voting rights, *Commercial Solvents* was furthermore seen to appoint the *Italian* company's general secretary and to review the latter's balance sheet.³⁵⁰ The precise composition of the subsidiary's board of directors and management was

³⁴⁵ ECJ of 22.1.1974, joined Cases 6 & 7/73, *Istituto Chemioterapico Italiana S.p.A. (hereinafter 'Istituto') and Commercial Solvents vs. Commission of the European Community*, [1974] ECR 223.

³⁴⁶ (A product of the family of nitropanes).

³⁴⁷ Cf. ECJ of 22.1.1974, joined Cases 6 & 7/73, *Istituto Chemioterapico Italiana S.p.A. and Commercial Solvents vs. Commission of the European Community*, [1974], ECR 223, C.M.L.R. [1974] Vol I, 309.

³⁴⁸ Cf. ECJ of 22.1.1974, joined Cases 6 & 7/73, *Istituto Chemioterapico Italiana S.p.A. and Commercial Solvents vs. Commission of the European Community*, [1974], ECR 223, C.M.L.R. [1974] Vol I, 309.

³⁴⁹ Commission Decision of 14.12.1972, IV/26.911, *Zoja/CSC-ICI*, [1972], OJ Nr. L 299/51, 57 – [No English version accessible].

³⁵⁰ IV/26.911, *Zoja/CSC-ICI*, [1972], OJ Nr. L 299/51, 54.

furthermore seen to reveal that *Commercial Solvents* had in fact made use of its capacity to exert a decisive amount of influence.³⁵¹

Commercial Solvents contended the Commission's competence, as well as its dominant position on the Common Market in denying to have possessed such an amount of 'control' over *Istituto* that would enable it to be treated as a 'single undertaking' for the purpose of Art 102 TFEU.³⁵² In citing the Court's previous decisions considering the concept of an 'economic unit', *Commercial Solvents* argued that in order for a parent and a subsidiary to be treated as a 'single undertaking',

*"there must be (a) a power of direction of the parent company over the subsidiary and also (b) the actual exercise of the parents control to such an extent that the subsidiary does not determine its behavior on the market in an autonomous manner, but essentially carries out the instructions given to it by the parent company."*³⁵³

Therefore, *Commercial Solvents* asserted the mere possibility of a company to control its subsidiaries not to be sufficient for the concept's application. Instead, the actual exertion of control to the extent that the subsidiary loses its 'market autonomy' was seen to be required. Accordingly, *Commercial Solvents* and *Istituto* emphasized that their activities on the European market had always taken place independently of each other and that the attribution of conduct and market shares was therefore not admissible.

The European Court of Justice nevertheless held that from the prohibition issued by *Commercial Solvents* in 1970 it could be inferred that the company was not abstaining from exerting its power of control over *Istituto*. Furthermore, it noted that the American company had well taken note of an attempt by *Istituto* to take over the company of *Zoja* by the means of a merger, making it unlikely for it not to have played a part on the final cancelling of this endeavor. Concluding, the Court held that:

"[41] As regards the market in nitropropane and its derivatives the conduct of Commercial Solvents Corp. and Istituto has thus been characterized by an obviously united action, which, taking account of the power of control of Commercial Solvents Corp. over Istituto, confirms the conclusions in the Decision that as regards their relations with Zoja the two companies must be deemed an economic unit and that they are jointly and severally responsible for the conduct complained of. In these circumstances the argument of Commercial Solvents Corp. that it did not do business within the Community and that therefore the Commission lacked competence to apply Regulation No17/63 to it must likewise be rejected".³⁵⁴

Whereas the Court had, up to this point, applied the concept of an 'economic unit' primarily for the assessment of corporate groups under Art 101 (1) TFEU,³⁵⁵ it clarified that this doctrine was

³⁵¹ IV/26.911, *Zoja/CSC-ICI*, [1972], OJ Nr. L 299/51 *ibid*.

³⁵² Cf. ECJ of 22.1.1974, joined Cases 6 & 7/73, *Istituto Chemioterapico Italiana S.p.A. and Commercial Solvents vs. Commission of the European Community*, [1974], ECR 223, C.M.L.R. [1974] Vol I 309, 319.

³⁵³ ECJ of 22.1.1974, joined Cases 6 & 7/73, *Istituto Chemioterapico Italiana S.p.A. and Commercial Solvents vs. Commission of the European Community*, [1974], ECR 223, C.M.L.R. [1974] Vol I 309, 323.

³⁵⁴ ECJ of 22.1.1974, joined Cases 6 & 7/73, *Istituto Chemioterapico Italiana S.p.A. and Commercial Solvents vs. Commission of the European Community*, [1974], ECR 223, C.M.L.R. [1974] Vol I 309, 344.

³⁵⁵ See for instance ECJ of 25.11.1971, Case 22/71, *Béguelin Import Co. vs. S.A.G.L. Import Export*, [1971] ECR 949 and ECJ of 14.7.1972, Case 48/69, *Imperial Chemical Industries Ltd. vs. Commission of the European Community*, [1972] ECR 619.

also relevant for the attribution of market shares in order to determine a company's dominant position on the market. On the basis of this assessment the Court was thus able to

- consider Art 102 TFEU applicable on the foreign parent company by the means of adding the market shares of both companies, and
- to attribute the market-conduct of *Istituto* to its parent company, holding the latter jointly and severally liable for the anticompetitive behavior.³⁵⁶

While the Commission had in essence based its reasoning on the mere possibility of a parent company to control its subsidiary, the Court emphasized the “*united action*” of the undertakings “*as regards their relations with Zoja*.”³⁵⁷ This assessment indicates that the Court regarded the actual exertion of influence as a necessary precondition for the attribution of conduct and market shares.

In emphasizing that the law must be in accord with “*common sense and reality*”, General Advocate *Jean-Pierre Warner* had ascertained that in cases of majority shareholdings, a parent and a subsidiary must always be treated as a ‘single undertaking’ for the purposes of Art 101 and 102 TFEU. According to the Advocate General, this interpretation was due to the fact that in practice subsidiary companies “*regularly act*” in accordance with their parent company’s business policy.

Though the European Court of Justice has not expressly adopted this assessment, it was criticized in literature that European adjudication was ignoring “*legal separation in groups of companies*” and thus circumventing “*traditional strictures customarily prerequisite for veil-lifting*.”³⁵⁸ It is important to point out that the Court’s interpretation of the ‘single economic entity’- doctrine has not been accepted without opposition on an international level.

2.2.1.2. The Concept of an ‘Economic Entity’ Requiring a Certain Level of Corporate Integration: Distinction of the Objectives of Art 101 and Art 102 TFEU

§ 1. Ahmed Saeed Flugreisen & Silver Line Reisebüro GmbH

In the two decisions that followed, the European Court of Justice was called to explicitly decide on whether a group of separate undertakings that had colluded according to Art 101 (1) TFEU could be considered to obtain a dominant position for the scope and content of their agreements under Art 102 TFEU.

In ***Ahmed Saeed Flugreisen*** and ***Silver Line Reisebüro GmbH vs. Zentrale zur Bekämpfung unlauteren Wettbewerbs e.V.***,³⁵⁹ two German travel agencies had offered their customers flights scheduled from Airports in Germany under particularly advantageous conditions. The flight

³⁵⁶ Cf. *Buntscheck*, Konzernprivileg, 64.

³⁵⁷ ECJ of 22.1.1974, joined Cases 6 & 7/73, *Istituto Chemioterapico Italiana S.p.A. and Commercial Solvents vs. Commission of the European Community*, [1974] ECR 223, C.M.L.R. [1974] Vol I 309, 344.

³⁵⁸ *Cynthia Day Wallace*, *The Multinational Enterprise and Legal Control: Host State Sovereignty in an Era of Economic Globalization*, (2001), [hereinafter cited as: *The Multinational Enterprise*], 639. In detail, see 3.1. below.

³⁵⁹ ECJ of 11.4.1989, C-66/86, *Ahmed Saeed Flugreisen and Silver Line Reisebüro GmbH vs. Zentrale zur Bekämpfung unlauteren Wettbewerbs e.V.*, [1989], ECR 803, 806 ff.

tickets, which the agencies had purchased from other travel agencies in London, nevertheless included the German Airports merely as intermediate stations.³⁶⁰ The volatile exchange rates and distinct tariffs of the original countries in which the flights started enabled the German travel agencies to forfeit the distance between the foreign airport and the German intermediate stations and to still offer a better price than in the case of a direct booking from Germany.³⁶¹ Other market participants objected that, by selling such tickets, the two German travel agents contravened the German ‘Luftverkehrsgesetz’,³⁶² which prohibited the application of air tariffs that had not been approved by the competent federal minister.³⁶³ Moreover, it was contended by the German Association against Unfair Competition (hereinafter ‘the Association’) that their actions fulfilled the facts of § 1 of the German Act against Unfair Competition³⁶⁴ as the sold airline tickets undercut the approved tariffs applied by their competitors.³⁶⁵

After ruling that the travel agents’ conduct was contrary to the relevant provisions of German law, the German Federal Supreme Court³⁶⁶ initiated proceedings for a preliminary ruling posing the question whether the coordination of tariffs prior to the minister’s approval constituted an infringement of Art 101 or Art 102 TFEU.

In respect to Art 101 TFEU, the ECJ unhesitatingly stated that the airlines’ conduct constituted

*“agreements which directly or indirectly fix purchase or selling prices for a certain transaction within the meaning of [Art 101 (1) (a)] of the Treaty”, as they may “even have the effect of completely eliminating [...] all price competition between the various passenger-carrying airlines.”*³⁶⁷

In its decision of the case, the Commission ascertained the participating airlines to commonly be in a dominant position also in respect to Art 102 TFEU, due to the fact that every form of price competition had been extinguished between them.³⁶⁸ The authority hereby based its view on the wording of Articles 108 and 109 TFEU,³⁶⁹ which draw no distinction between Articles 101 and 102 TFEU for the assessment of *“undertakings and anti-competitive behavior.”*³⁷⁰

Likewise, Advocate General Lenz had pointed out in his Opinion that the participants of a cartel were to be regarded as one ‘entity’ for the assessment of market dominance in the sense of Art 102 TFEU.³⁷¹

³⁶⁰ Cf. ECJ of 11.4.1989, C-66/86, *Ahmed Saeed Flugreisen and Silver Line Reisebüro GmbH vs. Zentrale zur Bekämpfung unlauteren Wettbewerbs e.V.*, [1989], ECR 803, [Grounds], para. 2.

³⁶¹ *Buntscheck*, Konzernprivileg, 66.

³⁶² (A law concerning air transport).

³⁶³ ECJ of 11.4.1989, C-66/86, *Ahmed Saeed Flugreisen and Silver Line Reisebüro GmbH vs. Zentrale zur Bekämpfung unlauteren Wettbewerbs e.V.*, [1989], ECR 803, *ibid.*

³⁶⁴ ‘UWG’.

³⁶⁵ Cf. ECJ of 11.4.1989, C-66/86, *Ahmed Saeed Flugreisen and Silver Line Reisebüro GmbH vs. Zentrale zur Bekämpfung unlauteren Wettbewerbs e.V.*, [1989], ECR 803, *ibid.*

³⁶⁶ Bundesgerichtshof.

³⁶⁷ Cf. ECJ of 11.4.1989, C-66/86, *Ahmed Saeed Flugreisen and Silver Line Reisebüro GmbH vs. Zentrale zur Bekämpfung unlauteren Wettbewerbs e.V.*, [1989], ECR 803, para. 19.

³⁶⁸ Cf. ECJ of 11.4.1989, C-66/86, *Ahmed Saeed Flugreisen and Silver Line Reisebüro GmbH vs. Zentrale zur Bekämpfung unlauteren Wettbewerbs e.V.*, [1989], ECR 803, para. 34.

³⁶⁹ (Ex-Articles 88-89).

³⁷⁰ Cf. ECJ of 11.4.1989, C-66/86, *Ahmed Saeed Flugreisen and Silver Line Reisebüro GmbH vs. Zentrale zur Bekämpfung unlauteren Wettbewerbs e.V.*, [1989], ECR 803, para. 31.

³⁷¹ ECJ of 11.4.1989, C-66/86, *Ahmed Saeed Flugreisen and Silver Line Reisebüro GmbH vs. Zentrale zur Bekämpfung unlauteren Wettbewerbs e.V.*, [1989], ECR 803, para. 27.

In deciding whether the application of a tariff, falling within the prohibition of Art 101 (1) TFEU, could constitute an ‘abuse’ of a dominant position the Court however simply referred to the developed concept of a ‘single economic entity’ stating that:

“[35] In that connection it should be pointed out in the first place, that according to the case-law of the Court, Art 101 TFEU does not apply where the concerted practice in question is between undertakings belonging to a single group as parent company and subsidiary if those undertakings form an economic unit within which the subsidiary has no real freedom to determine its course of action on the market.³⁷² However, the conduct of such a unit on the market is liable to come within the ambit of Article 102 TFEU.

[36] In contrast, the typical example of an agreement, decision or concerted practice falling within Article 101 TFEU is where two undertakings which are economically independent of each other engage, by concerted action, in price-fixing or other restrictions of competition on the relevant market.”³⁷³

Thus, the Court completely abstained from assessing whether the members of a cartel could consequently be accused of abusing their collective market dominance in the sense of Art 102 TFEU. Instead, it ruled once more on the necessary delineation between Articles 101 and 102 TFEU.

In respect to the structure of Art 101 (1) TFEU, the Court reminded that this provision is addressed to ‘economic entities’. The objective and purpose of Art 102 TFEU was hence to subsequently control the market behavior of these ‘economic entities’ towards third parties. The Court’s formulation that both provisions were applicable in the case that one of the undertakings had “succeeded in having the tariffs applied by other undertakings” can thus only mean that it hereby referred to the application of the provisions on only one of the undertakings of the cartel. This was explicitly stated to be the case as this undertaking had used its market power to induce other undertakings to engage in a price-fixing agreement. The parallel application of 101 and 102 TFEU was hereby restricted to this single undertaking and did not comprise the question of concerted market dominance.

The Court’s assessment can be interpreted in two ways: on the one hand, the Court’s statement can be understood as intending to equalize the terms of an ‘undertaking’ with that of ‘an economic entity’.³⁷⁴ On the other hand, the Court may have consciously denied the parallel application of Art 101 and 102 TFEU for separate legal entities, which have been found to collude under Art 101 TFEU. In case that these undertakings were not connected by factual or legal linkages, solely the cartel ban was to be decisive and Art 102 TFEU only applicable in order to control the market conduct of the separate entities participating in the agreement. According to the concept of a ‘single economic entity’, the opposite view, i.e. that several undertakings which have colluded automatically constitute an ‘economic entity’, cannot explain the application of Art 101 TFEU for agreements adopted between them.

§ 2. Societa Italiana Vetro SpA vs. EC Commission

³⁷² Hereby the Court cited its most recent decision of 4.5.1988 in Case 30/87, *Corinne Bodson vs. Pompes Funèbres* [1988] ECR 2479.

³⁷³ ECJ of 11.4.1989, C-66/86, *Ahmed Saeed Flugreisen and Silver Line Reisebüro GmbH vs. Zentrale zur Bekämpfung unlauteren Wettbewerbs e.V.* [1989], ECR 803, paras. 35-37.

³⁷⁴ Cf. *Buntscheck*, Konzernprivileg, 67.

The case of *Società Italiana Vetro S.p.A. a.o. vs. Commission of the European Community*³⁷⁵ also concerned the question of collective market dominance under Art 102 TFEU.

In its decision, the Commission had fined three Italian flat-glass producers for infringing both Art 101 (1) and Art 102 TFEU.³⁷⁶ On the application of another Italian producer, the Commission had launched investigations in 1986 against the three undertakings *Società Italiana Vetro* ['SIV'], *Fabbrica Pisana SpA* ['FP'] and *Vernante Pennitalia* ['VP'] finding that they had agreed upon prices, discounts and an identical classification of main customers in secret meetings.³⁷⁷ The undertakings concerned had hereby agreed on a concerted appearance towards the most prominent wholesale companies on the Italian flatglass sector.

After finding that their concerted conduct amounted to an infringement of Art 101 (1) TFEU, the Commission went on to examine the existence of a 'collective dominant position'. In this regard it held that FP, SIV and VP, as members of an oligopoly, enjoyed a degree of independence from competitive pressures that enabled them to impede effective competition, notably by not having to take into account the behavior of other market participants.³⁷⁸ Furthermore, their 'collective dominant position' could be derived from the fact that the three undertakings were directly able to control domestic supply and indirectly control supply from abroad, as their joint market share amounted to approximately 79% of the respective market.³⁷⁹ According to the Commission, this enabled the three undertakings to pursue a commercial policy that did not depend on market trends and conditions of competition, especially since "*the undertakings presented themselves on the market as a single entity and not as individuals*"³⁸⁰ towards external parties, including wholesalers.

Even though the Court of First Instance rejected the Commission's decision, it affirmed that 'collective market dominance' was possible in the context of Art 102 TFEU.³⁸¹ This can be derived from its following statement:

"[357] The Court notes that the very words of the first paragraph of Article 102 provide that 'one or more undertakings' may abuse a dominant position. It has consistently been held, as indeed all the parties acknowledge, that the concept of agreement or concerted practice between undertakings does not cover agreements or concerted practices among undertakings belonging to the same group if the undertakings form an economic unit.³⁸² It follows that when Article 101 TFEU refers to agreements or concerted practices between 'undertakings', it is referring to relations between two or more economic entities which are capable of competing with one another".

The Court of First Instance then went on to argue that there was 'no legal or economic reason' to suppose that the term of 'an undertaking' in this regard has a different meaning from the one given to it in the context of Art 101 TFEU. It thus held that:

³⁷⁵ CFI of 10.3.1992, Joined Cases T-68/89, T-77/89 and T-78/89, *Società Italiana Vetro SpA a.o. v.s. Commission of the European Community*, [1992] ECR II-1403, 1547.

³⁷⁶ Commission Decision of 7.12.1988, IV/31.906, *Flatglass*, [1989] OJ Nr. L 33/44, 65, para. 79.

³⁷⁷ CFI of 10.3.1992, Joined Cases T-68/89, T-77/89 and T-78/89, *Società Italiana Vetro SpA a.o. vs. Commission of the European Community*, [1992] ECR II-1403, 1547, paras. 16 ff.

³⁷⁸ Cf. IV/31.906, *Flatglass*, [1989] OJ Nr. L 33/44, 65, para. 78.

³⁷⁹ Cf. IV/31.906, *Flatglass*, [1989] OJ Nr. L 33/44, 65, para. 79.

³⁸⁰ IV/31.906, *Flatglass*, [1989] OJ Nr. L 33/44, 65, para. 79.

³⁸¹ Cf. *Buntscheck*, Konzernprivileg, 68.

³⁸² Hereby, the Court cited the ECJ's decision in *Centrafarm*, (see Case 15/74, *Centrafarm I*, [1974] ECR 1147, para. 41).

*"[358][...] There is nothing, in principle, to prevent two or more independent economic entities from being, on a specific market, united by such economic links that, by virtue of that fact, together they hold a dominant position vis-à-vis the other operators on the same market. This could be the case, for example, where two or more independent undertakings jointly have, through agreements or licenses, a technological lead affording them the power to behave to an appreciable extent independently of their competitors, their customers and ultimately of their consumers."*³⁸³

In holding that such a dominant position could well be attained by independent legal entities in case of close economic links, the CFI expressed that it viewed such an 'economic entity' to constitute an 'undertaking' in the sense of European competition law.

Despite the fact that the ECJ has never explicitly expressed this view,³⁸⁴ the CFI's assessment reveals that the term 'economic entity' requires a certain level of corporate integration. This derives from the fact that otherwise a minimum standard of influence would legally and economically be unfeasible, making an assumption of mutual responsibility impossible.³⁸⁵ Only if a corporate group features a sufficient interconnection of its organizational structure, allowing for at least a certain amount of coordination, can it be perceived as a 'single economic entity', essentially addressed by Articles 101 and 102 TFEU. According to the CFI, mere economic alliances only justify the assumption of market dominance of the various 'economic entities' in question.³⁸⁶ Thus it is important to note, that not every corporate group can be understood to constitute a 'single economic entity'. Rather, this can only be assumed where companies are interconnected by a certain level of corporate interrelation. This conclusion is pertinent not only for Art 102, but also for applying Art 101 TFEU on a corporate group of companies. The level of integration required and the conclusions this entails for the attribution of liability between the members of a corporate group are to be discussed in due course.³⁸⁷

2.2.2. The Development of a Legal Presumption for Wholly Owned Subsidiaries Leading to an Ambiguous Standard of Attributing Liability

2.2.2.1. The 'Belt and Braces' Approach to Antitrust Liability

In the following years, the ECJ repeatedly referred to its decision in *ICI*, holding that a separate legal personality was not sufficient per se to exclude the possibility of imputing a subsidiary's anticompetitive conduct to its parent company.³⁸⁸ According to the ECJ's persistent view, an attribution of responsibility was justified where the subsidiary, although having a separate legal

³⁸³ CFI of 10.3.1992, Joined Cases T-68/89, T-77/89 and T-78/89, *Società Italiana Vetro SpA a.o. vs. Commission of the European Community*, [1992] ECR II-1403, para. 358.

³⁸⁴ (Making it doubtful therefore whether the CFI's point of view can generally be accepted for the assessment of an 'economic entity' in general and for 'collective market dominance' in particular).

³⁸⁵ Cf. *Menz*, Wirtschaftliche Einheit, 116.

³⁸⁶ CFI, *ibid.*

³⁸⁷ In detail, see 2.2.1., § 1.3 below.

³⁸⁸ ECJ of 14.7.1972, C-48/69, *Imperial Chemical Industries Ltd. vs. Commission of the European Community*, [1972] ECR 619.

personality, did not decide independently on its own conduct on the market, but carried out, in all material respects, the instructions given to it by that parent company.³⁸⁹

In an attempt to provide the Commission with a basis of reference for assessing when this situation could legitimately be assumed, the ECJ consequently went on to outline a certain 'legal presumption' for the relationship between companies of a corporate group. In order to determine the accuracy of this approach, the circumstances upon which this (decisive) amount of control is based in practice should be reviewed. The case of *AEG-Telefunken AG vs. EC Commission* hereby serves as an initial orientation of the Court's line of reasoning.³⁹⁰

§ 1. AEG-Telefunken vs. EC Commission

The *Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunken* [hereinafter referred to as 'AEG'], a limited liability company incorporated under German law, had been engaged, amongst other things, in the development, manufacturing and marketing of consumer electronic products.³⁹¹ As of 1 January 1970, AEG entrusted its subsidiary, the *Telefunken Fernseh- und Rundfunk-GmbH* ['TFR'], with this sector of activity on the European market.³⁹² For the distribution of these products, TFR drew on AEG's marketing organization in other European member states, namely its French subsidiary, the *AEG-Telefunken SA* ['ATF'], and its Belgian subsidiary, the *AEG-Telefunken SA Belge* ['ATGB'].³⁹³ For the marketing of the products entrusted to TFR, AEG notified the Commission of an aspired selective distribution system, which was based on standard contracts with selected resellers on the various stages of the marketing process. As AEG guaranteed that the system was open to all independent retailers who satisfied the conditions of the standard contract, the Commission approved the program.

In the course of time however, the Commission became convinced that the actual application of the distribution system by AEG did not correspond to the scheme it had been notified of. Consequently, the Commission adopted a decision that required AEG to terminate, without delay, the application of the system as the latter arguably infringed Art 101 (1) TFEU.³⁹⁴ In its decision, the Commission took the view that AEG had not adhered to the conditions laid down in its notification, supplying only traditional retailers with its products and denying modern forms of distribution, such as discount stores, access to its network.³⁹⁵ Furthermore, it found that AEG had attempted to grant approved dealers in France territorial protection, which could only be regarded a quantitative and not a qualitative selection criterion.³⁹⁶ By the means of

³⁸⁹ ECJ of 14.7.1972, C-48/69, *Imperial Chemical Industries Ltd. vs. Commission of the European Community*, [1972] ECR 619, para. 134.

³⁹⁰ ECJ of 25.10.1983, C-107/82, *Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunken AG vs. Commission*, [1983] ECR 3151.

³⁹¹ (These comprised television sets, radios, tape-recorders, record-players and audio-visual equipment).

³⁹² Cf. ECJ of 25.10.1983, C-107/82, *Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunken AG vs. E.C. Commission*, [1983] ECR 3151, 3156.

³⁹³ ECJ of 25.10.1983, C-107/82, *Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunken AG vs. E.C. Commission*, [1983] ECR 3151, *ibid*.

³⁹⁴ Cf. ECJ of 25.10.1983, C-107/82, *Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunken AG vs. E.C. Commission*, [1983] ECR 3151; C.M.L.R [1984], 331.

³⁹⁵ Cf. ECJ of 25.10.1983, C-107/82, *Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunken AG vs. E.C. Commission*, [1983] ECR 3151; C.M.L.R [1984], 334.

³⁹⁶ On the necessity of including this latter criterion, see below.

the system, the German company was seen to pursue a policy of keeping retail prices stable, thus bringing about a uniform level of prices.

Against this decision, *AEG* appealed to the ECJ, submitting that the conditions for applying Art 101 (1) TFEU were essentially lacking. The appellant substantiated this assertion by stating that:

- by the means of the system it had not engaged in anticompetitive unilateral conduct with its subsidiaries;
- the maintenance of a minimum profit margin was lawful for the purpose of a selective distribution system;
- the conduct to which the Commission's objections relate could not be ascribed to it, and finally that
- the distribution system did not constitute an obstacle to intra-Community trade.³⁹⁷

Thus, the parent company of *AEG* considered the objections of the contested decision to be unfounded, as there was "*no distribution policy contrary to the system and there were no individual cases in which that policy was applied.*"³⁹⁸

It should be noted that *AEG* on the one side relied on the fact that intragroup agreements, such as the ones subject to the procedure, necessarily had to be exempted from Art 101 (1) TFEU. However, at the same time, it asserted that the conduct the subsidiaries carried out on the basis of these agreements could not be attributed to it, as its subsidiaries constituted individual branches of business.

The ECJ held that it was common grounds in Community law that agreements based on a selective distribution system necessarily affect competition in the Common Market. Nevertheless, the Court acknowledged that it had always been recognized in this regard that certain trade relations that are capable of fostering specific products or services of a higher quality, may justify a reduction of competition relating to all other factors than price.³⁹⁹

The Court assessed such systems to be permissible⁴⁰⁰ where it was provided that resellers were chosen on the basis of objective criteria relating to the qualitative nature of their technical qualifications and staff, as well as the suitability of their premises. However these were to necessarily be the same for all potential resellers.⁴⁰¹ Hence, it followed that the operation of a selective distribution system based on criteria other infringed Art 101 (1) TFEU. This was particularly assessed to be the case where the manufacturer applied the system in a discriminatory fashion, namely with a view to maintaining a high level of prices or excluding certain channels of distribution. Accordingly, the ECJ held that:

"[38] Such an attitude on the part of the manufacturer does not constitute, on the part of the undertaking, unilateral conduct which, as AEG claims, would be exempted from the prohibition contained in Art 101 (1) of the Treaty. On the contrary, it forms part of the contractual relations between the undertaking and resellers. [...]"

³⁹⁷ See ECJ of 25.10.1983, Case 107/82, *Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunken AG vs. E.C. Commission*, [1983] ECR 3151, para. 6.

³⁹⁸ ECJ of 25.10.1983, Case 107/82, *Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunken AG vs. E.C. Commission*, [1983] ECR 3151, *ibid.*

³⁹⁹ Cf. ECJ of 25.10.1983, Case 107/82, *Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunken AG vs. Commission*, [1983] ECR 3151, *ibid.*

⁴⁰⁰ That is, holding them to be in conformity with Art 101 (1) TFEU.

⁴⁰¹ See ECJ of 25.10.1983, Case 107/82, *Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunken AG vs. Commission*, [1983] ECR 3151; para. 33.

[39] *The view must therefore be taken that even refusals of approval* ⁴⁰² *are acts performed in the context of the contractual relations with authorized distributors inasmuch as their purpose is to guarantee observance of the agreements in restraint of competition which form the basis of contracts between manufacturers and approved distributors. Refusals to approve distributors who satisfy the qualitative criteria mentioned above therefore supply proof of an unlawful application of the system if their number is sufficient to preclude the possibility that they are isolated cases not forming part of the systematic conduct.*" ⁴⁰³

Regarding AEG's assertion that the conduct to which the objections relate could not be ascribed to it, the Court investigated the applicant's allegation to have never played an independent part in the employment of the selective distribution system by TFR, ATF and ATGB.

Following the Commission's view, who had found AEG to control this conduct, the Court once more referred to its holding in *ICI*.⁴⁰⁴ Since the subsidiaries had been required to carry out the parent's instructions on the basis of this distribution system, the ECJ concluded that the Commission had rightly held AEG liable. Moreover, the parent company of AEG had never disputed that it was in a position to exert decisive influence on the distribution and pricing policy of its subsidiaries. Even though AEG had therefore factually exerted control by means of an instruction, this fact was reckoned superfluous in regard to its liability for the conduct of TRF. As a wholly owned subsidiary, the latter was seen to "*necessarily follow [the] policy laid down by the same bodies as, under its statutes, determine AEG's policy.*"⁴⁰⁵

AEG's influence on ATF, on the other hand, was found to emerge indirectly from an internal memorandum which mentioned the necessity to accept '*Telefunken's policy*' when negotiating with distributors. The word '*Telefunken*' shows that ATF was in fact referring to the commercial policy of its parent AEG, which in fact determined the unitary policy to be followed by its various subsidiaries when distributing the respective products.⁴⁰⁶ The company of ATGB, on the other hand, was found to regularly inform TFR about its negotiations with a certain retailer, who in turn reported on this to their common parent company.⁴⁰⁷ As these indicia showed that AEG's subsidiaries possessed no independent decision-making power on the market, the Court concluded that the anticompetitive conduct of TFR, ATF, and ATGB necessarily had to be ascribed to it.

On the basis of these findings, the Court, for the first time, formulated a certain scheme of consideration determining a parent company's responsibility for the anticompetitive conduct of its subsidiaries. For a parent company to be responsible under Art 101 (1) TFEU for the conduct of its subsidiaries it must therefore be proven that:

⁴⁰² This means refusals of approval to the company's distribution system.

⁴⁰³ ECJ of 25.10.1983, Case 107/82, *Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunken AG vs. E.C. Commission*, [1983] ECR 3151.

⁴⁰⁴ ECJ of 14.7.1972, Case 48/69, *Imperial Chemical Industries Ltd. vs. Commission of the European Community*, [1972], ECR 619, para. 134.

⁴⁰⁵ ECJ of 25.10.1983, Case 107/82, *AEG-Telefunken AG vs. Commission*, [1983] ECR 3151; C.M.L.R [1984] 3, 327, para. 50; Similarly, see the Advocate General's view in the case of '*Commercial Solvent's*' (C- 6 & 7/73, *Istituto Chemioterapico Italiana S.p.A. and Commercial Solvents vs. Commission of the European Community*, [1974], ECR 223, C.M.L.R. 1974 Vol II, 319 ff.

⁴⁰⁶ ECJ of 25.10.1983, Case 107/82, *Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunken AG vs. Commission*, [1983] ECR 3151, para. 51.

⁴⁰⁷ Cf. ECJ of 25.10.1983, Case 107/82, *Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunken AG vs. Commission*, [1983] ECR 3151, para. 52.

- the parent was in a position to exert a decisive influence on its subsidiary's distribution and pricing policy and
- that it has actually made use of that power. As a wholly-owned subsidiary was presumed to necessarily follow a policy laid down by the same bodies which determine the parent's policy, it may nevertheless be presumed that (b) applies.⁴⁰⁸

Despite the fact that this assessment sheds light on the Court's principle mode of determining a parent company's liability for its subsidiaries' anticompetitive conduct, the ECJ's adjudication remained inconsistent on the **exact requirements** under which such an attribution was possible. In the course of time, the Commission therefore adopted a mode of assessment, sometimes referred to as a 'belt and braces' - approach to liability, which established a parent company's responsibility in the following way:⁴⁰⁹ while the exertion of decisive influence was presumed on the basis of a 100% shareholding, it was subsequently supported by elements pointing to an actual exertion of this form of influence.

Even though the Commission explicitly left open the possibility to consider the presumption alone sufficient for establishing liability in case that 'additional elements' were not at hand,⁴¹⁰ it accepted this assessment to be rebuttable. To invalidate the presumption, a parent company was either required to show that, under the special circumstances of the case, it had not exerted 'decisive influence' on the commercial policy of its subsidiary, or that the subsidiary nonetheless determined its business policy in an autonomous way.⁴¹¹

§ 2. Stora Kopparberg Bergslags AB vs. EC Commission

For the justification of this practice in the past decade, the Commission repeatedly referred to the ECJ's subsequent case of *Stora*.⁴¹² This judgment is furthermore noteworthy as it discusses the question of antitrust liability in cases of 'legal succession' and finally substantiates the criteria for determining the appropriate level of a fine.

By application lodged at the registry of the Court of Justice on 27 July 1998, the company of *Stora Kopparbergs Bergslags AB* brought an appeal against a judgment of the CFI, which had found several undertakings of the cartonboard sector to infringe Art 101 (1) TFEU.⁴¹³ In its decision, the Commission had imposed fines on 19 producers of cartonboard in finding that they had colluded contrary to the principles of this provision.⁴¹⁴ The respective proceedings had followed informal complaints by the *British Printing Industries Federation* and the *Fédération Française du Cartonnage*, which lead the Commission to carry out investigations at the business premises of a number of undertakings and trade associations operating in this sector. The evidence hereby obtained and the following requests for information and documents

⁴⁰⁸ See ECJ of 25.10.1983, Case 107/82, *AEG-Telefunken AG vs. Commission*, [1983] ECR 3151, para. 50.

⁴⁰⁹ Cf. *Riesenkampf and Krauthausen*, Liability of Parent Companies for Antitrust Violations of their subsidiaries, [hereinafter cited as: 'Liability of Parent Companies'], [2010] ECLR. issue 1, 38 (39).

⁴¹⁰ *Crofts*, Alliance One challenges liability in Spanish tobacco cartel before CFI, <http://www.mlex.com>, [accessed September 17, 2001] as cited by *Riesenkampf and Krauthausen*, *ibid*.

⁴¹¹ COMP/E-1/38.823, *Elevators and Escalators*, para. 605, as cited by *Riesenkampf and Krauthausen*, *ibid*.

⁴¹² ECJ of 16.11.2000, C-286/98 P, *Stora Kopparberg Bergslags AB vs. Commission of the European Community*, [2000] ECR I-9925.

⁴¹³ CFI of 14.5.1998, Case T-354/94, *Stora Kopparbergs Bergslags vs. Commission*, [1998] ECR II-2111.

⁴¹⁴ See Commission Decision of 13.4.1994, IV/C/33.833, of 13.7.1994, *Cartonboard*, [1994] OJ Nr. L 243 [hereinafter, 'the decision'].

led the Commission to conclude that from mid-1986 until at least April 1991, the undertakings concerned had engaged in anticompetitive agreements.⁴¹⁵ Consequently, it levied a fine of 11,250,000 European Currency Units on the company of *Stora*, as its subsidiaries *Kopparfors*, *Feldmühle* and *CBC* had been found to participate in the infringement of Art 101 (1) TFEU. *Stora* already owned 100% of the shares of *Kopparfors* when it acquired, in 1990, the majority shares of the German paper group *Feldmühle-Nobel [FeNo]*. This latter company owned two subsidiaries by the name of *Feldmühle* and *CBC*, which had also been found to participate in the breach of competition law.

In support of its application for annulment to the Court, *Stora* relied on a single plea alleging that it was not the correct addressee of the decision. Particularly, it argued that:

- first, the responsibility for the infringement in question was not imputable to it as a legal successor of the companies that had committed the infringement, since those companies still existed; and
- secondly, in view of the Commission's previous practice and case law, the conditions for attributing to the appellant responsibility for infringements committed within the group were not satisfied.⁴¹⁶

Stora therefore asserted that during the period covered by the decision, it had no effective 'control' over the commercial policy of the three companies concerned.⁴¹⁷ Finally, it disputed the Commission's assertion that a parent company may be held responsible for a subsidiary's anti-competitive conduct on the sole ground that the subsidiary was wholly owned by it.⁴¹⁸ In this regard, the Court of First Instance nevertheless held that:

*"[79] It is settled law that the fact that a subsidiary has separate legal personality is not sufficient to exclude the possibility of its conduct being imputed to the parent company, especially where the subsidiary does not independently decide on its own conduct, but carries out, in all material respects, the instructions given to it by the parent company."*⁴¹⁹

*[80] In the present case, since the applicant has not disputed that it was in a position to exert a decisive influence on Kopparfor's commercial policy, it is, according to the case law of the Court of Justice, unnecessary to establish whether it actually exercised that power. [...]"*⁴²⁰

Consequently, the Court of First Instance found that *Stora* had not submitted 'any evidence' to support its assertion that *Kopparfors* had carried on its business on the market for cartonboard

⁴¹⁵ ECJ of 16.11.2000, C-286/98 P, *Stora Kopparberg Bergslag vs. Commission*, [2000] ECR I-9925, para 4. The infringements were particularly derived from the fact that the undertakings had (a) met regularly in a series of secret and institutionalized meetings to discuss and agree on a common industrial plan to restrict competition, (b) agreed on regular price increases for each grade of the product in each national currency, (c) planned and implemented simultaneous and uniform price increases throughout the Community, (d) reached an understanding on maintaining the market shares of the major producers, (e) took concerted measures to control the supply of the product in the Community in order to ensure the implementation of the concerted price rises and, (f) exchanged commercial information of deliveries, prices, plant standstills, order backlogs and machine utilization in support of the above measures. See Art 1 of the Commission Decision [IV/C/33.833].

⁴¹⁶ ECJ of 16.11.2000, C-286/98 P, *Stora Kopparberg Bergslag vs. Commission*, [2000] ECR I-9925, para. 8.

⁴¹⁷ [*Kopparfors*, *Feldmühle* and *CBC*].

⁴¹⁸ ECJ of 16.11.2000, C-286/98 P, *Stora Kopparberg Bergslag vs. Commission*, [2000] ECR I-9925, *ibid*.

⁴¹⁹ CFI of 14.5.1998, Case T-354/94, *Stora Kopparbergs Bergslags vs. Commission*, [1998] ECR II-2111, citing yet again *ICI vs. E.C. Commission* (ECJ, 14.7.1972, C-48/69, [1972] ECR 619).

⁴²⁰ CFI *ibid*, citing the Case of *AEI vs. Commission* (107/82), 25.10.1983, [1983] ECR 3151, para. 50.

as an autonomous legal entity, determining its own commercial policy.⁴²¹ In regard to the other subsidiaries, the Court observed that even though the applicant had, at first, concluded contracts over merely 75% of *Feldmühle* and *CBC*, it subsequently acquired the shares of other subsidiaries belonging to the *FeNo* Group, so that, by the end of 1990, it held 97,84% of the entire group's shares. In regard to the attribution of their conduct to *Stora* as head of that group the CFI stated:

*"[82] Furthermore, the applicant does not dispute that at the date when it acquired the majority of the shares in the FeNo Group two companies in that group, Feldmühle and CBC, were participating in an infringement in which Kopparfors, the applicant's wholly-owned subsidiary was also participating. Since Kopparfors' conduct must be imputed to the applicant, the Commission justifiably stated in the individual particulars annexed to the statement of objections [...] that the applicant could not have been unaware of the anti-competitive conduct of Feldmühle and CBC".*⁴²²

The CFI therefore concluded that the Commission had been entitled to attribute to *Stora* the conduct of these companies in respect to the period before *and* after their acquisition. It particularly blamed *Stora* for neglecting to bring the infringement in question to an end after the acquisition, for instance, by making a simple request in this regard to the management board of *Feldmühle*. *Stora* conversely argued to have had no power under German company law to exert influence in this regard.

The CFI concluded by stating that this consequence was furthermore appropriate, as *Stora* had presented itself as the Commission's 'sole interlocutor' concerning the infringement in question during the administrative procedure.⁴²³

The second part of the plea concerned the amount of the fine levied by the Commission. In this respect *Stora* argued that the Commission had infringed its obligation to state reasons, since the authority had not made any explanations on the final sum of the fine. It furthermore found the Commission to have committed an error in its appraisal of the effects of the cartel, because it had not appropriately considered *Stora's* antitrust compliance program as a mitigating circumstance. It was thus ascertained that the authority had relied on 'extraneous considerations' for determining the final amount of the penalty.

The CFI explained that the mere purpose of the obligation to state reasons was to enable the Court to review the legality of the decision, and accordingly, the appropriateness of the fine. The CFI held that the scope of this obligation nevertheless depended on the nature of the act in question and on the context in which it was adopted.⁴²⁴ It furthermore found no exhaustive list of criteria to exist under Community law in this regard, but rather attributed the Commission a margin of discretion for assessing the gravity of infringements. Hereby, the authority was to

⁴²¹ CFI of 14.5.1998, Case T-354/94, *Stora Kopparbergs Bergslags vs. Commission*, [1998] ECR II-2111, para. 80. By mentioning that *Stora* could have e.g. put forward that *Kopparfors* possessed its own board of directors with external representatives the Court seemed to indicate this to be a noteworthy criterion for proving a company's independent conduct.

⁴²² CFI of 14.5.1998, Case T-354/94, *Stora Kopparbergs Bergslags vs. Commission*, [1998] ECR II-2111.

⁴²³ CFI of 14.5.1998, Case T-354/94, *Stora Kopparbergs Bergslags vs. Commission*, [1998] ECR II-2111, para. 85.

⁴²⁴ CFI of 14.5.1998, Case T-354/94, *Stora Kopparbergs Bergslags vs. Commission*, [1998] ECR II-2111, para. 117, citing inter alia Case T-49/95 *Van Megen Sports vs. Commission*, [1996] ECR II-1799, para. 51.

consider a number of different factors, including the particular circumstances and context of the case, as well as the deterrent character of fines.⁴²⁵

Despite this discretion, the CFI found the Commission to have erred in determining the *effects* of the cartel in the particular case. The Court contended that the Commission had not properly proven that the level of the transaction price was really higher than it would have been in the absence of collusion. Nevertheless, the CFI upheld the Commission's determination of the level of fines, since this default had not materially affected the assessment of the gravity of the infringement detected. *Stora* therefore appealed to the European Court of Justice, requesting that it set aside this judgment.

The ECJ explained that in alleging the CFI to have illegitimately attributed to it *Kopparfor's* conduct on the basis of mere shareholding criteria, *Stora* effectively disregarded pertinent case law. According to Community adjudication, a subsidiary's conduct was only attributed to its parent company where management control was factually exerted.⁴²⁶ Interestingly, the Court went on to explicitly state that holding 100% of a subsidiary's share capital was not in itself sufficient to prove the existence of this amount of influence.

Consequently, the ECJ reviewed *Stora's* allegation that the CFI had attributed to it *Kopparfor's* conduct on the sole grounds that it found *Stora* not to have submitted any evidence in support of the latter's economic independence. After citing once more its ruling in *ICI*,⁴²⁷ the Court held that:

*"[27] In the present case, it is common knowledge, as the Court of First Instance found in paragraph 80 of the contested judgment, that the appellant had owned the entire share capital of Kopparfors since 1 January 1987. The Court of First Instance added that the appellant had not disputed that it was 'in a position to exert decisive influence on Kopparfors' commercial policy' and that it had not submitted 'any evidence to support its assertion that Kopparfors had behaved autonomously'."*⁴²⁸

Accordingly, the ECJ found that the Court of First Instance had legitimately held *Stora* responsible for its wholly-owned subsidiary *Kopparfors*, because it had *not disputed* to have exerted 'decisive influence' on the latter's conduct.⁴²⁹ The ECJ then repeated the CFI's assertion that *Stora* had presented itself as the Commission's 'sole interlocutor' to reinforce that in the present case this amount of influence could factually be assumed. On these grounds, it rejected *Stora's* first plea opposing the attribution of *Kopparfor's* conduct.

In regard to the other subsidiaries' conduct, the Court contended that a differentiated assessment was necessary, as *Feldmühle* and *CBC* had admittedly not been owned by *Stora* during the entire period of the infringement. The Court decided that:

⁴²⁵ Cf. CFI of 14.5.1998, Case T-354/94, *Stora Kopparbergs Bergslags vs. Commission*, [1998] ECR II-2111, para. 118, referring to Case C-137/95 P, *SPO a.o. vs. Commission*, [1996] ECR II-1611, para. 54. In this regard the Court went on to state that the Commission had appropriately drawn out the criteria it took into account in paras. 168 and 169 of the contested decision.

⁴²⁶ Cf. ECJ of 16.11.2000, C-286/98 P, *Stora Kopparberg Bergslag vs. Commission*, [2000] ECR I-9925, para. 23, citing its judgments in the Case 48/69, *ICI vs. EC Commission*, [1972] ECR 619; Cases 32 & 36-82/78, *BMW Belgium a. o. vs. Commission*, [1979] ECR 2435; [1980] 1 C.M.L.R. 370, para. 24; and Case C-310/93 P, *British Gypsum vs. Commission*, [1995] ECR I-865, para. 11.

⁴²⁷ See already CFI of 14.5.1998, Case T-354/94, *Stora Kopparbergs Bergslags v. E.C. Commission*, [1998] ECR II-2111, citing *ICI vs. E.C. Commission* (48/69), 14.7.1992, [1972] ECR 619, para. 78.

⁴²⁸ ECJ of 16.11.2000, C-286/98 P, *Stora Kopparberg Bergslag vs. Commission*, [2000] ECR I-9925.

⁴²⁹ ECJ of 16.11.2000, C-286/98 P, *Stora Kopparberg Bergslag vs. Commission*, [2000] ECR I-9925, para. 28, [emphasis added].

[37] It should be noted that it falls, in principle, to the legal or natural person managing the undertaking in question when the infringement was committed to answer for that infringement, even if, at the time of the decision finding the infringement, another person had assumed responsibility for operating the undertaking.

*[38] In the present case there is no dispute that Feldmühle and CBC continued to exist after control of them had been acquired by the appellant in September 1990, so that responsibility for their actions had to be attributed to the legal person that directed the operation of their business in the period preceding their acquisition by the appellant."*⁴³⁰

Therefore, the ECJ upheld *Stora's* plea in regard to the period before the acquisition, contending that the company's mere awareness of *Feldmühle and CBC's* previous conduct was insufficient for an imputation of responsibility.

In regard to the amount of the fine, the ECJ practically repeated the CFI's assertions, especially emphasizing the deterrent character of antitrust fines. As the Commission was found to have appropriately justified its decision in this respect, the Court upheld the CFI's judgment. According to the ECJ, the fact that the Commission had not proven all effects of the cartel in their entirety could not alter or diminish the gravity of the infringement detected by it.

§ 3. Assessment of the *Stora*-Decision in Subsequent European Practice

The ECJ's judgment of *Stora* was repeatedly relied on in consequent case-law for assessing that the proof of a parent company's exertion of influence required the adduction of 'additional circumstances' other than mere capital participation.⁴³¹

Hereby it was perceived that a (decisive) shareholding in a subsidiary was not sufficient per se to attribute the latter's conduct to another undertaking of the same group. The imputation of a subsidiary's anticompetitive conduct to its parent was thus only considered possible upon two conditions. According to this approach, a parent must

- not only have been in a position to exert decisive influence on its subsidiary, but
- it must have in fact exerted this amount of control in the precise case.⁴³²

In its decision of *AEGL* the Court had, for the first time, formulated a legal presumption that the second fact could legitimately be assumed by the Commission in the case of **wholly-owned** subsidiaries.⁴³³ In light of such a substantial shareholding, it was assumed that the parent in fact exerted a decisive amount of influence. In this latter case, it was on the parent company to bring forward 'sufficient evidence' to rebut the said presumption. This view was consequently not only confirmed by the ECJ in *Stora*, but also reinforced by the CFI in its *Avebe*-judgment, in which the Court explicitly referred to a parent company's 'burden of proof' in this regard.

⁴³⁰ ECJ, *ibid.*

⁴³¹ See *Riesenkampff/Krauthausen*, Liability of Parent Companies, [2010] ECLR, issue 1, 38; *Christina Hummer*, Kartellrechtliche Haftung von Muttergesellschaften, *ecolx* 2010, 64 (65).

⁴³² Cf. also ECJ of 14.7.1992, C-48/69, *ICI vs. Commission*, [1972] ECR 619, para. 137, as cited by *Hummer*, *ibid.*

⁴³³ ECJ of 25.10.1983, C-107/82, *AEGL-Telefunken AG vs. Commission*, [1983] ECR 3151, para. 50.

§ 3.1. The Burden of Proving ‘Decisive Influence’

In *Avebe v Commission*⁴³⁴ the Court of First Instance found that for an attribution of anticompetitive conduct, the Commission could not merely rely on the fact that an undertaking ‘was able’ to exert decisive influence on its subsidiary. On the contrary, the Court emphasized that it was in principle for the *Commission* to demonstrate such influence on the basis of factual evidence, including any management power one of the undertakings may have over the other.⁴³⁵ In regard to wholly-owned subsidiaries, the CFI nevertheless went on to state that:

*“[136] In the case giving rise to the judgment in Stora Kopparbergs Bergslags [...], relied on by the Commission, the Court of Justice recognized that when a parent company holds 100% of the shares in a subsidiary which has been found guilty of unlawful conduct, there is a rebuttable presumption that the parent company actually exerted a decisive influence over its subsidiary’s conduct. In that situation, it is for the parent company to reverse that presumption by adducing evidence to establish that its subsidiary was independent”.*⁴³⁶

By this line of reasoning it becomes clear that the legal presumption of ‘decisive influence’, originally formulated by the ECJ in *AEGL*, was broadly endorsed and reinforced in subsequent adjudication. Hereby it was assumed that the Commission could legitimately rely on this amount of control in the case of wholly-owned subsidiaries, where the parent company did not dispute this upon sufficient evidence. To rebut the presumption, the parent company was required to show that its subsidiary had acted autonomously on the market and could thus be considered an independent ‘economic entity’.⁴³⁷

From the case of *Stora* it was furthermore concluded that in regard to all other subsidiaries, namely those in which a parent possessed a mere majority shareholding, it was on the Commission to prove the parent’s exertion of decisive influence. The above-mentioned term of ‘additional circumstances’ hereby refers to the evidence that either the Commission or, in the case of wholly owned subsidiaries, the controlling parent company is to bring forward to prove the subsidiary’s independence. With regard to the substance of these indications, it is insightful to briefly review the Opinion of General Advocate *Mischo* in the case of *Stora*.

After arguing there to be an assessment-relevant difference between the cases of exempting group-intern agreements from Art 101 (1) TFEU and the intragroup attribution of conduct, the Advocate General stated that not in all cases equally tight links could justify a parent company’s

⁴³⁴ CFI of 27.9.2006, Case T-314/01, *Coöpertieve Verkoop-en Productievereiniging van Aardappelmeel en deriven Avebe BA vs. Commission of the European Community*, [2006] ECR II-3085.

⁴³⁵ CFI of 27.9.2006, Case T-314/01, *Avebe BA vs. Commission*, [2006] ECR II-3085, para. 136, citing e.g. *Dansk Rørindustri and Others vs. Commission*, C-189, 202, 205-208 & 213/02 P [2005] ECR I-5425, paras. 118 to 122; Case C-196/99 P, *Aristrain v Commission* [2003] ECR I-11005, paragraphs 95 to 99; and Case T-9/99 *HFB and Others vs. Commission*, [2002] ECR II-1487, para. 527.

⁴³⁶ CFI of 27.9.2006, T-314/01, *Avebe BA vs. Commission of the European Community*, [2006] ECR II-3085, citing *Stora Kopparbergs Bergslags vs. Commission*, paragraphs 28 to 29, and Case T-354/94 *Stora Kopparbergs Bergslags vs. Commission*, para. 80.

⁴³⁷ On the problems incurred by parent companies in this regard however, see § 2.1. below.

responsibility.⁴³⁸ The Advocate General thus questioned whether it was always necessary to prove that a parent had in fact exerted ‘decisive influence’.⁴³⁹

Even though the ECJ had often reinforced this view by alluding to a parent company’s instruction,⁴⁴⁰ the Advocate General asserted that one could not conclude that such a ‘degree of evidence’ was demanded from the Commission in every case.⁴⁴¹ Rather, the Advocate General stepped in for the two-staged approach to assessing liability endorsed by the ECJ in its decision of *AEG*. He nevertheless emphasized that the ECJ had previously asserted that the bond of economic dependence existing between a parent company and a subsidiary did not principally preclude a divergence in conduct or interests between them.⁴⁴²

Consequently, Advocate General *Mischo* approved of the Opinion of Advocate General *Darmon* in the case of *Orkem vs. Commission* who had stated in this regard that:

*“[19] This, it seems to me, clearly indicates that the legal status of a wholly owned subsidiary does not in itself justify a presumption of unity of conduct in a market or disregard of the legal identity of the undertaking from the procedural standpoint. In principle, it is only when the Commission has established such unity of conduct that it can take account of it.”*⁴⁴³

In regard to the CFI’s argumentation that it was for the parent to contend this lack of influence in the case of a 100% shareholding, Advocate General *Mischo* went on to state that:

*“At this stage, I suggest that the Court of Justice should find that although the Commission has the burden of proving that the parent company in fact exercised decisive influence over its subsidiary’s conduct, that burden is eased in the case of 100 per cent control. Something more than the extent of shareholding must be shown, but it may be in form of indicia.”*⁴⁴⁴

The Advocate continued stating that even though in the case in question *Stora* had not instructed *Kopparfors* to participate in the cartel, the Court of First Instance had, upon the facts of the case, been entitled to conclude that *Stora* was *informed* of those matters and did not object to them.⁴⁴⁵

The Advocate’s line of reasoning was then adopted by the ECJ, who asserted that contrary to the appellant’s assertion, the CFI had not attributed to it *Kopparfors*’s conduct on the

⁴³⁸ See Opinion of AG *Mischo* in Case C-286/98 P, *Stora Kopparberg Bergslag vs. Commission*, [2000] ECR I-9925, [2001] 4 C.M.L.R. 12, A 37 on page 380; citing the cases of *Centrafarm* (C-15/74, *Centrafarm vs. Sterling Drug*, [1974] ECR 1147; [1974] 2 C.M.L.R. 480), *Bodson* (C-30/87, *Corinne Bodson vs. Pompes Funèbres des Régions Libérées*, [1988] ECR 2479; [1989] 4 C.M.L.R. 984) and *Ahmed Saeed Flugreisen* (C-66/86, *Saeed Flugreisen and Silver Line Reisebüro*, [1989] ECR 803; [1990] 4 C.M.L.R. 102) to confirm this view.

⁴³⁹ See Opinion of AG *Mischo* in Case C-286/98 P, *Stora Kopparberg Bergslag vs. Commission*, [2000] ECR I-9925, para. 38.

⁴⁴⁰ See for instance the cases of *ICI vs. EC Commission*, (Case 48/69, [1972] ECR 619); *Europemballage and Continental Can vs. Commission*, (Case 6/72 [1973] ECR 215); and *BPB Industries and British Gypsum vs. Commission*, (Case C-310/93 P [1995] ECR I-865).

⁴⁴¹ See Opinion of AG *Mischo* in Case, C-286/98 P, *Stora Kopparberg Bergslag vs. Commission*, [2000] ECR I-9925, para. 40; [emphasis added].

⁴⁴² See ECJ of 18.12.1987, Joined Cases 32 & 36-82/78, *BMW Belgium a. o. vs. Commission*, [1979] ECR 2435, as cited by Advocate General *Darmon* in the Case 374/87, *Orkem vs. Commission*, [1989] ECR 3283, para. 19.

⁴⁴³ Advocate General *Darmon* in the Case C-374/87, *Orkem vs. Commission*, [1989] ECR 3283, para. 19.

⁴⁴⁴ See Opinion of AG *Mischo* in C-286/98 P, *Stora Kopparberg Bergslag vs. Commission*, [2000] ECR I-9925, para. 48.

⁴⁴⁵ See Opinion of the AG in Case C-286/98 P, *Stora Kopparberg Bergslag vs. Commission*, [2000] ECR I-9925, para. 51.

basis of a mere shareholding participation.⁴⁴⁶ Furthermore, the Court confirmed *Stora's* responsibility for the other subsidiaries after their acquisition, contending that it was “for the applicant, as parent company, to adopt in regard to its subsidiaries any measure necessary to prevent the continuation of the infringement which it was not unaware of.”⁴⁴⁷

Regarding the **criteria** indicating a subsidiary's autonomous market conduct, previous adjudication had particularly taken into account whether the parent company could influence its subsidiaries' commercial policy. Hereby it had been reviewed whether the parent company determined the subsidiary's pricing policy,⁴⁴⁸ production- and distribution activities,⁴⁴⁹ sales targets, gross profits, its sales costs, cash flow, stock and marketing activities.⁴⁵⁰ Nevertheless, a company's market strategy was not the only point of reference for attributing conduct between companies of a corporate group.⁴⁵¹ In the case of *Stora*, the Court therefore ascertained that attention was also to be paid to the “various aspects” in the context of the “economic, organizational, and legal links between a parent and a subsidiary company”, alleging that these could not be summarized in a conclusive manner.⁴⁵²

Even though these links admittedly vary from case to case, it cannot be concluded from this assessment that a consistent approach to parental liability, following a certain scheme of consideration, is principally inappropriate.⁴⁵³

In order to assess whether previous adjudication has provided companies with a clear base of reference in this regard, it is necessary to scrutinize the Court's subsequent adjudication. The criteria drawn on both by the Commission, as well as the undertakings which have attempted to rebut the presumption, must be appraised. This in turn determines the question to which legal entity of a corporate group the acts of a subsidiary should appropriately be attributed. Especially the CFI's adjudication has sometimes been ambivalent in this regard.

§ 3.2. The Ascertainment of the Correct Legal Entity in a Group of Companies

The CFI primarily had to deal with this question in the case of *HFB*,⁴⁵⁴ in which the applicants criticized the Commission for illegitimately holding them jointly and severally liable.

⁴⁴⁶ Cf. ECJ of 16.11.2000, C-286/98 P, *Stora Kopparberg Bergslag vs. Commission*, [2000] ECR I-9925, para. 27. Rather, the Court emphasized that *Stora* had not provided evidence that its subsidiary had acted independently in the precise case.

⁴⁴⁷ See ECJ of 16.11.2000, C-286/98 P, *Stora Kopparberg Bergslag vs. Commission*, [2000] ECR I-9925, para. 9, referring to the CFI's assessment in para. 83 of the contested judgment.

⁴⁴⁸ ECJ of 14.7.1972, C-48/69, *ICI vs. Commission*, [1972] ECR 619, para. 137; ECR 1972, 787= Celex No. 669 J0052, 52-69, *Geigy vs. Commission*, para. 45.

⁴⁴⁹ ECJ of 6.3.1974, C-6-7/73, *Istituto Chemioterapico Italiana and Commercial Solvents vs. EC Commission*, [1974], 223, paras. 37 and 38.

⁴⁵⁰ CFI, 12.1.1995, T-102/92, *Viho vs. EC Commission*, [1995] ECR II-17, para. 48, and CFI T-112/05, *Akzo Nobel NV vs. EC Commission*, [2007] ECR II-5049, para. 64, (in detail, see further below), as cited by *Christina Hummer*, Kartellrechtliche Haftung von Muttergesellschaften, *ecolex* 2010, 65.

⁴⁵¹ Cf. *Christina Hummer*, *ibid.*

⁴⁵² See ECJ in C-286/98 P, *Stora Kopparberg Bergslag vs. Commission*, [2000] ECR I-29925, para. 22 ff, alluding to the Case C-294/98 P, *Metsä-Serla and Others vs. Commission*, [2000] ECR I-10065, para. 27, in which the Court for the first time termed this formulation. Most recently, see CFI of 12.12.2007, Case T-112/05, *Akzo Nobel NV*, [2007] ECR II-5049, para. 65, as confirmed by ECJ Case C-97/08 P, *Akzo Nobel NV vs. Commission*, [2009] ECR I-08237, paras. 72 ff.

⁴⁵³ In detail, see 3.1. below.

⁴⁵⁴ CFI of 22.3.2002 in Case T-9/99, *HFB a.o. vs. Commission*, [2002] ECR II-1487.

In this case, the undertakings involved had been active on the market for district heating pipes, for which the largest market in the Union had been that of Germany and Denmark. At the end of 1990, four Danish producers concluded an agreement on a general cooperation for the area of the domestic market. One year later, two German producers⁴⁵⁵ regularly participated in their meetings, which according to the Commission, was aimed at setting quotas for the whole of the European market.⁴⁵⁶

In its decision, the Commission ascertained the agreements between the Danish producers, including those with their German competitors, to constitute a 'single agreement' prohibited under Art 101 (1) TFEU. Even though the arrangement was originally confined to Denmark, it was attributed the long-term objective of extending the participant's market control to the entire area of the Common Market.⁴⁵⁷

After fining the Danish companies for their infringements individually, the Commission was obliged to assess the relations between the undertakings belonging to the German *Henss/Isoplus* group, in order to determine the correct addressees of its decision. The difficulty of this assessment was that the undertakings concerned were not only interrelated by mutual shareholding participation, or (factual) control agreements, but had reformed themselves during the course of the infringement, thus regularly changing the composition of the group.⁴⁵⁸

For this reason, the Commission ascertained the German producers of '*Henss*' and '*Isoplus*' to constitute a 'de facto' group, which had to be regarded as a 'single undertaking' for the purpose of Art 101 (1) TFEU.⁴⁵⁹ Owing to the absence of a parent company coordinating the conduct of this group, the Commission held that the companies involved were to be 'jointly and severally' liable for the adoption of the anticompetitive conduct.⁴⁶⁰

Pursuant to the complaint of the applicants for holding them commonly liable, the Court of First Instance contended the Commission's Decision to be erroneous in regard to the so-called *HFB GmbH* and the *HFB KG*, two companies of this group. The Court primarily acknowledged that these companies could not be made responsible for the illicit activity, which took part before their creation.⁴⁶¹ Since antitrust liability could not be attributed a 'repercussive effect', the Court decided that these companies could not be blamed for the anticompetitive conduct in question merely because they belonged to the group at the time the Commission had issued its decision. Referring to the Court's decision in *Stora*,⁴⁶² the CFI formulated that antitrust liability should in effect be restricted to the natural or legal person managing the companies involved even if at the time of the decision another person had assumed responsibility for their business operations. Consequently, the CFI reviewed the responsibility of the other companies of this group.

⁴⁵⁵ Hereinafter referred to as the '*Henss/Isoplus group*', which also included the *Pan-Isovit GmbH*, a company governed by Austrian law.

⁴⁵⁶ CFI of 22.3.2002 in Case T-9/99, *HFB a.o. vs. Commission*, [2002] ECR II-1487, para. 9. For the purpose of sharing the Danish market, quotas were agreed on and consequently implemented and monitored by a 'contract group' consisting of sales managers of the undertakings concerned, informing the other participants of the price it intended to quote.

⁴⁵⁷ CFI of 22.3.2002 in Case T-9/99, *HFB a.o. vs. Commission*, [2002] ECR II-1487, para. 14.

⁴⁵⁸ For the detailed composition, see CFI of 22.3.2002 in Case T-9/99, *HFB a.o. vs. Commission*, [2002] ECR II-1487, paras. 25-33.

⁴⁵⁹ Cf. CFI of 22.3.2002 in Case T-9/99, *HFB a.o. vs. Commission*, [2002] II-1487, para. 101.

⁴⁶⁰ CFI, *ibid*.

⁴⁶¹ Cf. CFI of 22.3.2002 in Case T-9/99, *HFB a.o. vs. Commission*, [2002] II-1487, para. 102; citing in this regard: Case T-11/89, *Shell vs. Commission*, [1992] ECR II-757, paragraph 311.

⁴⁶² See ECJ of 16.11.2000, C-286/98 P, *Stora Kopparberg Bergslags vs. Commission*, [2000] ECR I-29925, paras. 31 to 40.

In finding the undertakings of the *Isoplus* group to constitute a ‘single economic entity’ due to their “unitary organization of personal, tangible and intangible elements, pursuing a specific economic aim on a long term basis,”⁴⁶³ the CFI approved of the Commission’s view of holding them jointly and severally liable for the committed infringement.⁴⁶⁴ The Court fortified its view in stating that:

“[526] There is even more reason for holding those companies jointly and severally responsible in the present case since, at the time of the infringement, there was no person at the head of all the companies belonging to the *Henss/Isoplus* group to which, as the person responsible for the acts of the group, responsibility for the infringement could have been imputed. [...]”⁴⁶⁵

Thus, the Court of First Instance held that in a situation in which it may be exceedingly difficult or even impossible to identify the legal person coordinating the group’s activities, the Commission was entitled to hold all companies of this group jointly and severally responsible for the respective conduct. According to the Court this was necessary, because the formal separation between those companies, resulting from their separate legal personality, “cannot prevent a finding that they have acted jointly in an anticompetitive manner on the market for the purposes of applying the competition rules.”⁴⁶⁶

Even if this analysis, allowing for the imposition of joint and several liability on undertakings united by the same economic interests, may seem plausible at first instance, it does not take into account that such an undifferentiated attribution of liability essentially disregards an in-depth analysis of a company’s actual involvement in an infringement. Because a company is not deprived of its separate legal personality by its participation in a corporate group, this approach is highly questionable in respect to general principles of corporate law.⁴⁶⁷

In order to review whether the European Court of Justice endorsed this ambiguous approach to liability, it is insightful to review further adjudication on this matter, particularly the following case of ‘*Aristrain*’.

In *Aristrain*, two sister companies engaged in the European steel industry were found to have infringed competition law.⁴⁶⁸ In the year 1974, this industry underwent a crisis, characterized by a fall in demand and giving rise to problems of excess supply and lower prices.⁴⁶⁹ In an attempt to manage this calamity, the Commission imposed mandatory production quotas during the years 1980 to 1988.⁴⁷⁰ As steel prices subsequently continued to remain high, the Commission carried out a series of inspections at the business premises of the various undertakings engaged

⁴⁶³ Cf. the definition of ‘an undertaking’ in European case-law described under 1.2.

⁴⁶⁴ CFI of 22.3.2002 in Case T-9/99, *HFB a.o. vs. Commission*, [2002] ECR II-1487, para. 525.

⁴⁶⁵ CFI of 22.3.2002 in Case T-9/99, *HFB a.o. vs. Commission*, [2002] ECR II-1487.

⁴⁶⁶ CFI of 22.3.2002 in Case T-9/99, *HFB a.o. vs. Commission*, [2002] ECR II-1487, para. 526. The Court concluded by contending that this approach must a fortiori be applied, where no such legal person existed.

⁴⁶⁷ In detail, see point 3.2. below.

⁴⁶⁸ See ECJ of 2.10.2003, C-196/99 P, *Siderúrgica Aristrain Madrid SL vs. Commission of the European Community*, [2003] ECR I-11049, as cited by *Riesenkampff and Krauthausen*, Liability of Parent Companies: [2010] ECLR, 39.

⁴⁶⁹ ECJ of 2.10.2003, C-196/99 P, *Siderúrgica Aristrain Madrid SL vs. Commission of the European Community*, [2003] ECR I-11049, para. 2.

⁴⁷⁰ ECJ of 2.10.2003, C-196/99 P, *Siderúrgica Aristrain Madrid SL vs. Commission of the European Community*, [2003] ECR I-11049, para. 3.

in this sector of the European market. This led to the adoption of the contested decision, in which the authority imposed fines on 17 companies, as well as the trade association of this industry for infringing Art 101 (1) TFEU.⁴⁷¹

The company of *Siderúrgica Aristrain Madrid SL* [hereinafter '*Aristrain*'] consequently contested the decision on nine grounds of appeal, contending, amongst other things, that the Commission had infringed Community law "*in the line of argument relating to the legal person obliged to pay the fine imposed as a result of the conduct of two separate companies.*"⁴⁷²

The Court of First Instance went on to state that the Commission had duly established that the companies of *Aristrain*⁴⁷³ and its sister company *Aristrain Olaberría* had to be regarded as a 'single economic unit' and accordingly a single 'undertaking' for the purpose of Art 101 (1) TFEU. This was particularly assumed as these undertakings had equally participated in the various infringements of competition law. Thus, the Commission had been entitled to impute the latter's conduct to the former, and take this company's annual turnover as a basis for calculating the amount of the fine.⁴⁷⁴ Similar to its assertions in *HFB*,⁴⁷⁵ the Court ascertained that:

"[141] [...] In a situation in which, owing to the family composition of the group and the dispersal of its shareholders, it was impossible or exceedingly difficult to identify the legal person at its head to which, as the person responsible for coordinating the group's activities, responsibility could have been imputed for the infringements committed by the various component companies of the group, the Commission was entitled to hold the two subsidiaries [namely the appellant] and Aristrain Olaberría jointly and severally responsible for all the acts of the group [...]."476

Even though *Aristrain* did not dispute that the two companies were part of the same group, it claimed that the Court of First Instance was wrong to approve the fine imposed upon it, penalizing it for an unlawful conduct, which had also been carried out by its sister company *Aristrain Olaberría*.

In its legal assessment of the case, the European Court of Justice acknowledged the Commission's findings to be unsubstantiated in regard to the addressee of the decision.⁴⁷⁷ The Court went on to state that:

"[95] The fact that only the appellant was chosen as debtor of the fine imposed in respect of the acts of that undertaking and of Aristrain Olaberría is all the more incomprehensible since, in recital 16(b) of the grounds of the contested decision, the Commission acknowledges that they are two separate companies and since, subsequently, that decision makes no reference to specific

⁴⁷¹ Cf. ECJ of 2.10.2003, C-196/99 P, *Siderúrgica Aristrain Madrid SL vs. Commission of the European Community*, [2003] ECR I-11049, paras. 5-7.

⁴⁷² ECJ of 2.10.2003, C-196/99 P, *Siderúrgica Aristrain Madrid SL vs. Commission of the European Community*, [2003] ECR I-11049, para.12.

⁴⁷³ For the precise composition of this undertaking, see ECJ, C-196/99 P, *Siderúrgica Aristrain Madrid SL vs. Commission of the European Community*, [2003] ECR I-11049, para. 91.

⁴⁷⁴ CFI of 14.9.2004, T-156/94, *Siderúrgica Aristrain Madrid SL vs. Commission of the European Community*, [1999] ECR II- 645, 140.

⁴⁷⁵ See CFI, of 22.3.2002 in Case T-9/99, *HFB a.o. vs. Commission*, [2002] ECR II-1487.

⁴⁷⁶ CFI, *ibid.*

⁴⁷⁷ ECJ of 2.10.2003, C-196/99 P, *Siderúrgica Aristrain Madrid SL vs. Commission of the European Community*, [2003] ECR I-11049, para. 94, alleging the Commission's conclusion to contain 'no reasons whatsoever for this decision'.

*circumstances relating to the attribution of responsibility for the infringements, thereby suggesting that those infringements are to be attributed to each company to the extent of its own involvement.”*⁴⁷⁸

Instead, the Court emphasized that it was

*“settled case law that the anti-competitive conduct of an undertaking can [only] be attributed to another undertaking where it has not decided independently upon its own conduct on the market, but carried out, in all material respects, the instructions given to it by that other undertaking, having regard in particular to the economic and legal links between them.”*⁴⁷⁹

In the present case therefore, the ECJ observed that the Commission had not established the power of *Aristrain* to direct the conduct of its sister company *Aristrain Olaberria* to the point of depriving it of any real independence in determining its own course of action on the market.⁴⁸⁰ Accordingly, the Court of First Instance was found to be wrong in ruling on the possibility to impute to a company all the acts of a group, even though this company had not been identified as the legal person at the head of that group responsible for coordinating the group’s activities. In its conclusion, the Court underlined that:

*“[99] The simple fact that the share capital of two separate commercial companies is held by the same person or the same family is insufficient, in itself, to establish that those two companies are an economic unit with the result that, under Community competition law, the actions of one company can be attributed to the other and that one can be held liable to pay a fine for the other.”*⁴⁸¹

Since the contested decision was even found to be contradictory in suggesting, on the one side, that responsibility for the detected infringement had to be attributed to both undertakings to an equal extent, while at the same time ordering only one of them to pay the fine, the ECJ annulled it in its entirety. This finding is substantial for perceiving the Court’s understanding of a ‘single economic entity’. The judgment reaffirms the ECJ’s holding in *Stora* insofar as it denies that the aspect of share ownership is conclusive in itself for determining a company’s decisive influence and therefore liability for the conduct of a separate legal entity of the same group.⁴⁸² Because the assessment of the case was nevertheless confined by the substance of the appeal, it left open a number of questions in regard to the assessment of intragroup responsibility.

§ 3.3. The Assessment of Indicia Pointing to ‘Decisive Influence’

⁴⁷⁸ ECJ of 2.10.2003, C-196/99 P, *Siderúrgica Aristrain Madrid SL vs. Commission of the European Community*, [2003] ECR I-11049.

⁴⁷⁹ ECJ of 2.10.2003, C-196/99 P, *Siderúrgica Aristrain Madrid SL vs. Commission of the European Community*, [2003] ECR I-11049, para. 96, explicitly referring to Case C-294/98 P, *Metsä-Serla a.o. vs. Commission*, [2000] ECR I-10065, para. 27.

⁴⁸⁰ ECJ of 2.10.2003, C-196/99 P, *Siderúrgica Aristrain Madrid SL vs. Commission of the European Community*, [2003] ECR I-11049, para. 97.

⁴⁸¹ ECJ of 2.10.2003, C-196/99 P, *Siderúrgica Aristrain Madrid SL vs. Commission of the European Community*, [2003] ECR I-11049.

⁴⁸² Cf. *Riesenkampff and Krauthausen*, Liability of Parent Companies, [2010] ECLR, 40.

In the years to follow, the Court of First Instance had several further opportunities to deal with the aspect of corporate group liability, particularly regarding the criteria parent companies were required to bring forward to rebut the legal presumption, initially formulated by the ECJ in *AEG*.⁴⁸³

In the case of *Tokai Carbon*, for instance, the Court was to ascertain whether the presumption of ‘decisive influence’ was reinforced by factual evidence.⁴⁸⁴ After pointing out once more that Art 101 (1) TFEU was aimed at “*economic units, made up of a combination of personal and physical elements*”, the Court went on to assess the economic interrelation between the undertakings concerned by the decision.⁴⁸⁵

In this respect, the CFI asserted that the company of *Intech EDM BV* and its wholly owned subsidiary, the *Intech EDM AG*, had expressly stated that they did not challenge the findings of fact in regard to the roles they had played in the cartel. Since their assertion that this subsidiary “*acted largely independently of its former parent company*” was found to be entirely unsupported by factual evidence, the Court concluded that the Commission was correct in holding the two companies jointly liable for the anticompetitive conduct detected, “*with the acts of one being imputable to the other*’.⁴⁸⁶

This assessment draws yet again on the lacking contestation by the parent company concerning the autonomous conduct of its subsidiary, in which case the Commission was arguably not required to bring forward indicia to support the presumption of the parent company’s ‘decisive influence’.

Likewise, the CFI has argued in *DaimlerChrysler vs. Commission*, formulating that:

“[219] As the Court of Justice held in *Stora Kopparbergs Bergslags v Commission*, [...], while a 100 per cent shareholding does not in itself suffice for a finding of responsibility against the parent company, the Commission is also entitled to base its decision on the imputation to the parent company of the conduct of the subsidiary on the fact that the parent company did not dispute that it was in a position to exert a decisive influence on its subsidiary’s commercial policy and produced no evidence to support its claim that the subsidiary was autonomous.[...]”⁴⁸⁷

The Court furthermore approved of the Commission’s decision “*particularly*” because the parent “*had put itself forward in the administrative procedure as being the sole representative of the companies in the group*.”⁴⁸⁸

Holding parent companies liable for the infringements of their subsidiaries essentially involves the question of the **nature of a company’s participation** required for its liability in European antitrust law.⁴⁸⁹ Thus, yet another point of the CFI’s judgment of *Tokai Carbon* must be analyzed.

⁴⁸³ ECJ of 25.10.1983, Case 107/82, *AEG-Telefunken AG vs. Commission*, [1983] ECR 3151, para. 50.

⁴⁸⁴ CFI of 15.6.2005, Joined Case T-71/03, T-74/03, T-87/03 and T-91/03, *Tokai Carbon Co. Limited a.o. vs. Commission*, [2005] ECR II-10.

⁴⁸⁵ CFI of 15.5.2005, Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03, *Tokai Carbon Co. Limited a.o. vs. Commission*, [2005] ECR II-10, referring to Case COMP/E-2/37.667, *Speciality Graphite*, [2002] OJ Nr. L 356 [Hereinafter referred to as ‘the Decision’].

⁴⁸⁶ Surprisingly, in this last point the CFI, in para. 62 of the judgment, referred to its decision in Case T-9/99, *HFB a.o. vs. Commission* [2002] ECR II-1487 despite the ECJ’s ruling in the subsequent judgment of *Aristrain*.

⁴⁸⁷ CFI of 15.9.2005, Case T-325/01, *DaimlerChrysler AG vs. Commission of the European Community*, [2005] ECR II-3319.

⁴⁸⁸ CFI, Case T-325/01, *DaimlerChrysler AG vs. Commission of the European Community*, [2005] ECR II-3319, *ibid*.

Subsequent to approving the Commission's decision of holding the two companies of the *Intech* group jointly and severally liable, the Court stated that it was necessary to examine which precise acts the Commission took into consideration when imputing responsibility reciprocally to both undertakings so as to establish their participation in the detected infringement.⁴⁹⁰

The Court asserted that the Commission found (without being contradicted by the applicants on this) that *Intech EDM AG* took part in almost all of the meetings organized by the cartel on the European level, as well as in several of the local meetings concerning the German, British, French, and Italian markets.⁴⁹¹ Albeit the fact that the *Intech* group alleged that it had hereby not actively participated in the cartel but merely attended the meetings in the interest of their main supplier and sales partner '*Ibiden*', the Court held that it insofar sufficed to note that:

*"[65]... according to settled case law, where an undertaking participates, even if not actively, in the meetings between undertakings with an anti-competitive object and does not publicly distance itself from what occurred at them, thus giving the impression to the other participants that it subscribes to the results of the meetings and will act in conformity with them, it may be concluded that it is participating in the cartel resulting from those meetings."*⁴⁹²

This assessment is insightful in regard to the required amount of a parent company's involvement in its subsidiary's antitrust infringement in order to be held liable under current principles European case law. In this respect it is clear that a parent company's 'passive toleration' of an infringement, even if not directly instructed by it,⁴⁹³ is sufficient for imposing responsibility on it.⁴⁹⁴ To free itself from liability, it is arguably necessary for the parent to actively demand the subsidiary's termination of the infringement and to subsequently take effective steps for ensuring the latter's compliance. In case the parent nevertheless fails to adopt any such measures, the Commission may legitimately assume its approval of the specific conduct, regardless of whether the subsidiary acted explicitly in its interest.⁴⁹⁵

Recent case-law seems to further reduce the Commission's obligation to indicate the parent company's actual involvement in the infringement upon the exertion of decisive influence, thus lowering the degree of participation for holding it liable.⁴⁹⁶ This directly affects the demonstration of 'evidence' a parent company is required to bring forward in order to establish its subsidiary's autonomous conduct.

§ 3.4. The Parent Company's Rights of Defense

⁴⁸⁹ Due to the topical confinement of this thesis this issue will only be assessed in regard to Art 101 (1) TFEU.

⁴⁹⁰ CFI, Joined Case T-71/03, T-74/03, T-87/03 and T-91/03, *Tokai Carbon Co Limited a.o. vs. Commission*, [2005] ECR II-10, para.63.

⁴⁹¹ CFI, *ibid*, para. 64, referring to paras. 243, 248, 254, 261 & 267 of 'the decision'.

⁴⁹² CFI of 15.5.2005, Joined Case T-71/03, T-74/03, T-87/03 and T-91/03, *Tokai Carbon Co Limited a.o. vs. Commission*, [2005] ECR II-10.

⁴⁹³ In this case of course, the infringement would not need to be 'attributed' to the parent company under the principles of European case-law laid out so far, but the parent company could be held directly liable for its own illicit conduct. See also 3.1.1.3, § 3.3.2. below.

⁴⁹⁴ See, in particular ECJ of 16.11.2000, C-286/98 P, *Stora Kopparbergs Bergslags AB*, [2000] ECR I-09925, para. 29.

⁴⁹⁵ See ECJ of 16.11.2000, C-286/98 P, *Stora*, [2000] ECR I-9925, para. 10.

⁴⁹⁶ CFI of 26.4.2007, Joined Cases T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02, T-136/02, *Bolloré SA a.o. vs. Commission*, [2007] ECR 947, and particularly ECJ, Case 97/08 P, *Akzo Nobel NV vs. Commission*, [2009] ECR I-08237 (In detail, see 2.2.2.2.).

In *Bolloré vs. EC Commission*, for instance, the CFI acknowledged that the statement of objections issued by the Commission had not enabled the undertaking of *Bolloré* to fully acquaint itself with the accusations raised against it in regard to its direct involvement in the infringement.⁴⁹⁷ Furthermore, the Commission had not informed *Bolloré* of the facts on which it established its responsibility in regard to its subsidiary *Copigraph* so that the former was admittedly unable to defend itself during the administrative procedure in this regard.⁴⁹⁸

However, the Court went on to state that such defect only entailed the annulment of the decision in case the respective allegations “*could not have been substantiated to the requisite legal standard on the basis of other evidence in the decision on which the undertakings concerned were given the opportunity to comment.*”⁴⁹⁹ Moreover, the Court held that an infringement of *Bolloré*’s rights of defense was only capable of affecting the validity of the decision in case the latter was based exclusively on this company’s *direct involvement* in the infringement.⁵⁰⁰ In case the Commission had therefore correctly held *Bolloré* liable for its subsidiary’s antitrust infringement, the fact that the Commission had erred in regard to the former’s direct involvement in the anticompetitive conduct could not justify the annulment of the decision.⁵⁰¹ Consequently, the Court assessed the base of *Bolloré*’s contention in regard to its relationship with its subsidiary *Copigraph*.

Subsequent to restating that a 100% shareholding in a subsidiary was a strong indication of a parent company’s exertion of ‘decisive influence’, it referred once more to the ECJ’s judgment in *Stora*, stating that something more than this extent of shareholding had to be shown for holding the latter liable. For this purpose, the Commission could nevertheless rely on mere ‘indicia’. Accordingly, the Court fortified that the Commission had not, as attested by the undertaking of *Bolloré*, relied exclusively on the latter’s amount of shareholding in its subsidiary *Copigraph*. Rather, the Commission had drawn on ‘other factual matters’ in order to establish that the latter had carried out, in all material respects, the instructions given to it by *Bolloré*.

These ‘other factual matters’ included the fact that, contrary to the applicant’s allegations, the two undertakings were found to be personally connected by sharing a common director. It was specifically pointed out that *Bolloré* had also employed one of *Copigraph*’s CEO’s as a manager of its special paper division. The Court furthermore emphasized that the lacking legal authority of this member of the parent’s management to issue binding instructions for the subsidiary’s market conduct did not prevent him from ensuring that the latter’s business policy was in line with that of its parent company.⁵⁰²

In respect to *Bolloré*’s claim that *Copigraph* essentially had its own infrastructure, its own staff and independently published its own annual accounts, the Court ascertained that these

⁴⁹⁷ CFI of 26.4.2007, Joined Cases T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02, T-136/02, *Bolloré SA a.o. vs. Commission*, [2007] ECR 947.

⁴⁹⁸ See CFI of 26.4.2007, Joined Cases T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02, T-136/02, *Bolloré SA a.o. vs. Commission*, [2007] ECR 947, para. 79.

⁴⁹⁹ CFI of 26.4.2007, Joined Cases T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02, T-136/02, *Bolloré SA a.o. vs. Commission*, [2007] ECR 947, para. 80.

⁵⁰⁰ CFI, *ibid.*, referring to Case T-352/94, *Mo och Domsjö vs. Commission*, [1998] ECR II-1989, para. 63.

⁵⁰¹ See CFI of 26.4.2007, Joined Cases T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02, T-136/02, *Bolloré SA a.o. vs. Commission*, [2007] ECR 947, para. 81. This was seen not to have a decisive effect on the decision’s operative part.

⁵⁰² CFI of 26.4.2007, Joined Cases T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02, T-136/02, *Bolloré SA a.o. vs. Commission* [2007] ECR 947, para. 140.

instances by themselves did not prove that the subsidiary was able to define its market conduct in an autonomous way.⁵⁰³ Even *Bolloré's* assertions that *Copigraph* had decided on its commercial policy in an entirely independent fashion, that the latter's portion of the group's entire turnover was negligible, and that *Copigraph* had acquired its raw material from an independent distributor were deemed irrelevant.⁵⁰⁴

On the contrary, the facts set out by *Bolloré* were interpreted as evidence to *reinforce* the presumption that it had exerted 'decisive influence' on its subsidiary's market conduct. Furthermore, the fact that the subsidiary had in the meantime been taken over by another undertaking was ascertained insufficient to relieve *Bolloré* from liability.

Even though this assessment shows that the Court of First Instance already pursued a very strict approach to corporate group liability,⁵⁰⁵ hereby confining a parent company's rights of defense to a susceptible extent, this last assertion is admittedly in line with the ECJ's economic approach to antitrust liability.

According to established case-law namely, an undertaking cannot rid itself of responsibility by selling a company or business division involved in an antitrust infringement, as long as it still exists at the time of the Commission's decision.⁵⁰⁶ For determining this latter aspect however, previous adjudication has required the Commission to necessarily employ a strict 'economic point of view'. Thus, if a company involved in a breach of competition law has changed its legal personality, or has been acquired by another undertaking even after the termination of this conduct, its previous parent company could still be held liable.⁵⁰⁷

This 'economic point of view' should nevertheless also appropriately be employed for ascertaining whether the bond between a parent and a subsidiary company is sufficiently strong for holding the former responsible for the latter's antitrust infringement in the first place. In this regard it may be questioned. however, whether European case-law has consistently respected established principles of corporate law.

§ 4. Assessment of European Practice Following 'Stora' under the Principles of Corporate Law

Primarily it has been shown that the Court of First Instance has quite accurately followed the principles set out by the ECJ in *AEG* and *Stora* in respect to the criteria the Commission could rely on for assuming a parent company's exertion of 'decisive influence'.

Contrary to the alleged ambiguity of its case-law as to whether the mere ownership of a subsidiary's shares sufficed for holding a parent company liable,⁵⁰⁸ the Court has pursued a clear

⁵⁰³ CFI of 26.4.2007, Joined Cases T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02, T-136/02, *Bolloré SA a.o. vs. Commission*, [2007] ECR 947, para. 142.

⁵⁰⁴ CFI of 26.4.2007, Joined Cases T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02, T-136/02, *Bolloré SA a.o. vs. Commission*, [2007] ECR 947, para. 144.

⁵⁰⁵ For the current approach of the ECJ, see 2.2.2.2. below.

⁵⁰⁶ See initially Commission Decision 86/398/EEC, *Polypropylen*, [1986] OJ Nr. L 230/1.

⁵⁰⁷ See *Dyckjaer-Hansen/Hoegh*, ECLR 2003, 203 in reference to the ECJ's decision in the case of *Anic Partecipazioni* (ECJ of 8.7.1999, C-49/92 P, [1999] ECR I-4125).

⁵⁰⁸ See in this regard *Riesenkampff and Krauthausen*, Liability of Parent Companies, [2010] ECLR, 40; furthermore *Yves Botteman and Laura Atlee*, An update on parent liability for antitrust violations of subsidiaries, Steptoe's EU Competition Practice, p. 3.

line of assessment this regard.⁵⁰⁹ In practically all of its judgments its standpoint has been that mere capital ownership is not sufficient per se for construing liability. Rather, it found that the Commission was required to bring forward further indicia substantiating the parent company's intrusive amount of 'control' of its subsidiary's market conduct.⁵¹⁰

In the case of wholly owned subsidiaries, however, the Court referred to the ECJ's assessment in *AEG*, ascertaining that it was in this case primarily upon the parent company to rebut this degree of influence upon factual evidence. Only in case that the parent disputed its exertion of 'decisive influence' upon accurate evidence, the Commission was obliged to further substantiate its claim.

Before going into detail on the ambiguous standard in which this approach has nevertheless been implemented in practice, the current principles on the distribution of the burden to prove 'decisive influence' may be summarized by the following chart:

Presumption of 'decisive influence'	Demonstration of actual influence	Cases of legal succession	Conscience or passive toleration of an infringement
General standard according to 'ICI': ⁵¹¹ <i>The conduct of a subsidiary may be imputed to the parent company in particular where, although having a separate legal personality, that subsidiary does not decide independently on its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company.</i>			
1. In the case of a 100% shareholding:		Same for all kinds of shareholdings:	
Presumption of 'decisive influence'-requiring a parent company's active contestation. ⁵¹²	Where not disputed: Comm. can assume this amount of control to be given in the actual case. If disputed: Comm. must substantiate assertion (form of indicia sufficient).	The case of a legal or organizational restructuring of an undert. does not nec. mean that a new entity free from liab. is created-> rather economic point of view. ⁵¹³	'Passive toleration' explicitly leads to responsibility. ⁵¹⁴ The parent is conversely required to take direct steps of prevention.
2. Less than (nearly) 100%, but majority shareholding:		Acc. to settled case-law a purchaser is not resp. for conduct prior to a subsidiary's acquisition, provided that the vendor maintains its legal personality. ⁵¹⁵	This however presupposes that the parent company factually controlled the company at the time of the infringement. ⁵¹⁶

⁵⁰⁹ See CFI of 27.9.2006, Case T-314/01, *Coöperatieve Verkoop-en Productievereinigiging van Aardappelmeel en deriven Avebe BA vs. Commission of the European Community*, [2006] ECR II-3085.

⁵¹⁰ For an assessment of the Court's ambiguity in regard to the content of these indicia, see however right below.

Commission must substantiate the existence of 'decisive influence' upon factual indicia.	Evaluation of 'decisive influence' must take into account all 'economic and legal links' between a parent and a subsidiary company. ⁵¹⁷	Sole exception: acquirer explicitly takes over responsibility for the infringement. ⁵¹⁸	Questionable how far parent company can be made responsible for conduct it has evidently not been aware of: In detail, see case of <i>Akzo Nobel</i> . ⁵¹⁹

As I have argued, the Court has not been entirely clear on the indicia that companies could rely in order to rebut the said presumption. At times, the Court has even entirely abstained from demanding further indicia. In the case of *Michelin*, for instance, it assessed that European competition law principally recognized the fact that different companies belonging to the same group form an 'economic unit' where the companies concerned do not independently determine their own market conduct.⁵²⁰ Without substantiating the facts on which this economic dependence was based, the Court went on to ascertain that such companies therefore constitute 'an undertaking' within the meaning of Articles 101 and 102 TFEU. This essentially ignores the necessary substantiation of the factual evidence the Commission must adduce in order to determine whether a subsidiary has autonomously decided on its own market conduct. The judgment, which aimed at determining whether a parent could also be regarded as a recidivist for infringements committed by its subsidiaries,⁵²¹ is representative for the tendency towards an all-encompassing evaluation of a 'single economic entity' between companies of a corporate group in European practice.

Admittedly, the extent of the parent company's exertion of 'control' in regard to its subsidiary's business operations is a central factor in most cases imposing liability.⁵²² As indicated above, however, an attribution of liability within a corporate group necessitates the assessment of the

⁵¹¹ ECJ of 14.7.1972, Case 48/69, *Imperial Chemical Industries Ltd. vs. Commission of the European Community*, ECR [1972], 619, paras. 132 and 133.

⁵¹² Primarily, ECJ of 25.10.1983, Case 107/82, *AEG vs. EC Commission*, [1983] ECR 315.

⁵¹³ See ECJ of 28.3.1984, joined cases C-29/83 and 30/83, *CRAM und Rheinzink vs. Commission*, [1984] ECR 1679, para. 9.

⁵¹⁴ This may be assumed where the parent does not explicitly give any instructions or direct signs of an 'appreciation' of the infringement, but conversely refrains from action despite its consciousness of the ongoing infringement, thus indirectly tolerating or appreciating the subsidiary's course of action. See ECJ of 16.11.2000, C-286/98 P, *Stora Kopparbergs Bergslags AB*, [2000] ECR I-9925, para. 10.

⁵¹⁵ See CFI of 20.4.1999, T-305/94 a.o., *Limburgse Vinyl Maschappij a.o. vs. EC Commission (LVM)*, [1999] ECR II-931, paras. 961 and 984; and ECJ C-279/98 P, *Cascades vs. Commission*, [2000] ECR I-9693, para. 79, as cited by *Hummer*, *ecolex* 2010, 66.

⁵¹⁶ See ECJ of 16.11.2000, C-286/98 P, *Stora Kopparbergs Bergslags AB vs. Commission*, [2000] ECR I-29925, paras. 31 to 40.

⁵¹⁷ See ECJ of 16.11.2000, Case C-294/98 P, *Metsä-Serla a.o. vs. Commission*, [2000] ECR I-10065, para. 27.

⁵¹⁸ In this case however, the purchaser possesses the same rights of defense which would normally be enjoyed by the transferor: See CFI T-45/98, *Krupp Thyssen and Acciai Speciali Terni SpA vs. Commission*, [2001] ECR II-3757, paras. 62 ff, as cited by *Hummer*, *ecolex* 2010, 66. In detail, see 2.2.1, § 1.3., 3.3.2, d.

⁵¹⁹ ECJ of 10.9.2009, Case 97/08 P, *Akzo Nobel NV vs. Commission*, [2009] ECR I-08237, paras. 54 ff.

⁵²⁰ CFI of 30.9.2003, Case T-203/01, *Manufacture Française des Pneumatiques Michelin vs. Commission of the European Community*, [2003] ECR II-4071, para. 290.

⁵²¹ (Especially concerning infringements, which had previously not been attributed to the respective parent company).

⁵²² *Blumberg*, *The Law of Corporate Groups*, (1987), Vol III, (Substantive Law), 187.

companies' factual economic relationship. In order to disregard a company's legal separation in corporate law, the amount of control hereby exerted must be of a 'substantial degree'.⁵²³ Principally, the Court has made it clear that parent companies are required to rebut that they in fact exercise such an intrusive amount of control over the subsidiary's market conduct. Nevertheless, the Court has left undertakings obliged to do so in an uncertain position. Therefore, it needs to be analyzed, whether the manner in which European antitrust practice ascertains the control relationship between a parent and a subsidiary company on the basis of the legal presumption outlined above is consistent with general principles of corporate law. This concerns especially the factual instances in which companies are viewed to exert a 'decisive' amount of influence on their subsidiary's market conduct. Before going into detail on the essential ambiguity of European case law in this regard, it is necessary to briefly outline the relevant principles of corporate 'entity law'.

§ 4.1. The Principles of Corporate 'Entity Law'

When incorporated, a business enterprise constitutes an independent legal entity, possessing its own rights and duties, its own assets and liabilities, as well as its own active and passive legal sphere.⁵²⁴

On the level of the single corporation, the creation of the concept of '*legal personality*' at the end of the 19th century lead to a clear distinction between the legal sphere of the enterprise owners or investors and the incorporated undertaking. This in turn not only led to the accumulation of capital in companies, but substantially increased investment activity encouraged by the concept of '*limited liability*'.⁵²⁵ According to this rule, the responsibility of corporate shareholders was limited to the amount of their capital investment, which strengthened the insulation of individuals from the liabilities and debts of the corporation.⁵²⁶ The evolution of these principles in company law thus resulted in the creation of modern corporate 'entity law'.⁵²⁷

In today's global economy, however, companies increasingly conduct their business operations in the constellation of several economically interrelated companies, i.e. a 'polycorporate enterprise' rather than a single corporate entity.⁵²⁸ This development has substantially changed the structural organization of enterprises in corporate law.⁵²⁹ This change of enterprise structures has confronted modern company law with a certain paradox, which can be perceived in the following statement:

⁵²³ See e.g. *Blumberg*, The Law of Corporate Groups, (2005), Vol III, (Substantive Law), § 10.1; *Antunes*, The Liability of Polycorporate Enterprises, 13 Conn. J. Int'l L. 197, (1998-1999), 199.

⁵²⁴ Cf. *Antunes*, *ibid*, 200.

⁵²⁵ Cf. *Antunes*, The Liability of Polycorporate Enterprises, 13 Conn. J. Int'l L. 197, (1998-1999), 200.

⁵²⁶ *Antunes*, *ibid*, 201, citing on the historical development of limited liability a.o. *Phillip I. Blumberg*, The Law of Corporate Groups (1987); furthermore *Minchinton*, Chartered Companies and Limited Liability, in: Limited Liability and the Corporation, T. Ornhiol (ed.), (1982) 137-155; *Blumberg & Strasser*, Corporate Groups and Enterprise Liability: Contracts and Torts, 706, PLI/Corp. 7, (1990), p. 17- 23; and *E. Dodd*, The Evolution of Limited Liability in American Industry, 61 Harv. L. Rev. 1351 (1948).

⁵²⁷ Cf. *Blumberg*, The Law of Corporate Groups, Vol III (Substantive Law), (1987), 100.

⁵²⁸ Cf. *Antunes*, *ibid*, 203.

⁵²⁹ See in this regard see *Blumberg*, The Increasing Recognition of Enterprise Principles in Determining Parent and Subsidiary Corporation Liabilities [hereinafter: Enterprise Principles], 28 Conn. L. Rev., (1996), 295, 297.

“In fact, whereas the original regulatory framework of incorporated enterprises was firmly anchored on the dogmatic archetype of corporate autonomy - along with the fundamentals of legal personality and limited liability -, legislators all over the world have tacitly begun to comply with some corporate practices and even introduced new legal mechanisms which have brought about a new emergent feature: corporate control.”⁵³⁰

By the emergence of ‘corporate control’ it was possible for businesses to participate in commerce by means of several legally independent companies, united by a common strategic or financial aim, i.e. in the constellation of a ‘corporate group’. Even though it is impossible to define the notion of ‘corporate control’ in an all-encompassing manner, embracing its origin, mechanisms, forms, or effects in the various legal areas concerned with the assessment of corporate group structures,⁵³¹ it is essential for the evaluation of the factual relation of corporate group companies in a specific case.

Since the legal mechanisms of ‘corporate control’ therefore comprise a multitude of aspects,⁵³² the growing statutory and jurisdictional acceptance of this concept has confronted classical corporation law with an impasse: on the one side, the regulation of the incorporated enterprise necessarily alludes to a company’s legal autonomy conferred upon it by the dogma of ‘legal separation’. On the other side, it is necessary to consider its economic affiliations with other companies.⁵³³

One of the areas in which the challenge set by the concept of the ‘polycorporate enterprise’ is particularly complex concerns the area of ‘*enterprise liability*’, i.e. the determination of corporate responsibility in light of a specific parent-subsidiary relationship.⁵³⁴ This is essentially due to the fact that the complexities of these intra-enterprise control relationships are not always entirely transparent.⁵³⁵

For a proper assessment of the aspect of liability in an individual case, it is therefore necessary to look behind the corporate structure of a company’s legal separation in order to ascertain the legal entity, which is responsible for a culpable action.⁵³⁶ This must not always be the company that has factually been found to be involved in the illicit behavior. For the area of company law, this is essentially recognized under the concept of ‘piercing the corporate veil’.⁵³⁷

⁵³⁰ *Antunes*, The Liability of Polycorporate Enterprises, 13 Conn. J. Int’l L., (1998-1999), 197, 204.

⁵³¹ See in detail, *Blumberg*, 28 Conn. L. Rev. 295, (1996) 297 ff.

⁵³² These may be of a financial nature (namely intercorporate stock ownership, cross-shareholdings, and the concentration of voting rights), of a contractual nature (for instance by the use of specific intra-enterprise contractual agreements or common commercial contracts), of a personal nature (for example a common executive board), or an organizational nature (namely, those established through the corporate by-laws). In detail, see *Antunes*, *ibid*, 205 (206).

⁵³³ For efforts in this respect, see e.g.: *Forum Europaeum Konzernrecht*, ZGR 1998, 627; *Peter Hommelhoff* in: FS Fleck, Zum revidierten Vorschlag einer Europäischen Konzernrichtlinie, (1984), 125 ff; *Blaurock* in: FS Sandrock, (1982), 79.

⁵³⁴ See e.g. *Lutter*, 100 Bände BGHZ: Konzernrecht, 15 Zeitschrift für Unternehmens- und Gesellschaftsrecht, 444, 458 (1987); *Schmitthoff*, Banco Ambrosiano and Modern Company Law, J. Bus. Law 361, 363 (1982); as cited by *Antunes*, *ibid*; furthermore *Wallace*, The Multinational Enterprise, 630 ff referring to the case-law of the Community Courts above, 639.

⁵³⁵ *Wallace*, The Multinational Enterprise, 630.

⁵³⁶ Cf. *Wallace*, *ibid*.

⁵³⁷ For the development of this term in common law jurisdiction, see e.g. *Blumberg*, The Law of Corporate Groups, (1987), Vol III (Substantive Law), 100; *Williamson*, The Modern Corporation: Origins, Evolution, Tributes, 19, J. Econ. Literature 1537 (1981); *Daemz*, The Rise of the Modern Industrial Enterprise, in: Managerial Hierarchies, 203, *Chandler* (ed.), (1980), the latter as cited by *Antunes*, 13 Conn.J. Int’l L. 197 (1998), 197.

§ 4.2. The Concept of 'Piercing the Corporate Veil'

'Piercing the veil' jurisprudence dominates cases involving the imposition of liability on one affiliate of a corporate group for acts of another.⁵³⁸ According to this approach, the imposition of liability on a parent, or other component of a corporate group for the torts or flawed contracts of a subsidiary, or another affiliated company, rests on a disregard of the separate incorporation of these companies. Even though this doctrine has originally been established for civil law cases, its principles are now prevalent in all areas of the law concerned with the assessment of economic affiliations and accordingly play a role for determining intragroup liability in antitrust cases.⁵³⁹

Since courts applying this concept rely on the premise that entity law exists to serve the fundamental principle of limited liability, the concept of 'veil lifting' has originally been adopted to counteract fraud and outright abuse of the corporate form.⁵⁴⁰ Upon this approach, a disregard of the corporate form should only be undertaken in 'exceptional' cases. These have sometimes been assessed to comprise situations in which a company is controlled by another to such an extent that it may be seen as a 'tool', a mere 'instrumentality' or an 'agency' of the parent.⁵⁴¹ Such an undifferentiated approach to disregarding the corporate form has nevertheless not gone without criticism.⁵⁴²

First, the use of such metaphors cannot amount to a substitute for the precise assessment of the economic realities between distinct companies of a corporate group. Such an approach namely bears the danger of an inconclusive assessment of a particular case. Furthermore, the standard inherent to this assessment has been applied indiscriminately, essentially disregarding the objectives of the different areas of law in which it has been applied.⁵⁴³ In statutory law, however, each legal area is framed by its own legal text and history, as well as a specific administration and socio-economic problem giving rise to its enactment. An undifferentiated approach to 'piercing the corporate veil', ignoring the distinct objectives of the specific legal area in which it applied, must therefore be rejected.

As the circumstances in which intragroup liability is imposed differ substantially therefore, some courts have recognized that it is necessary to distinguish between the different areas of its application. The substantive assessment of liability under the concept of 'piercing the veil' must therefore be refined with respect to the standard inherent to the legal area in which it is employed.⁵⁴⁴ These standards may essentially differ for cases imposing civil and those imposing tort, or criminal-akin liability.

⁵³⁸ Cf. *Blumberg*, *The Law of Corporate Groups*, 105 (106).

⁵³⁹ See in this regard *Blumberg*, *Enterprise Principles*, 28 Conn. L. Rev. 295, 297 (1996), 322.

⁵⁴⁰ See *Wallace*, *The Multinational Enterprise*, 631, citing for more detail: *Farrar and Hannigan*, and contributors *Furey and Wylie*, *Farrar's Company Law* (London: Butterworths, 4th ed. [1998]), 70-78.

⁵⁴¹ In detail, see *Blumberg*, *The Law of Corporate Groups*, 107.

⁵⁴² See *Balline*, *Corporations* §136 (rev.ed. 1946); *Latty*, *Subsidiaries and Affiliated Corporations*, 157-58 (1936); *Hamilton*, *The Corporate Entity*, 49 Tex. L.Rev. 979 (1971); *Landers*, *A Unified Approach to Parent, Subsidiary, and Affiliate Questions in Bankruptcy*, 43 U. Chi.L. Rev. 589, 619-20 (1915), as cited by *Blumberg*, *ibid*.

⁵⁴³ *Blumberg*, *The Law of Corporate Groups*, 107.

⁵⁴⁴ Cf. *Blumberg*, *The Law of Corporate Groups*, 108 (110) referring a.o. to: *Klemme*, *The Enterprise Liability Theory of Torts*, 47 U. Col. L. Rev., (1976), 153; *Priest*, *The Invention of Enterprise Liability: A Critical History of Intellectual Foundations of Modern Tort Law*, 14 J. Legal Stud. 461(1985).

The traditional view of requesting a ‘cautious’ or ‘reluctant’ application of the doctrine,⁵⁴⁵ essentially disregarding the conventional principle of ‘legal separation’, cannot ignore the underlying realities of modern corporate business practice.⁵⁴⁶ Even in the area of statutes of specific application the legislature has often adopted principles typically building on the concepts of the ‘controlled’ and the ‘controlling’ company for assessing corporate group relations.⁵⁴⁷ Contrary to the strict delineation between the separate legal personalities of a company and its individual shareholder, a differentiated approach is necessary for enterprises belonging to a corporate group. From an exclusively economic perspective, these enterprises namely behave as a ‘unified enterprise’.⁵⁴⁸

The practice of veil-lifting, which has experienced a substantial shift by the proliferation of multinational enterprises, has lead courts to adopt a certain ‘unity of enterprise’-approach to deal with situations in which a company has factually not acted on an independent basis.⁵⁴⁹ This in turn encouraged the development of so-called ‘**enterprise law**’, which has its principal foundation in the concept of ‘corporate control’.⁵⁵⁰ Although the existence of economic links hereby constitute an essential element of assessment, they must appropriately consider the factual relation between the companies concerned.⁵⁵¹

‘Corporate control’ therefore dominates the assessment of attributing responsibility for illicit conduct from one undertaking to another of the same corporate group. However, the standard is ambiguous.⁵⁵² On the one hand, some courts are reluctant to abandon the traditional concept of ‘entity law’ as the generally accepted principle of governing corporations under international law. On the other hand, the notion of ‘corporate control’⁵⁵³ has sometimes been employed in an indiscriminatory fashion, allowing for a broad imputation of liability between enterprises of a corporate group.

In European competition law the attempt was made to resolve this ambiguity by demanding a parent company’s ‘*decisive* influence’ on the market conduct of its subsidiary. This assessment, requiring a certain level of corporate integration for the imposition of liability, can principally only be approved of. What needs to be analyzed, however, is whether the assessment of this degree of control in practice is in line with ‘enterprise theory’.

§ 4.3. The Criteria Parent Companies Have Relied on in an Attempt to Rebut the ‘Stora Presumption’

The principle problem courts dealing with the imposition of intragroup liability are hereby confronted with concerns the assessment of when this amount of control may be regarded as

⁵⁴⁵ *White v Winchester Land Dev. Corp.*, 584 S.W.2d 56 (Ky. Ct. App. 1979); Furthermore see e.g., *Baker v Raymond Int’l, Inc.*, 656 F. 2d 173, 179 (5th Cir. 1981), cert. denied, 456 U.S. 983 (1982) as cited by *Blumberg*, *The Law of Corporate Groups*, 106.

⁵⁴⁶ Cf. *Dearborn*, *Enterprise Liability*, 97 Cal. L. Rev. (2009), 195, 199.

⁵⁴⁷ Cf. *Blumberg*, *Enterprise Principles*, 28 Conn. L. Rev. 295, 298.

⁵⁴⁸ See, originally *Berle*, *The Theory of Enterprise Liability*, Colum. L.Rev. (1947), 343.

⁵⁴⁹ Cf. *Wallace*, *The Multinational Enterprise*, 657.

⁵⁵⁰ *Blumberg*, *The Multinational Challenge*, 60, 92, 94, as cited by *Wallace*, *ibid*.

⁵⁵¹ Cf. *Wallace*, *ibid*.

⁵⁵² See e.g. *Dearborn*, *Enterprise Liability*, 97 Cal. L.Rev. (2009), 195, 246.

⁵⁵³ [Hereinafter also referred to as ‘control’].

‘intrusive’, thus allowing for a disregard of the legal separation between corporate group companies.

Courts imposing intragroup liability have assessed a parent company’s ‘decisive influence’ by emphasizing elements such as:

- the parent company’s participation in its subsidiary’s day-to-day business operations;
- the parent company’s determination of important strategic policy decisions;
- the parent company’s determination of the subsidiary’s business decisions, bypassing the subsidiary’s directors or management body;
- the parent company’s issuance of instructions to the subsidiary or the involvement of its own personnel in the conduct of the subsidiary’s business affairs.⁵⁵⁴

Thus, the understanding of ‘corporate control’ focuses on a parent company’s direct ability to control the instrumentalities of subsidiaries that have caused torts.⁵⁵⁵ Hereby it has not always been necessary that a parent company has exerted influence in the form of a direction.⁵⁵⁶ Rather, the domination of a subsidiary included mere general influence on the latter’s commercial policy, or an interrelation on the level of their personnel. While control facts determine the assessment of intragroup liability, they must be substantiated in order include the incentive structure of an economically integrated enterprise.

In European antitrust law, this essentially relates to the **criteria**, which have been ascertained relevant for holding a parent company liable for its subsidiary’s anticompetitive conduct. Over the years, companies caught by the ‘*Stora* presumption’ have attempted to rebut its conditions on upon a number of facts, claiming, amongst others: ⁵⁵⁷

- the parent to be a ‘pure holding company’ restricted to major and broad financial or strategic decisions without sufficient operational resources to exercise any influence on the business conduct of its subsidiaries;⁵⁵⁸
- the subsidiary’s reporting duties to be limited to financial results or forecasts and not to cover the area of commercial policy;⁵⁵⁹
- the parent and the subsidiary to be operating on distinct product markets;⁵⁶⁰ and finally
- that the parent company had not exerted influence in the specific area of business in which the infringement occurred.⁵⁶¹

All of the above arguments have been rejected by the ECJ.⁵⁶² Furthermore, it has repeatedly been mentioned by the Court that evidence demonstrating that the parent had not exerted influence

⁵⁵⁴ Cf. *Blumberg*, in: *The Law of Corporate Groups*, (1987), Vol III, Substantive Law, 188.

⁵⁵⁵ See also *Dearborn*, *Enterprise Liability*, 97 Cal. L.Rev. (2009), 195, 247.

⁵⁵⁶ See *Blumberg*, *The Law of Corporate Groups*, §10.02., supra note 7.

⁵⁵⁷ Cf. *Botteman and Atlee*, *Steptoe’s EU Competition Practice*, An update on parent liability for antitrust violations of subsidiaries, http://www.steptoel.com/assets/tachments/EU%20Comp%20Briefing_%20Dec%202009.pdf.

⁵⁵⁸ See e.g. most recently CFI of 30.9.2009, Case T-175/05, *Akzo Nobel NV vs. Commission*, [2009] ECR II-184, paras. 102 – 104; and Case T-168/05, *Arkema SA vs. Commission*, [2009], ECR II-180, para. 159.

⁵⁵⁹ See CFI of 30.9.2009, Case T-175/05, *Akzo Nobel NV vs. Commission*, [2009] ECR II-184, paras. 94 – 95; Case T-168/05, *Arkema SA vs. Commission*, [2009], ECR II-180, para. 53.

⁵⁶⁰ Case T-168/05, *Arkema SA vs. Commission*, [2009], ECR II-180, *ibid*.

⁵⁶¹ CFI of 12.12.2007, Case T-112/05 *Akzo Nobel NV vs. Commission*, [2007] ECR-II 05049, para. 83. See also the elements brought forward in *Bolloré SA a.o. vs. Commission* (Joined Cases T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02, T-136/02, [2007] ECR 947, paras. 140 ff).

in the specific area of business in which the infringement occurred was not sufficient to deny the imposition of liability. Rather, it was required for the subsidiary to have acted in an entirely autonomous fashion at the time of the infringement.⁵⁶³

§ 4.4. The Ambiguity Inherent to the ‘Stora-Presumption’

At this point it is possible to perceive that there is a rub in the Court’s standard of assessment. Principally, nothing speaks against the implementation of a legal presumption where there is a precise base of reference for companies to contravene it.⁵⁶⁴ Enterprises should thus be provided with a clear line of assessment, stating the criteria by which they are presumed to have ‘intrusively’ interfered with their subsidiary’s market conduct. Because a parent company is hereby essentially blamed for its own operational business demeanor, such an assessment of ‘corporate control’ should be careful not to disregard common economic realities.

A fundamentally strict approach to control-based liability on the basis of mere capital links nevertheless incentivizes the very type of decentralization and subsequent risk externalization that the Court aimed to prevent by the creation of a ‘legal presumption’.⁵⁶⁵ An assessment of intragroup liability should therefore be careful not to suffer from rigidity and formalism. This explains why the intra-enterprise attribution of rights and liabilities among the constituent companies of a corporate group should not flow from an overriding concept of the group as an ‘economic entity’.⁵⁶⁶

Where the standard of ‘entity’ law’, with its basic foundation of ‘legal separation’, is nevertheless inappropriate to reflect economic affiliations, a more holistic approach to corporate liability is required. In this regard, the movement from ‘entity law’ to so-called ‘enterprise principles’ has attempted to appropriately consider the economic realities underlying the management of corporate groups in different areas of the law today.⁵⁶⁷ Enterprise theory hereby draws a distinction between the corporate shareholders whose passive holdings in the corporation represent a simple investment choice, and those for whom the subsidiary or affiliated company is part of its functionally and economically integrated business.⁵⁶⁸

Accordingly, the ‘enterprise concept’ draws not only on the criterion of ownership for reviewing the integrated management of a corporate group but also includes an assessment of the precise relationship of control that exists between a parent and a subsidiary company.

⁵⁶² See *Botteman and Atlee*, An update on parent liability for antitrust violations of subsidiaries, Steptoe’s EU Competition Practice, p. 4.

⁵⁶³ See e.g. CFI Joined Cases T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02, T-136/02, *Bolloré SA a.o. vs. Commission*, [2007] ECR 947, paras. 134 ff.

⁵⁶⁴ See e.g. *Thomas*, Die verfahrensrechtliche Bedeutung der Marktbeherrschungsvermutung des § 19 (3) GWB, [The presumption of dominance under § 19 (3) of the German antitrust code], WuW 5/2002, 472, and in detail under 3.2.2. below.

⁵⁶⁵ See in detail 3.2.1. For the general problem inherent to the behavioral approach of ‘control-based’ liability in this regard, see *Dearborn*, Enterprise Liability, 97 Cal. L.Rev. (2009), 195, 247 f (249).

⁵⁶⁶ Cf. *Blumberg*, Enterprise Principles, 13 Conn. L. Rev (1995-1996), 299.

⁵⁶⁷ See originally, *Berle*, The Theory of Enterprise Entity, 47 Colum. L. Rev. (1947), 343.

⁵⁶⁸ *Dearborn*, Enterprise Liability, 97 Cal. L. Rev. (2009), 250.

Instead of constituting a transcendental legal concept, enterprise theory rests on essentially pragmatic considerations.⁵⁶⁹

These considerations essentially reflect the underlying objectives of the legal area in which ‘enterprise liability’, i.e. a company’s responsibility on the basis of its exertion of control over another enterprise, is imposed.⁵⁷⁰ In respect to the allocation of corporate risk between a parent and a subsidiary company, this method of assessment is furthermore inevitable to appropriately induce companies to behave according to the pertinent policies of the respective legal area. Therefore, enterprise principles referring to the realities of the group’s management require an apposite mode of determining when an ‘intrusive’ or ‘decisive’ amount of control exists between affiliated companies.

The outline of case-law above has shown that this amount of control has not been substantiated by European antitrust practice in a satisfactory manner. Except in some rare cases in which the existence of ‘decisive influence’ was denied despite the fulfillment of the ‘*Stora*-presumption’,⁵⁷¹ the legal separation between group companies has been ignored upon the pretense of an improved ‘effectiveness’ of antitrust enforcement.⁵⁷² In the years succeeding the ECJ’s judgment of *Stora*, the **Court of First Instance** was not able to provide parent companies with a clear base of reference for assessing in which cases their corporate involvement in another company could lead to the imposition of an antitrust fine.

Particularly perplexing in the CFI’s mode of assessing intragroup liability was the way in which it imposed **joint and several liability** for antitrust infringements committed by one or several undertakings of a corporate group on the entire concern without examining the legal and economic links between them.⁵⁷³ Even though the European Court of Justice has clearly disapproved of attributing conduct in an indiscriminate manner between several undertakings of a corporate group,⁵⁷⁴ the CFI has not complied with this line of case-law in *Tokai Carbon*.⁵⁷⁵ As indicated above, this understanding of a ‘single economic entity’ essentially deviates from the preconditions outlined by the ECJ in previous adjudication, expressly requiring the exertion of ‘decisive’ influence of a controlling company on a controlled one.

Clearly, the affiliation of undertakings forming a corporate group involves a certain degree of economic integration. In most cases, companies of a corporate group are conducting interrelated fragments of a unified business.⁵⁷⁶ Without a significant exertion of influence of one legal entity on another, however, the imposition of intragroup responsibility entirely disregards

⁵⁶⁹ Cf. *Blumberg*, *Enterprise Principles*, *ibid*; referring to the various areas of the law which are already based on enterprise principles.

⁵⁷⁰ See *Blumberg*, *ibid*, 299 ff.

⁵⁷¹ Case COMP/C.38.238/B.2, *Raw Tobacco Spain*, [2007] OJ Nr. L 102/14, para. 376.

⁵⁷² Basis of the presumption is obviously the acceleration of the procedure, by ‘unburdening’ the Commission of the necessity of a precise assessment of the criteria on which ‘decisive influence’ between companies can be established.

⁵⁷³ CFI, Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03, *Tokai Carbon Co Limited a.o. vs. Commission*, [2005] ECR II-10, para. 63, and CFI, Case T-9/99, *HFB a.o. v EC Commission*, [2002] II-1487, para. 525.

⁵⁷⁴ See above in Case C-196/99 P, *Siderúrgica Aristrain Madrid SL vs. Commission of the European Community*, [2003] ECR I-11049, para. 99.

⁵⁷⁵ See CFI, Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03, *Tokai Carbon Co Limited a.o. vs. Commission*, [2005] ECR II-10, para. 62.

⁵⁷⁶ *Blumberg*, *The Law of Corporate Groups*, 192.

the concerned company's separate legal personality. The CFI's formulation in the case of *HFB*, for instance,⁵⁷⁷ blurs the criteria of a 'single economic entity' to a substantial degree.

The Court's approach of principally holding companies of a corporate group to constitute a 'single economic unit' and thus a 'single undertaking', therefore omits an assessment of the underlying economic realities enterprise theory attempts to take into account. Without the existence of a 'controlling' and a 'controlled' undertaking, the imposition of joint and several liability on a corporate group as a whole must be rejected. Regarding the ECJ's clear dismissal of this undifferentiated approach to intragroup liability in its decision of *Aristrain* however,⁵⁷⁸ this approach of the Court of First Instance must be regarded as obsolete.

Furthermore, the CFI's assessment of a parent company's '**rights of defense**' in regard to the Commission's statement of objections must be critically reviewed. In its judgment of *Bolloré*, the Court of First Instance primarily acknowledged that the authority had not appropriately substantiated on which basis it imposed antitrust liability on the parent company of *Bolloré*. As already mentioned, the Court of First Instance ruled that such a defect only entailed the annulment of the Decision in case "*the allegations concerned could not have been substantiated to the requisite legal standard on the basis of other evidence on which the company's concerned were given were given the opportunity to comment*".⁵⁷⁹

Moreover, the CFI emphasized that an infringement of *Bolloré's* rights of defense was only capable of affecting the validity of the decision if it was based purely on the parent company's direct involvement in the breach of Art 101 (1) TFEU.⁵⁸⁰ Therefore, the Court denied the annulment of the Commission's decision as the company of *Bolloré* had been given the principle opportunity to defend itself in regard to its subsidiary's anticompetitive conduct during the subsequent administrative procedure. Having thus concluded that the Commission's error of assessment did not affect *Bolloré's* responsibility for its subsidiary's illicit conduct, the Court of First Instance upheld the Commission's decision, requiring the parent company to pay the fine for this behavior.

Principally, the finding that a decision must not primarily be overturned in the light of an unsubstantiated statement of objections is not worthy of critique if the concerned company is later on given the possibility to defend itself. However, in regard to the fact that a parent company is hereby held liable for its 'indirect involvement', there is ambiguity in the Court's assessment. Under the presumption of '*Stora*' namely, it is principally upon a parent company to rebut the presumption of 'decisive influence' in order to avoid being held liable for the illicit conduct of a subsidiary. This is the case irrespective of whether the parent company had directly been involved in the illicit conduct itself and answered the Commission's objections in this regard. It is therefore inconsistent of the CFI to rely on a legal presumption of responsibility, while at the same time diluting this standard on the grounds that a company did not necessarily need to be informed of the allegations it was required to rebut. The ambiguity of the Court's assessment is furthermore apparent given the fact that it solely regarded the 'direct involvement' of a company relevant for upholding its rights of defense. For a parent company

⁵⁷⁷ Cf. CFI of 22.3.2002 in Case T-9/99, *HFB a.o. vs. EC Commission*, [2002] ECR II-1487, para. 114; See § 3.3. above.

⁵⁷⁸ See ECJ of 2.10.2003, C-196/99 P, *Siderúrgica Aristrain Madrid SL vs. Commission of the European Community*, [2003] ECR I-11049, para. 99.

⁵⁷⁹ CFI of 26.4.2007, Joined Cases T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02, T-136/02, *Bolloré SA a.o. vs. Commission*, [2007] ECR 947, para. 80.

⁵⁸⁰ CFI Joined Cases T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02, T-136/02, *Bolloré SA a.o. vs. Commission*, [2007] ECR 947, *ibid*.

however, being held liable for its ‘indirect involvement’ in an infringement by the means of its subsidiary generates the same (financial) consequences.

The European Court of Justice, to which the undertakings concerned in the case of *Bolloré* appealed, primarily acknowledged the incoherence of the CFI’s approach.⁵⁸¹ The Court reminded of the fact that in all proceedings in which sanctions are imposed, the observance of a company’s rights of defense is a fundamental principle of European Union law.⁵⁸² It ruled that the Commission’s statement of objections must therefore contain the essential elements which the authority regards relevant for holding a company liable.⁵⁸³

This was seen to include the necessary substantiation to which legal person of a corporate group of companies the Commission aimed to attribute responsibility for the alleged anticompetitive behavior.⁵⁸⁴ Finally, upon *Bolloré’s* contention that the set of judgments cited by the CFI to fortify its view⁵⁸⁵ concerned essentially different situations, the ECJ added that the Commission was to indicate in which capacity an undertaking was called on to answer the allegations.⁵⁸⁶

The ECJ hence concluded:

“[44] However, the fact that in the contested decision Bolloré was held liable on the ground that it was involved in its capacity as Copigraph’s parent company, as well as on the ground of its direct involvement, does not preclude the decision possibly having been based on conduct in respect of which Bolloré was not able to defend itself.”⁵⁸⁷

From this understanding it becomes clear that the ECJ not only clearly distinguished between a company’s ‘direct or indirect’ involvement in an infringement, but also required the Commission to indicate, already in its statement of objections, in which form it intended to hold a company liable. Furthermore, both forms of liability, specifically the parent company’s obligation to provide sufficient evidence why it regarded the subsidiary to be liable for its own conduct,⁵⁸⁸ were given the same significance in respect to a company’s rights of defense. Hereby the ECJ once more refrained from giving a detailed account of the criteria, which a parent company was to submit in order to avoid being held ‘indirectly’ liable for its subsidiary’s conduct.

2.2.2.2. The ECJ’s Judgment in the case of Akzo Nobel

⁵⁸¹ That is, including on the one hand the burden of providing evidence to rebut the presumption of decisive influence on a wholly-owned subsidiary, while on the other drawing an indistinct delineation between a company’s direct or indirect involvement. See ECJ of 3.9.2009, Joined Cases C-322/07 P, C-327/07 P and C-338/07 P, *Papierfabrik August Köhler AG, Bolloré SA and Distribuidora Vizcaína de Papeless SL vs. Commission* [hereinafter: *Bolloré a.o. vs. Commission*], [2009] ECR I-7191 389.

⁵⁸² ECJ of 3.9.2009, Joined Cases C-322/07 P, C-327/07 P and C-338/07 P, *Bolloré a.o. vs. Commission*, [2009] ECR I-7191 389, para. 34.

⁵⁸³ Cf. ECJ, *ibid*, para. 35.

⁵⁸⁴ ECJ of 3.9.2009, Joined Cases C-322/07 P, C-327/07 P and C-338/07 P, *Bolloré a.o. vs. Commission*, [2009] ECR I-7191 389, para. 38.

⁵⁸⁵ CFI, Joined Cases T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02, T-136/02, *Bolloré SA a.o. vs. Commission*, [2007] ECR 947, para. 80.

⁵⁸⁶ ECJ of 3.9.2009, Joined Cases C-322/07 P, C-327/07 P and C-338/07 P, *Bolloré a.o. vs. Commission*, [2009] ECR I-7191 389, para. 40.

⁵⁸⁷ ECJ of 3.9.2009, Joined Cases C-322/07 P, C-327/07 P and C-338/07 P, *Bolloré a.o. vs. Commission*, [2009] ECR I-7191 389.

⁵⁸⁸ This leads to the necessity of assessing the fine merely on the basis of this company’s turnover.

As noted above, in the years following the ECJ's decision of *Stora*, undertakings have attempted to rebut the presumption formulated therein on the basis of a number of criteria.⁵⁸⁹ Even though the presumption seemed clear on the conditions on which the Commission could legitimately rely for the existence of 'decisive influence', these were still regularly disputed by the undertakings concerned by it.⁵⁹⁰ Furthermore, it was contentious on which modes of influence the Commission was required to assess the imputation of conduct and liability between undertakings of a corporate group. Especially the case law of the Court of First Instance did not appropriately substantiate the control relationship between a parent and a subsidiary,⁵⁹¹ but limited its assessment to stating that the evidence asserted by the undertakings concerned by the presumption did not suffice for its rebuttal. On the contrary, the company's argumentation was sometimes even viewed to reinforce the existence of 'decisive influence'.

The discussion particularly revolved around the fact whether the Commission could simply rely on the mere attestation of a 100% shareholding on the basis of the presumption alone, or whether it was furthermore required to substantiate the latter by adducing further evidence why it assumed that the parent had exerted a 'decisive' amount of influence.⁵⁹² The ECJ's decision of *Stora* had namely occasionally been interpreted in this latter way. This was essentially due to the fact that the Court had mentioned further criteria (apart from a company's shareholding),⁵⁹³ to confirm that the possibility of exerting decisive influence had in fact been made use of by the concerned parent company.⁵⁹⁴ For these reasons, the ECJ's decision in the case of *Akzo Nobel*⁵⁹⁵ was awaited with great anticipation.

§ 1. The Court's Ruling

In her Opinion of the case, General Advocate *Juliane Kokott* primarily stepped in for an assumption of 'decisive influence' in case that the parent company of a wholly-owned subsidiary had not disputed this. As may be seen from the parties' assertions, however, this fact had still been debated controversially. In this decision, the ECJ therefore substantiated its case-law by granting the Commission a substantial facilitation of its procedural obligations.

The case had been initiated by a leniency application filed by an American producer, on which basis the Commission launched investigations in the global choline chloride industry. This inquiry resulted in the adoption of the contested decision.⁵⁹⁶ The appellants of the case

⁵⁸⁹ In essence, all of these assertions had been rejected by Community legislature (see § 4.3. above).

⁵⁹⁰ ECJ of 10.9.2009, Case 97/08 P, *Akzo Nobel NV vs. Commission*, [2009] ECR I-08237, para. 24 ff; Cf. EuZW, Rechtsprechung, Heft 22/2009, 816.

⁵⁹¹ See e.g. CFI of 15.9.2005, Case T-325/01, *DaimlerChrysler AG vs. Commission of the European Community*, [2005] ECR II-3319.

⁵⁹² See 2.2.2.1. regarding the 'belt and braces' the Commission has sometimes adopted.

⁵⁹³ For instance, the fact that the parent company had presented itself as the Commission's sole interlocutor during the administrative procedure.

⁵⁹⁴ ECJ of 16.11.2000 in C-286/98 P, *Stora Kopparberg Bergslags vs. Commission*, [2000] ECR I-29925, paras. 29-29; CFI Case T-354/94, *Stora Kopparbergs Bergslags vs. Commission*, [1998] ECR II-2111, paras. 85 ff.

⁵⁹⁵ ECJ of 10.9.2009, Case 97/08 P, *Akzo Nobel NV vs. Commission*, [2009] ECR I-08237.

⁵⁹⁶ Commission Decision of 9.12.2004 in Case COMP/C.37.533, *Choline Chloride*, [2005] OJ Nr. L. 190.

comprised five companies belonging to the *Akzo Nobel* group, which was among the producers of choline chloride, predominantly used as a water-soluble vitamin in the animal-feed industry.⁵⁹⁷

In the period concerned by the Commission's investigation, the parent undertaking of *Akzo Nobel BV* held, either directly or indirectly, all the shares of the other appellants.⁵⁹⁸ The detected cartel was primarily implemented on a global level, hereby comprising several North American and European companies between June 1992 and April 1994, and consequently carried on merely on the European level⁵⁹⁹ until October 1998.⁶⁰⁰ The Commission regarded the arrangements concluded at the global and the European levels as a complex and continuous infringement in regard to the area of the Common Market, in which the European producers had participated during the entire period.⁶⁰¹

Thus, the Commission found the companies of the *Akzo* group to have taken part in a series of market sharing, and price fixing agreements and addressed its decision to the entire group. The authority justified this assessment by considering the group as a 'single economic unit,' finding it to have participated as such in the infringement of Art 101 (1) TFEU.⁶⁰²

The Commission concluded that the parent company of *Akzo Nobel* was not only in a position to exert 'decisive influence' on the market conduct of its subsidiaries, but that it had in fact done so, since the latter essentially lacked commercial autonomy.⁶⁰³ The Commission hereby asserted that this was proven by the documents produced by *Akzo Nobel* during the administrative procedure,⁶⁰⁴ and imposed a fine of approximately 21 million Euros on the basis of the group's combined worldwide turnover.

In support of their appeal before the **Court of First Instance**, the applicants relied on three pleas in law. The applicants' first plea was based on the incorrect imputation of joint liability to the parent company of *Akzo Nobel*, despite its substantial shareholding in the other companies.⁶⁰⁵ In this respect, the applicants submitted that the 'decisive' amount of influence that a parent company was required to exercise in order to be considered liable for the anticompetitive conduct of its subsidiaries was to relate to the area of commercial policy in the strict sense. Therefore, the Commission was seen to be required not only to show that the parent company possessed the potential to direct its subsidiaries' commercial conduct, but also to prove that it had in fact exerted this power to the point of depriving the subsidiary of its

⁵⁹⁷ In addition to producers, the choline chloride market is made up of converters, who buy the product from producers in liquid form and convert it into choline chloride either on behalf of the producer or on their own behalf; See Case 97/08 P, *Akzo Nobel NV vs. Commission*, [2009] ECR I-08237, para. 7.

⁵⁹⁸ Comprising, *Akzo Nobel Nederland BV*, *Akzo Nobel Chemicals Internional BV*, and *Akzo Nobel Functional Chemicals BV*.

⁵⁹⁹ In the contested decision, the European Economic Area ['EEA'].

⁶⁰⁰ Cf. ECJ, Case 97/08 P, *Akzo Nobel NV vs. Commission*, [2009] ECR I-08237, para. 11.

⁶⁰¹ ECJ of 10.9.2009, Case 97/08 P, *Akzo Nobel NV vs. Commission*, [2009] ECR I-08237, para. 12.

⁶⁰² Even though *Akzo Nobel Functional Chemicals* was created as a subsidiary of *Akzo Nobel Chemicals* in June 1999, it was addressed by the Commission, as the latter regarded it as the legal successor of its parent company in respect to the majority (!) of its activities in the choline chloride sector.

⁶⁰³ ECJ of 10.9.2009, Case 97/08 P, *Akzo Nobel NV vs. Commission*, [2009] ECR I-08237, para., 15.

⁶⁰⁴ ECJ of 10.9.2009, Case 97/08 P, *Akzo Nobel NV vs. Commission*, [2009] ECR I-08237, para. 16.

⁶⁰⁵ ECJ of 10.9.2009, Case 97/08 P, *Akzo Nobel NV vs. Commission*, [2009] ECR I-08237, para. 21. The assertion by the Commission that the action did not contain any pleas in law capable of justifying an annulment of the contested decision concerning the establishment of liability or the amount of the fine was dismissed by the CFI in paragraphs 31 and 32 of the judgment under appeal. (CFI of 12.12.2007, Case T-112/05, *Akzo Nobel NV* [2007] ECR II-5049, [2008] 4 C.M.L.R. 12).

independence.⁶⁰⁶ In case the subsidiary therefore determined its commercial policy largely on its own parts, the Commission was obliged to find solely the subsidiary liable for the breach of competition law. The applicants asserted that even though it was clear from Community case-law that wholly-owned subsidiaries were presumed to have carried out the instructions of their parent companies, it was again upon the Commission to show that the parent company had in fact exercised decisive influence in the specific case.⁶⁰⁷

The applicants took the view that they established *Akzo Nobel's* subsidiaries to have largely determined their commercial policy on their own parts by the evidence submitted and therefore rebutted the presumption relied on by the Commission. According to the applicants, the sole fact that the companies of a corporate group had organized their business into several units could not suffice in itself to make the proof of the parent's actual involvement in the infringement unnecessary.⁶⁰⁸ Therefore the Commission was seen not to have sufficiently satisfied its obligation, as the 'evidence' it relied on for assuming 'decisive influence' merely alluded to the parent company's substantial shareholding in the other companies.

In consideration of this first plea in law, the CFI analyzed whether the Commission had been correct to attribute the subsidiaries' illicit conduct to its parent corporation, stating that:

*"[57] It must be borne in mind, first of all, that the concept of an undertaking within the meaning of Article 101 TFEU includes economic entities which consist of a unitary organization of personal, tangible and intangible elements, which pursue a specific economic aim on a long-term basis and can contribute to the commission of an infringement of the kind referred to in that provision."*⁶⁰⁹

Therefore, not the mere relationship between the parent company and its subsidiary instigating the infringement, and certainly not the former's actual involvement, but the mere fact that they constituted a 'single undertaking' in the sense described above was to enable the Commission to address its decision to the (final) parent company of the corporate group. The CFI nevertheless went on to state that European competition law recognizes *"that different companies belonging to the same group form an economic entity and therefore an undertaking within the meaning of Articles 101 and 102 TFEU if the companies concerned do not determine independently their own conduct on the market."*⁶¹⁰

Furthermore, the Court held that for the purpose of enforcing the Commission's decision it was necessary to identify an entity possessing legal personality.⁶¹¹ Whether the Court hereby merely intended to restate all principles of existing case-law for holding parent companies liable, or whether it seemed to suggest by this formulation that subsidiaries lacked legal personality in case their parents had exerted 'decisive influence' upon them, is not entirely clear.⁶¹² The Court then analyzed the applicant's assertion in respect to the conditions the Commission could legitimately rely on for the presumption of 'decisive influence'.

⁶⁰⁶ ECJ of 10.9.2009, Case 97/08 P, *Akzo Nobel NV vs. Commission*, [2009] ECR I-08237, para. 23.

⁶⁰⁷ Cf. ECJ of 10.9.2009, Case 97/08 P, *Akzo Nobel NV vs. Commission*, [2009] ECR I-08237, para. 24.

⁶⁰⁸ Cf. ECJ, Case 97/08 P, *Akzo Nobel NV vs. Commission*, [2009] ECR I-08237, paras. 25-26.

⁶⁰⁹ CFI of 12.12.2007, Case T-112/05, *Akzo Nobel NV*, [2007] ECR II-5049.

⁶¹⁰ CFI of 12.12.2007, Case T-112/05, *Akzo Nobel NV*, [2007] ECR II-5049, para. 58, citing in this respect, Case T-203/01, *Michelin vs. Commission* [2003] ECR II-4071, para. 290. See already the criticism of the Court's formulation in this decision under § 2.1., 4.

⁶¹¹ Cf. CFI, *ibid*, para. 59.

⁶¹² For a detailed assessment of this aspect see 3.1.1.2.

In reference to the ECJ's judgment in the case of *AEG*, the CFI reinforced that in the case of a 100% shareholding there was a 'simple presumption' that the parent company had exercised 'decisive influence' on its subsidiary and that the companies concerned therefore constituted a 'single undertaking' within the meaning of Art 101 (1) TFEU.⁶¹³ After reminding that it was generally upon the parent company to dispute "*before the Community judicature*" this presumption by adducing evidence to establish the independence of its subsidiary,⁶¹⁴ the Court consequently assessed whether the Commission was to bring forward 'additional circumstances' in order to rely on the said presumption. The Court went on to formulate:

*"[61] In that regard, it must be made clear that, while it is true that [...] in Stora, [...] the Court of Justice referred, as well as to the fact that the parent company owned 100% of the capital of the subsidiary, to other circumstances, such as the fact that it was not disputed that the parent company exercised influence over the commercial policy of its subsidiary or that both companies were jointly represented during the administrative procedure, the fact remains that those circumstances were mentioned by the Court of Justice for the sole purpose of identifying all the elements on which the Court of First Instance had based its reasoning before concluding that this reasoning was not based solely on the fact that the parent company held the entire capital of its subsidiary."*⁶¹⁵

Accordingly the CFI argued that the ECJ's assertions in this decision could not lead to an abrogation of the principle conditions of the presumption laid down in *AEG-Telefunken vs. EC Commission*.⁶¹⁶ Therefore, it was sufficient for the Commission to show that the entire share capital of a subsidiary was held by its parent company in order to legitimately conclude that the latter exercised 'decisive influence' on its subsidiary's commercial policy. Upon this presumption, the authority was considered competent to hold this parent company 'jointly and severally liable' for the payment of the fine imposed on the subsidiary, unless it succeeded in proving that the latter had, in essence, not complied with the instructions issued by it.⁶¹⁷

This formulation seems surprising in a two-fold way. First, the Court refrained from justifying why it was necessary to calculate the fine on the basis of the group's worldwide turnover in order to hold the parent company of *Akzo Nobel* liable for a fine that was explicitly imposed for its subsidiary's illicit conduct. And secondly, because the Court ascertained a subsidiary's commercial autonomy upon the fact that the latter had contravened the business policy laid out by the parent company as head of the corporate group. Even though the CFI acknowledged that the ECJ had previously reviewed influence in the area of a company's

⁶¹³ CFI of 12.12.2007, Case T-112/05, *Akzo Nobel NV*, [2007] ECR II-5049, para. 60, hereby citing also its own decisions in *Limburgse Maschappij and Others v Commission*, 'PVC II', (Joined Cases T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94, [1999] ECR II-931, para. 978); and *Tokai Carbon a.o. vs. Commission* [Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03, [2005] ECR II-10, para. 59].

⁶¹⁴ Even though the Court did not make a precise statement which circumstances the disputing parent company was to adduce in order to establish the subsidiary's independence, it may be derived from this formulation that the parent company is obliged to bring forward these assertions already during the administrative procedure.

⁶¹⁵ CFI of 12.12.2007, Case T-112/05, *Akzo Nobel NV*, [2007] ECR II-5049.

⁶¹⁶ CFI, *ibid*.

⁶¹⁷ Cf. CFI of 12.12.2007, Case T-112/05, *Akzo Nobel NV*, [2007] ECR II-5049, para. 62. The CFI concluded that this would denote that the subsidiary had acted 'autonomously on the market'.

commercial policy when analyzing the existence of a 'single economic entity',⁶¹⁸ the Court held that it could not be inferred "*that it is only those aspects that are covered by the concept of the 'commercial policy' of a subsidiary for the purpose of the application of Articles 101 and 102 TFEU with respect to the parent company.*"⁶¹⁹

Rather, it was for the parent to put before the Court any evidence relating to all 'economic, legal and organizational links' between them, in order to demonstrate that it did not constitute a 'single economic entity' with its subsidiary.⁶²⁰ It followed that even though each piece of evidence adduced by the parties was to be taken into account for the assessment of a case, these linkages nevertheless varied in nature and importance according to the specific features of the corporate group.⁶²¹

Consequently, the Court reviewed the evidence submitted by the applicants for contravening the existence of 'decisive influence'.⁶²² After concluding that the parties constituted a 'single economic entity' and therefore 'an undertaking' within the meaning of Art 101 TFEU due to the fact that the parent possessed the subsidiaries' entire share capital, it held that there was no need to determine whether the parent had in fact exercised influence on its subsidiaries' conduct.⁶²³ Upon the same argumentation it dismissed the applicant's assertion that the Commission had infringed Art 23 (2) of Regulation 1/2003 upon the fact that the fine exceeded 10% of the subsidiary's business volume, which had actually been involved in the infringement.⁶²⁴ Finally, it rejected the applicant's line of reasoning by which an infringement of the Commission's obligation to state reasons in regard to the responsibility of *Akzo Nobel BV* as joint and several debtor was claimed, and consequently dismissed the action on the whole.⁶²⁵ The parties therefore appealed to the **European Court of Justice**.

After admitting the principal foundation of the appeal on the basis that all appellants possessed a legal interest in the respective judgment, the ECJ reviewed the Commission's allegation that the concerned companies had relied on a new plea in law before the Court. Contrary to the Commission's view, the ECJ nevertheless found that the plaintiffs' arguments attempting to rebut that the parent company of *Akzo Nobel* had exercised 'decisive influence' on the other companies of the group to constitute an elaboration of the plea that joint and several liability had wrongly been imputed to this company.⁶²⁶ Hence, the ECJ declared the appeal to be admissible. In their appeal, the companies of the *Akzo group* relied on a single plea in law, claiming that the Court of First Instance had incorrectly applied the definition of an 'undertaking' within the meaning of Art 101 TFEU and Art 23 (2) of Regulation No 1/2003 by holding the head of the group jointly and severally liable for the conduct of its constituents.⁶²⁷ This plea consisted of two separate parts.

In the first part of the plea, the appellants submitted that the CFI had applied the wrong legal test in order to determine whether *Akzo Nobel's* subsidiary had acted autonomously on the

⁶¹⁸ Hereby the Court explicitly referred to a company's pricing policy, production and distribution activities, sales objectives, gross margins, sales costs, cash flow, stocks and marketing.

⁶¹⁹ See CFI of 12.12.2007, Case T-112/05, *Akzo Nobel NV*, [2007] ECR II-5049, para. 64.

⁶²⁰ Cf. CFI of 12.12.2007, Case T-112/05, *Akzo Nobel NV*, [2007] ECR II-5049, para. 65.

⁶²¹ CFI, *ibid*.

⁶²² Cf. ECJ of 10.9.2009, Case 97/08 P, *Akzo Nobel NV vs. Commission*, [2009] ECR I-08237, para. 28.

⁶²³ Cf. ECJ, *ibid* [emphasis added].

⁶²⁴ (*Akzo Nobel Functional Chemicals*).

⁶²⁵ See CFI of 12.12.2007, Case T-112/05, *Akzo Nobel NV*, [2007] ECR II-5049, paras. 91-92, and 94-96.

⁶²⁶ See ECJ, *ibid*.

⁶²⁷ ECJ of 10.9.2009, Case 97/08 P, *Akzo Nobel NV vs. Commission*, [2009] ECR I-08237, para. 40.

market.⁶²⁸ Thereby, it had incorrectly interpreted the Commission's **burden of proving** the basis of the allegation.

Even though the applicants contended that the Court of Justice had established a rebuttable presumption in order to alleviate the Commission's burden of proof in this regard,⁶²⁹ it had nevertheless expressly stated that a mere capital shareholding in a subsidiary did not suffice to establish a parent company's responsibility. This was especially deemed the case where the exertion of 'decisive influence' on that subsidiary was disputed by the parent.⁶³⁰ The appellants asserted that it was instead upon the Commission to adduce sufficient evidence that this degree of control had actually been exerted by the parent company in the precise case.

As full ownership of a subsidiary therefore only gave rise to the presumption where such 'additional elements' indicating the subsidiary's autonomous market conduct were provided, the Commission could not have discharged itself of this burden of proof by simply referring to the fact that the subsidiary was wholly owned.⁶³¹ The Court of First Instance was therefore assessed to have violated the appellant's rights of defense by holding that it was sufficient for the Commission to establish that a parent company held all the shares in a subsidiary in order to conclude that the latter had exercised 'decisive influence' on the latter's commercial policy.⁶³² This was particularly held to be the case since the CFI had, in its previous decisions, held that although a 100% shareholding provided a strong indication of a parent company's influence on the subsidiary's market conduct, this was not sufficient in itself to impute liability for the latter's illicit conduct. Rather, something more than the extent of shareholding had to be shown.⁶³³ Finally, the appellants criticized the Commission's argumentation that a subsidiary's autonomy could be assumed in case the latter had actively contravened the instructions issued to it by its parent company.⁶³⁴

The Commission retorted by stating that there was no need to ascertain whether a parent company had in fact used its power to influence the commercial policy of its subsidiary in a decisive manner where the parent company had a 100% shareholding in the subsidiary.⁶³⁵ Thus, the CFI had not infringed the principle standard of *Stora*, without linking the application of the presumption to the production of 'additional circumstances'. Because supplementary criteria in previous judgments⁶³⁶ had only been examined to reinforce the said presumption, the existence of full ownership could legitimately be relied on for determining a parent company's exertion of 'control'.⁶³⁷

As to the argument relating to the infringement of the parent company's rights of defense, the Commission asserted the existence of presumptions not to be unusual in European competition

⁶²⁸ See ECJ 10.9.2009, Case 97/08 P, *Akzo Nobel NV vs. Commission*, [2009] ECR I-08237, para. 42.

⁶²⁹ ECJ of 25.10.1983, Case 107/82, *AEG-Telefunken AG vs. Commission*, [1983] ECR 3151, para. 50.

⁶³⁰ ECJ of 10.9.2009, Case 97/08 P, *Akzo Nobel NV vs. Commission*, [2009] ECR I-08237, paras. 43-44.

⁶³¹ Cf. ECJ 10.9.2009, Case 97/08 P, *Akzo Nobel NV vs. Commission*, [2009] ECR I-08237, para. 45.

⁶³² See ECJ of 10.9.2009, Case 97/08 P, *Akzo Nobel NV vs. Commission*, [2009] ECR I-08237, para. 47.

⁶³³ ECJ of 10.9.2009, Case 97/08 P, *Akzo Nobel NV vs. Commission*, [2009] ECR I-08237, para. 46.

⁶³⁴ Cf. CFI, Case T-112/05, *Akzo Nobel NV*, [2007] ECR II-5049, para. 62.

⁶³⁵ ECJ, Case C-97/08 P, *Akzo Nobel NV vs. Commission*, [2009] ECR I-08237, para. 49, citing in this regard the conditions laid down in the case of '*ICI*' (Case 48/69, *Imperial Chemical Industries Ltd. vs. Commission of the European Community*, [1972] ECR 619, para. 134).

⁶³⁶ The Commission explicitly referred to the cases of T-325/01 *DaimlerChrysler vs. Commission* [2005] ECR II-3319, and Joined Cases T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02 and T-136/02, *Bolloré a.o. vs. Commission*, [2007] ECR II-947.

⁶³⁷ See also ECJ of 10.9.2009, Case 97/08 P, *Akzo Nobel NV vs. Commission*, [2009] ECR I-08237, para. 51.

law. By informing the concerned parties that it intended to rely on the presumption, the Commission rather offered these undertakings the opportunity to comment on the conditions inherent in this presumption. This was furthermore deemed necessary to provide the Commission with all documents for reviewing the parties' position, as these companies in fact possessed the relevant information relating to the alleged infringement.⁶³⁸ In regard to the appellant's criticism of the CFI's ruling that a subsidiary's market autonomy had wrongly been assumed where it had acted in divergence of its parent company's business policy, the Commission asserted that this view was based on an incorrect reading of the Court's judgment. By this assertion the Court had solely meant to express that a subsidiary was to be viewed as an independent economic entity, either because no instructions had been issued, or because it was not obliged to follow them.⁶³⁹

The ECJ commenced its assessment by stating that European competition law referred to the activity of 'undertakings', which principally covered "*any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed.*"⁶⁴⁰

In this respect, the Court asserted that this concept was to be understood as an 'economic unit', even if legally this unit consisted of several natural or legal persons.⁶⁴¹ Accordingly, when found to have infringed the competition principles, such an 'economic unit' was to necessarily answer the Commission's statement of objections addressed to it unequivocally.⁶⁴² Nevertheless, the Court held that it was necessary for the Commission to indicate already in this preliminary statement in which capacity a legal person⁶⁴³ was called on to answer the allegations.⁶⁴⁴ The Court continued by stating that an imputation of conduct between the companies of such an economic unit was possible where the conditions laid out in the case of '*ICI*' were met,⁶⁴⁵ having regard in particular to the "*economic, organizational and legal links between those two legal entities*".⁶⁴⁶ This was seen to be the case, because in such a situation the parent company and its subsidiary formed a single 'economic unit' and therefore a 'single undertaking' for the purpose of European competition law. The Court went on to hold that:

*"[59] [...] Thus, the fact that a parent company and its subsidiary constitute a single undertaking within the meaning of Art. 81 [now Article 101 TFEU] enables the Commission to address a decision imposing fines to the parent company, without having to establish the personal involvement of the latter in the infringement."*⁶⁴⁷

In the specific case that a parent company had a 100% shareholding in a subsidiary, which had infringed the competition rules, the former's exertion of 'decisive influence' could 'refutably' be

⁶³⁸ Cf. ECJ of 10.9.2009, Case 97/08 P, *Akzo Nobel NV vs. Commission*, [2009] ECR I-08237, para. 52.

⁶³⁹ Cf. ECJ of 10.9.2009, Case 97/08 P, *Akzo Nobel NV vs. Commission*, [2009] ECR I-08237, para. 53.

⁶⁴⁰ ECJ of 10.9.2009, Case 97/08 P, *Akzo Nobel NV vs. Commission*, [2009] ECR I-08237, para. 54.

⁶⁴¹ ECJ of 10.9.2009, Case 97/08 P, *Akzo Nobel NV vs. Commission*, [2009] ECR I-08237, para. 55.

⁶⁴² See ECJ of 10.9.2009, Case 97/08 P, *Akzo Nobel NV vs. Commission*, [2009] ECR I-08237, para. 56.

⁶⁴³ In the particular context, this means the separate legal entities making up the 'economic unit'.

⁶⁴⁴ Cf. ECJ, Case 97/08 P, *Akzo Nobel NV vs. Commission*, [2009] ECR I-08237, paras. 57-58.

⁶⁴⁵ See Case 48/69, *Imperial Chemical Industries Ltd. vs. Commission of the European Community*, [1972] ECR 619, para. 134.

⁶⁴⁶ ECJ of 10.9.2009, Case 97/08 P, *Akzo Nobel NV vs. Commission*, [2009] ECR I-08237, para. 58.

⁶⁴⁷ ECJ of 10.9.2009, Case 97/08 P, *Akzo Nobel NV vs. Commission*, [2009] ECR I-08237.

presumed.⁶⁴⁸ The Court continued that it was sufficient for the Commission to prove that the subsidiary was wholly owned by the parent company in order to presume that the latter controlled its subsidiary's business conduct. In reference to the question whether the Commission was to hereby rely on 'additional circumstances', such as the fact that it was not disputed by the parent company that it had exercised influence on its subsidiary's commercial policy, or that both companies were jointly represented during the administrative procedure, the Court asserted that such instances had only been mentioned in previous adjudication to reinforce the parent company's actual influence in the precise case.⁶⁴⁹ Rather, a parent company could only invalidate the conditions of the presumption in case that it adduced 'sufficient evidence' that its subsidiary had in fact acted independently on the market.⁶⁵⁰ Hence, the Commission was seen to have legitimately regarded the parent company as 'jointly and severally liable' for the payment of the fine imposed for the conduct of its subsidiary.

Furthermore, the Commission was not required to submit evidence in its statement of objections of a parent company's exertion of control other than establishing that the latter held a 100% of its subsidiaries' shares. In regard to the parties' assertion that the Court of First Instance had restricted their possibility of rebutting the presumption to cases in which instructions had been issued,⁶⁵¹ the ECJ held that the CFI had given no reason to assume that this was the case. Rather, the fact that the subsidiary had contravened its parent companies' instructions was only an indication of its economic independence. On the contrary, the Court assessed the CFI to have adopted a "*relatively open position in that respect*", allowing the parent company to put before it any evidence relating to the organizational, economic and legal links between itself and the subsidiary, which were apt to demonstrate that they did not constitute a 'single economic entity'.⁶⁵² Accordingly, the Court dismissed the appellant's arguments relating to an infringement of their rights of defense.

In the second part of the plea, the companies of the *Akzo Nobel* group criticized the Court of First Instance for incorrectly determining a subsidiary's independent market conduct. The CFI was accused of having wrongfully interpreted the concept of a company's **commercial policy**, which was pertinent for ascertaining whether the parent had 'decisively' influenced its subsidiary's market conduct. Thus, other aspects than those mentioned by the Court of First Instance⁶⁵³ were seen to be characteristic for evaluating the existence of a 'single economic entity' between a parent and a subsidiary company.⁶⁵⁴

According to the appellants, the term of a company's 'commercial policy' was to strictly relate to its particular market conduct and to be limited to the production of goods and services, which it sold on the basis of certain conditions, in a given territory and during a specific period of time.⁶⁵⁵ Therefore, the CFI was seen to have insufficiently determined the pertinent links between the parent company of *Akzo Nobel* and its subsidiaries in order to establish the latter's

⁶⁴⁸ Cf. Case 97/08 P, *Akzo Nobel NV vs. Commission*, [2009] ECR I-08237, para. 60, citing ECJ of 25.10.1983, C-107/82, *AEG-Telefunken AG vs. Commission*, [1983] ECR 3151.

⁶⁴⁹ See ECJ, *ibid*, para. 62.

⁶⁵⁰ ECJ of 10.9.2009, Case 97/08 P, *Akzo Nobel NV vs. Commission*, [2009] ECR I-08237, para. 61, referring to that effect to paragraph 29 of its own decision in *Stora* (ECJ of 16.11.2000, C-286/98 P, *Stora Kopparberg Bergslag vs. Commission*, [2000] ECR I-29925).

⁶⁵¹ Namely in para. 62 of its judgment.

⁶⁵² ECJ of 10.9.2009, Case 97/08 P, *Akzo Nobel NV vs. Commission*, [2009] ECR I-08237, para. 65.

⁶⁵³ Specifically in paragraph 64 of its judgment.

⁶⁵⁴ Cf. ECJ of 10.9.2009, Case 97/08 P, *Akzo Nobel NV vs. Commission*, [2009] ECR I-08237, para. 67.

⁶⁵⁵ ECJ of 10.9.2009, Case 97/08 P, *Akzo Nobel NV vs. Commission*, [2009] ECR I-08237, para. 68.

independence.⁶⁵⁶ The extension of the concept of a company's 'commercial policy' beyond its market conduct was therefore seen to amount to an infringement of the principle of 'personal liability', essentially protected by the competition principles upon established case-law of the European Court of Justice.⁶⁵⁷ By its mode of assessment, the CFI was nevertheless seen to have created a regime of strict liability.

The Commission retorted by stating that the question whether the concept of 'commercial policy' should be given a broad or narrow definition was irrelevant with regard to the determination of a 'single economic entity'.⁶⁵⁸ Rather, it was necessary to regard all 'organizational, economic and legal links' existing between the concerned companies. In respect to the argument of the parties that the Commission and the ECJ had infringed the principle of 'personal liability', the Commission simply declared there to be no principle of 'strict liability' in European competition law, since liability was not imputed to companies "*without proof being established*".⁶⁵⁹ In effect, it took the view that it was not contrary to the principle of 'personal liability' to hold a parent company liable for the actions of its wholly-owned subsidiary.

In its assessment of this part of the plea, the Court primarily reminded of the fact that the conduct of a subsidiary could be imputed to its parent company where the conditions laid out in the case of '*ICI*' were fulfilled.⁶⁶⁰ The Court went on to state, that a subsidiary's market conduct could not be regarded as the sole factor for determining the existence of an 'economic unit'.⁶⁶¹ The Advocate General had therefore been correct to point out that other factors than the area of a company's commercial policy had to be taken into account in order to assess a parent company's intrusive exertion of control.

In order to ascertain whether a subsidiary determined its business conduct in an independent way, the Court ruled that attention had to be given not only to the aspects exemplified by the CFI,⁶⁶² but to all the relevant factors relating to the 'economic, organizational and legal links' which tie a subsidiary to its parent company. Again the Court concluded that these factors vary from case to case and could therefore not be summarized in an exhaustive manner.⁶⁶³ In this respect, the ECJ asserted that the Court of First Instance had not committed an error in regard to the business sphere in which the parent company was to exert a decisive amount of influence. Accordingly, the Court dismissed the appellants' argumentation that the assessment of the Court of First Instance had led to the creation of a regime of strict liability, stating:

"[77] It must be observed in that connection that [...] Community competition law is based on the principle of the personal responsibility of the economic entity which has committed the infringement. If the parent company is part of that economic unit, which [...] may consist of several legal persons, the parent company is regarded as jointly and severally liable with the other legal persons making up that unit for infringements of competition law. Even if the parent company does not participate directly in the infringement, it exercises, in such a case, a decisive influence over the

⁶⁵⁶ Cf. ECJ of 10.9.2009, Case 97/08 P, *Akzo Nobel NV vs. Commission*, [2009] ECR I-08237, para. 67.

⁶⁵⁷ See ECJ of 10.9.2009, Case 97/08 P, *Akzo Nobel NV vs. Commission*, [2009] ECR I-08237, para. 69.

⁶⁵⁸ Cf. ECJ of 10.9.2009, Case 97/08 P, *Akzo Nobel NV vs. Commission*, [2009] ECR I-08237, para. 45.

⁶⁵⁹ Cf. ECJ, *ibid.*

⁶⁶⁰ See ECJ of 10.9.2009, Case 97/08 P, *Akzo Nobel NV vs. Commission*, [2009] ECR I-08237, para. 72.

⁶⁶¹ Cf. ECJ of 10.9.2009, Case 97/08 P, *Akzo Nobel NV vs. Commission*, [2009] ECR I-08237, para. 73.

⁶⁶² See in particular para. 64 of the CFI's judgment.

⁶⁶³ Cf. ECJ of 10.9.2009, Case 97/08 P, *Akzo Nobel NV vs. Commission*, [2009] ECR I-08237, para. 74.

subsidiaries that have participated in it. It follows that, in that context, the liability of the parent company cannot be regarded as strict liability."⁶⁶⁴

As a result, the Court considered the second part of the appellants' plea to be unfounded and therefore dismissed the appeal in its entirety. In practice, the Court's judgment of this case has been heavily criticized. The objections address a number of issues, which will now be discussed in detail.

§ 2. Assessment of the Court's Ruling

As General Advocate *Juliane Kokott* rightly stated, the proceedings of this case gave the ECJ the opportunity to clarify, to a significant respect, its case-law with respect to the conditions required for an attribution of antitrust responsibility between undertakings of a corporate group.⁶⁶⁵ Primarily, previous case-law had shown that it was often still contentious whether the existence of the legal presumption for wholly-owned subsidiaries could be employed on the basis of mere capital links, or whether 'additional circumstances' were required, pointing to the parent company's exertion of decisive influence in the precise case. The Court's ruling makes it clear that the Commission may nevertheless primarily rely on the instance of mere capital participation between the companies concerned. Before evaluating the accuracy of this interpretation in regard to general principles of corporate law, the Court's reasoning and the effects this mode of assessment generates must briefly be analyzed.

§ 2.1. Review of the Necessity of Additional Criteria Denoting the Existence of 'Decisive Influence'

In her Opinion of the case, **Advocate General Kokott** argued that the effective enforcement of competition law requires clear rules.⁶⁶⁶ A presumption rule, which allowed the Commission to attribute to a parent company the responsibility for the cartel offences of its wholly-owned subsidiary, was ascertained to create legal certainty and to be 'straightforward' to implement in practice.⁶⁶⁷

The Advocate General went on to claim that presumption rules were by no means unknown to competition law and that, on the contrary, the characteristics of evidence tendered as proof of infringements of the competition rules implied "*that it must be open to the authority or private party on whom the burden lies to draw certain conclusions from typical sequences of events on the basis of common experience*".⁶⁶⁸

⁶⁶⁴ ECJ of 10.9.2009, Case 97/08 P, *Akzo Nobel NV vs. Commission*, [2009] ECR I-08237.

⁶⁶⁵ Cf. Opinion of AG Kokott, of 23.4.2009, in Case 97/08 P, *Akzo Nobel NV vs. Commission*, [2009] ECR I-08237, para. 1.

⁶⁶⁶ AG Kokott, in Case 97/08 P, *Akzo Nobel NV vs. Commission*, [2009] ECR I-08237, para. 71, as cited in this regard by *Riesenkampff and Krauthausen*, *Liability of Parent Companies*, [2010] ECLR 41.

⁶⁶⁷ AG Kokott, *ibid.*

⁶⁶⁸ AG Kokott, in Case 97/08 P, *Akzo Nobel NV vs. Commission*, [2009] ECR I-08237, para. 72.

In the Advocate General's opinion, a parent company holding 100% of a subsidiary's shares is regularly in a position to exert 'decisive influence' on the latter's conduct. This was particularly assessed to be the case, because a parent company in such a dominant position not only has the right to appoint the members of its subsidiary's management bodies, but because such personal interconnections were seen to 'usually' exist between the two companies.⁶⁶⁹ From this fact the Advocate General inferred that there was a necessary coincidence of interests between a parent company and its wholly-owned subsidiary, leading to the 'obvious conclusion' that the subsidiary did not independently determine its market conduct. Rather, the subsidiary was seen to inevitably act in accordance with the business policy of its parent company.⁶⁷⁰

In a next point, the Advocate General addressed the Commission's obligation to bring forward 'additional circumstances' pointing to the actual exertion of 'decisive influence' under the *Stora* rule.

Even though the Court of First Instance had, in its subsequent case-law, repeatedly suggested that these 'additional circumstances' were to be understood as indicia substantiating the subsidiary's independent market conduct,⁶⁷¹ the content and necessity of these indicia was seen to be contentious.⁶⁷² The discussion following the case of *Stora* had particularly revolved around the ECJ's statement in this judgment that the parent company had correctly been addressed by the Commission since it had presented itself as the "*Commission's sole interlocutor during the administrative procedure*".⁶⁷³

Considering the characteristics of the relationship between parent companies and their wholly-owned subsidiaries analyzed above, the Advocate General nevertheless emphasized that in its *Stora* judgment, the Court did not "*by any means*" require the adduction of further conditions apart from a 100% shareholding for the applicability of the presumption rule.⁶⁷⁴ Rather, the Court had mentioned this fact in order to merely specify all the criteria upon which the parent company of *Stora* could be held responsible in the precise case. In line with this reasoning, the Advocate General found that the Court of First Instance had, in the case under consideration, remained within the limits of the Court's pertinent case-law by relying only on the existence of a 100% shareholding for presuming the parent to decisively control its subsidiary.⁶⁷⁵ Particularly with respect to the close interrelation between parent companies and their wholly-owned subsidiaries outlined above, the Advocate General did not see convincing reasons to increase the requirements of the presumption to what she called '100% plus X'.⁶⁷⁶ The analysis of the Court's ruling in the case of *Akzo Nobel* shows that it unhesitatingly endorsed this approach.⁶⁷⁷

⁶⁶⁹ Cf. *AG Kokott*, in Case 97/08 P, *Akzo Nobel NV vs. Commission*, [2009] ECR I-08237, para. 73.

⁶⁷⁰ See *AG Kokott*, *ibid.*

⁶⁷¹ See only CFI of 12.12.2007, Case T-112/05, *Akzo Nobel NV*, [2007] ECR II-5049, para. 64.

⁶⁷² In regard to the latter aspect, the Commission had, since *Stora*, questioned their principle requirement in order to base its statement of objections directly to the parent company.

⁶⁷³ See *AG Kokott*, *ibid.*

⁶⁷⁴ *AG Kokott*, in Case 97/08 P, *Akzo Nobel NV vs. Commission*, [2009] ECR I-08237, para. 60.

⁶⁷⁵ *AG Kokott*, in Case 97/08 P, *Akzo Nobel NV vs. Commission*, [2009] ECR I-08237, para. 62.

⁶⁷⁶ See *idem* in Case 97/08 P, *Akzo Nobel NV vs. Commission*, [2009] ECR I-08237, paras. 70-76.

⁶⁷⁷ ECJ of 10.9.2009, Case 97/08 P, *Akzo Nobel NV vs. Commission*, [2009] ECR I-08237, para. 61.

In fact, there are nevertheless highly convincing arguments to require the Commission to show circumstances in addition to mere ownership in order to legitimately presume that a parent has exerted 'decisive influence' on its subsidiary's market conduct.⁶⁷⁸

As a preliminary remark, the Advocate General points out that the fundamental problem of attributing cartel offences rests on the fact that the addressees of the competition rules and the addressees of the Commission's decisions are not necessarily the same.⁶⁷⁹ Because the competition rules are addressed to 'undertakings' regardless of their organization and legal nature, the Advocate General pointed out that decisions penalizing breaches of the competition rules must be directed at legal persons in order to be enforced effectively.⁶⁸⁰ Corporate groups, however, comprise a number of legal persons, and thus necessarily require the occurrence of an illicit conduct to be specified in regard to a particular legal person.

In a next step, Advocate General *Kokott* ascertained that when imposing fines for infringements of competition law, the Commission must take into account both their nature, as well as the fines' purpose. In reference to the fines' nature⁶⁸¹ the General Advocate went on to assert that:

*"[39] Therefore, what is decisive for the attribution of cartel offences is the 'principle of personal responsibility', which is founded in the rule of law and the principle of fault. Personal responsibility means that in principle a cartel offence is to be attributed to the natural or legal person who operates the undertaking which participates in the cartel; in other words, the principal of the undertaking is liable."*⁶⁸²

In respect to the purpose of the measures imposed, the Advocate consequently pointed to the fact that they necessarily *deter* companies from committing cartel offences, so as to attain the final aim of preventing distortions of competition.

These two principles, namely the principle of 'personal liability' and the 'deterrence' of perpetrators, are furthermore substantial in regard to the appropriate criticism of the approach adopted in current case-law for attributing liability between companies of a corporate group. Even though the ECJ, as initially formulated by Advocate General *Kokott*, correctly presumes that 'personal responsibility' as a point of reference for antitrust infringements supports the effective enforcement of the competition provisions,⁶⁸³ the way in which the Court applies this doctrine on corporate groups is ambivalent.

⁶⁷⁸ Cf. *Riesenkampff and Krauthausen*, [2010] ECLR 41, referring to the so-called 'belt and braces' approach. See also *Botteman and Atlee*, An update on parent liability for antitrust violations of subsidiaries, available at: http://www.stepto.com/assets/tachments/EU%20Comp%20Briefing_%20Dec%202009.pdf; *Michael Kling*, Die Haftung der Konzernmutter für Kartellverstöße ihrer Tochterunternehmen, WRP 4/2010, 506. In essence, also *Schroeder*, Die Anwendung des Kartellverbots auf verbundene Unternehmen, WuW 4/1988, 274 (282), and *Riesenkampff*, Haftung der Muttergesellschaft für kartellrechtswidriges Verhalten der Tochtergesellschaft [hereinafter: Haftung der Muttergesellschaft], WuW 4/2001, 357, who already criticised the ambivalence in the ECJ's approach in *Stora*.

⁶⁷⁹ *AG Kokott*, in Case 97/08 P, *Akzo Nobel NV vs. Commission*, [2009] ECR I-08237, para. 36.

⁶⁸⁰ Cf. *AG Kokott*, in Case 97/08 P, *Akzo Nobel NV vs. Commission*, [2009] ECR I-08237, para. 37.

⁶⁸¹ See e.g. *Schwarze/Bechtold/Bosch*, Deficiencies in EC Competition Law, Gleiss/Lutz (2008), 22, and in detail in under 2.3. below.

⁶⁸² *AG Kokott*, in Case 97/08 P, *Akzo Nobel NV vs. Commission*, [2009] ECR I-08237, para. 39.

⁶⁸³ This was seen to be the case, because the (legal) person 'conducting' the company in question was held liable for its respective business decisions.

In this regard, already the Court's assessment in the case of *Stora* had been criticized.⁶⁸⁴ According to this case, a (controlling) parent company had been considered to be in a position to substantially influence the commercial policy of its subsidiary, unless the latter acted in an independent manner, which the applicant would nevertheless be required to prove.⁶⁸⁵ The Court therefore evidently demanded proof of the subsidiary's commercial autonomy.⁶⁸⁶ The ambivalence of this approach is made apparent by the fact that, under general principles of company law, a 100% capital participation will naturally put the (legal) person holding these shares in a *position* to decisively influence the market conduct of this undertaking. The case-law of the competition institutions was nevertheless indefinite in regard to the precise criteria that denote a subsidiary's 'autonomous' market conduct despite the parent company's capital participation. The Court furthermore complicated the company's defense in holding that the Commission could, in the light of a 100% capital participation, 'legitimately assume' that the parent company exerted decisive influence on its subsidiary's market conduct. Already on this basis, the legal presumption was considered to be of an unjustified strong nature, even though the Court had affirmed that the presumption could not overturn the Commission's duty of proving the alleged perpetrator's breach of competition law.⁶⁸⁷ According to the Court, the parent corporation was thereby not burdened with the onus of proving the subsidiary's independence in regard to the infringement committed.⁶⁸⁸

The ECJ's assertion of the nature of the legal presumption in *Stora* has therefore been criticized in literature as 'abstruse' and 'difficult to comprehend'.⁶⁸⁹ Particularly it was seen ambivalent how the Court could, on the one hand decide a 100% shareholding to be insufficient for an attribution of liability, while, on the other hand not contradict this view by stating that in the case of full ownership, the actual exertion of decisive influence could legitimately be 'assumed'. Therefore, the Court's ruling that mere capital ownership was insufficient criterion for an attribution of antitrust liability in itself was deemed to be relativized by partially contradictory and partially sibylline explanations.⁶⁹⁰

§ 2.2. The 'Rebuttable Presumption' for Wholly Owned Subsidiaries

Primarily I have argued that the formulation of a legal presumption is not problematic in itself where the concerned parties are given a clear outline of the criteria they are to bring forward for its effective rebuttal.⁶⁹¹ This assessment is not only pertinent for the area of civil law procedures, but also holds true for the administrative process of European antitrust law.⁶⁹²

⁶⁸⁴ *Riesenkampff*, Haftung der Muttergesellschaft, WuW 4/2001, 357.

⁶⁸⁵ [Translation of] *Riesenkampff*, *ibid.*

⁶⁸⁶ *Riesenkampff*, Haftung der Muttergesellschaft, WuW 4/2001, *ibid.*

⁶⁸⁷ *Riesenkampff*, Haftung der Muttergesellschaft, WuW 4/2001, 358. For the Commission's duty in this regard, see Art 2, Regulation No. 1/2003.

⁶⁸⁸ See ECJ of 16.11.2000, C-286/98 P, *Stora Kopparberg Bergslag vs. Commission*, [2000] ECR I-29925, para. 29.

⁶⁸⁹ See *Menz*, Wirtschaftliche Einheit, 315; *Riesenkampff*, WuW 4/2001, 357.

⁶⁹⁰ *Riesenkampff*, Haftung der Muttergesellschaft, WuW 4/2001, 358.

⁶⁹¹ See § 4.3. above.

⁶⁹² Cf. e.g. *Svetlicinii*, Exploring the Role of Legal Presumptions under the 'Convincing Evidence Standard' in EC Merger Control, in: *Global Antitrust Review*, 2008, 117 ff; *Riesenkampff/Krauthausen*, Liability of Parent Companies for Antitrust Violations of their Subsidiaries, ECLR [2010], Issue 1, 38 ff; and for an

This is due to the fact that from an enforcement point of view, it is not only the evident deleterious effect that cartels create on the market.⁶⁹³ Rather, the inaccessibility of incriminating evidence has been assessed to denote the specifically harmful character of a cartel, distinguishing it from any other form of anticompetitive behavior.⁶⁹⁴ Given that it is primarily the undertaking's management that has the means to comprehensively collect any form of (alleviative) evidence, it is in undoubtedly in a more favorable position than the authorities to present this information during the procedure.⁶⁹⁵ Moreover, irrespective of their clandestine character, cartels are difficult to prove due to their varying and mutating characteristics.⁶⁹⁶ These circumstances confront competition authorities with a nearly 'unfeasible' threshold for proving the occurrence of an infringement in detail.⁶⁹⁷ For this reason, the appropriate application of legal presumptions can even be regarded as indispensable to induce the undertakings concerned to bring forward all relevant information for their proper defense.⁶⁹⁸

The legitimacy of the current presumption of 'decisive influence' is nevertheless questionable in regard to the Court's interpretation of the Commission's burden of proof, allowing it to establish the parent company's *factual* exertion of 'decisive influence' on the basis of mere ownership criteria. At least in the case of wholly-owned subsidiaries the Commission is therefore currently not obliged to present further indicia demonstrating why it could justifiably presume the parent not only to exercise control, but to exercise it to an *intrusive extent*. Under the approach assumed in *AEG* and *Stora*, the Commission was arguably still required to adduce sufficient indicia in this regard, where the parent undertaking disputed to have exercised decisive influence, while at the same time denoting the elements it relied on for this contention. Consequently, parent companies whose wholly owned subsidiaries are involved in infringements of competition law are now left with the **burden to prove** that influence was not exercised as presumed by the Commission.⁶⁹⁹

Regarding the **criteria**, which parent companies are to rely on, in order to (assess their chances of) contradict(ing) this presumption, the ECJ has refrained from the clarification that was expected of its judgment in the case of *Akzo Nobel*.⁷⁰⁰ On the contrary, the Court's substantiation of the Commission's presumption in this case contains features of a 'self-fulfilling prophecy'.⁷⁰¹

example under national law: *Thomas*, Die verfahrensrechtliche Bedeutung der Marktbeherrschungsvermutung des § 18 Abs 3 GWB, WuW 2002, 470.

⁶⁹³ Cf. *Scordamaglia*, Cartel Proof, Imputation and Sanctioning in European Competition Law: reconciling effective enforcement and adequate protection of procedural guarantees [hereinafter: Cartel Proof, Imputation and Sanctioning] ECLR [2010], Vol 7, Issue1, 7.

⁶⁹⁴ *Scordamaglia*, *ibid.*

⁶⁹⁵ For a detailed analysis of the Commission's powers of collecting intelligence from antitrust violators see *Wils*, Principles of European Antitrust Enforcement, (2005), 129 ff.

⁶⁹⁶ *Scordamaglia*, ECLR [2010], Vol 7, Issue1, 7. In this sense, the duration and intensity of participation, as well as the subsequent anticompetitive conduct of each individual undertaking on the market may vary and take different forms.

⁶⁹⁷ Cf. *Scordamaglia*, ECLR [2010], Vol 7, Issue1, 8, deducing from this the impracticability of imposing an appropriate sanction reflecting the cartelists' real participation.

⁶⁹⁸ For a detailed account of the probational difficulties see Joined Cases C-204/00 P, *Aalborg Portland A/S vs. Commission* (often referred to as the 'Cement-Case'), [2004] ECR I-123, paras. 54-59, as cited by *Scordamaglia*, *ibid.* Critically on this 'inducement' aspect, see however *Schwarze/Bechtold/Bosch*, *ibid.*, 54 ff.

⁶⁹⁹ *Riesenkampff and Krauthausen*, Liability of Parent Companies, [2010] ECLR 41.

⁷⁰⁰ Cf. *Riesenkampff and Krauthausen*, *ibid.*

⁷⁰¹ See the assertions of GA Kokott, *AG Kokott*, in Case 97/08 P, *Akzo Nobel NV vs. Commission*, [2009] ECR I-08237, para. 72.

Already in its *Flat-Glass*-decision, the Commission held that a presumption was based on the facts that ‘typically occur’ in case the conditions on which it is based apply.⁷⁰² In this respect it assessed that the ever-increasing complexity of group structures could lead to the situation that ‘an undertaking’ was made up of more than one company. Accordingly, the natural or legal person actually responsible for the cartel offence was viewed to be not necessarily congruent with the one that had appeared as the participant to outsiders.⁷⁰³ For this reason, the formal separation between companies resulting from their separate legal personality was ascertained to be inconclusive for the purpose of applying the competition rules on corporate groups. The decisive factor was rather seen in their ‘unity of their conduct’ on the market.⁷⁰⁴ In her assessment of the case of *Akzo Nobel*, AG Kokott argued in a similar manner, stating that:

“[48] In order for a parent company to ‘be in a position’⁷⁰⁵ to exert decisive influence over its subsidiary, there must be more than merely a bond of economic dependence between the subsidiary and the parent company. In the present case, however, there is no need for any detailed discussion as to what type of link between the two companies is required for that purpose. That is because a parent company is in any event undoubtedly in a position to exert decisive influence over its subsidiary if – like Akzo Nobel NV in this case – it controls it wholly, whether by means of a direct shareholding or indirectly through its shareholdings in other companies.”⁷⁰⁶

This formulation makes it clear that the European competition institutions currently hold that the exertion of ‘decisive influence’ is necessarily bound to 100%, or near 100% ownership.⁷⁰⁷ Based on the fact that a parent company that possesses such a substantial shareholding in a company evidently has the means to exert influence on it, the parent company of *Akzo Nobel* attempted, as mentioned above, to rebut the presumption by asserting that the term of ‘decisive’ influence was reserved for the area of a company’s *commercial policy*.⁷⁰⁸ The appellants’ approach is reasonable upon the consideration that this area of a company’s business policy is essentially characteristic for its ‘market conduct’, originally referred to by the Court in its judgment of *ICI*.

The ECJ nevertheless rejected this argument by holding that the determination of a subsidiary’s autonomous market conduct could not be limited to the area of a company’s commercial policy in the strict sense. Adopting an explicitly indefinite methodology, the Court stated that this was rather to be ascertained upon “*the relevant factors relating to the economic, organizational, and legal links, which tie the subsidiary to the parent company*”.⁷⁰⁹ As the Court found these to essentially vary from case to case⁷¹⁰ it left the level of a ‘decisive’ amount of influence, comprised by the legal presumption, consciously unsubstantiated.

⁷⁰² Commission Decision of 28.11.2007, COMP/39.165, *Flat Glass*, para. 448, as cited by *Riesenkampff and Krauthausen*, *ibid.*

⁷⁰³ AG Kokott, in Case 97/08 P, *Akzo Nobel NV vs. Commission*, [2009] ECR I-08237, para. 42.

⁷⁰⁴ AG Kokott, *ibid.*

⁷⁰⁵ (Original emphasis).

⁷⁰⁶ AG Kokott, in Case 97/08 P, *Akzo Nobel NV vs. Commission*, [2009] ECR I-08237.

⁷⁰⁷ *Riesenkampff and Krauthausen*, Liability of Parent Companies, [2010] ECLR, 41.

⁷⁰⁸ See ECJ of 10.9.2009, Case 97/08 P, *Akzo Nobel NV vs. Commission*, [2009] ECR I-08237, para. 68. This term was seen to explicitly comprise the area of a company’s pricing policy, production and distribution activities, sales objectives, gross margins, sales costs, cash flow, stocks and marketing.

⁷⁰⁹ ECJ of 16.11.2000, Case 97/08 P, *Akzo Nobel NV vs. Commission*, [2009] ECR I-08237, para. 74.

⁷¹⁰ ECJ of 16.11.2000, Case 97/08 P, *Akzo Nobel NV vs. Commission*, [2009] ECR I-08237, *ibid.*

These **metaphoric** considerations, only generally circumscribing the required level of interrelation between affiliated companies, deprives undertakings of any points of reference for reproducing the factual circumstances of the pertinent relationship of a parent and a subsidiary company. This situation leaves companies that have been found to infringe European competition law in a considerably unsatisfactory situation.

The current approach to intragroup liability in European competition law must therefore be scrutinized on the basis of two essential points of critique. On the one hand, the lack of substantiated factors pointing to the actual exertion of ‘control’ by the parent company is problematic under the **fault-based approach** to liability, which is essentially inherent to European competition law. This aspect is crucial for assessing whether the current practice of holding parent companies liable for their subsidiary’s antitrust infringements is consistent with general legal principles of procedural law. These principles are nevertheless critical for (appropriately) imposing antitrust responsibility on a legal person. On the other hand, the ambiguous assessment of ‘corporate control’ is highly questionable under the principles of ‘enterprise law’. This is due to the fact that, as mentioned above, every parent-subsidiary relationship is essentially characterized by a relationship of ‘control’.⁷¹¹ Arguably, these principles cannot be ignored for a dogmatically consistent application of the antitrust provisions on corporate groups.

After outlining the pertinent legal principles the Court is to regard when imposing liability on a legal entity, I will therefore assess from a dogmatic point of view the inadequate manner in which intragroup liability is currently imposed. The latter point of assessment must necessarily be made in relation to the Court’s understanding of a ‘single economic entity’. For the ECJ, this concept seems to constitute a sufficient justification of its current approach to corporate group liability. However, for both points of assessment it is necessary to consider not only the essential objectives of European antitrust law, but also the principal economic rationale of carrying out business in the form of a corporate group.

§ 2.3. The Necessity of Considering General Legal Principles

The necessity of the competition principles to adhere to a ‘clear set of rules’⁷¹² and the principle of ‘personal liability’ under current antitrust law requires an assessment under **general principles of European Union law**. Due to the hierarchy of norms that also applies to European law, the legal provisions for fining undertakings under Regulation 1/2003 must be judged by the standards of superior Union law.⁷¹³

These principles not only comprise the Charter of Fundamental Rights of the European Union [CFR],⁷¹⁴ but also general democratic standards such as the ‘rule of law’.⁷¹⁵ Apart from the fact

⁷¹¹ See *Blumberg*, the Law of Corporate Groups, (1987) Vol III, § 6.02.

⁷¹² See *AG Kokott*, in Case 97/08 P, *Akzo Nobel NV vs. Commission*, [2009] ECR I-08237, para. 71.

⁷¹³ Cf. *Schwarze/Bechtold/Bosch*, Deficiencies in EC Competition Law, Gleiss/Lutz Rechtsanwälte, 14.

⁷¹⁴ Charter of Fundamental Rights of the European Union, OJ (2000/C364/01), [hereinafter referred to as ‘the Charter’].

⁷¹⁵ For an example of national law (i.e. German antitrust law) in this regard cf. *Brettel*, Unternehmensbußgeld, Bestimmtheitsgrundsatz und Schuldprinzip, ZWeR 1/2009, 25, 40.

that European Union law had already comprised the principles of the European Convention of Human Rights [ECHR] on the basis of established case-law, Art (2) TFEU now includes them in the form of a positive legal basis. This provision explicitly substantiates that the Union respects the fundamental rights as guaranteed by the ECHR, which are furthermore inherent to the constitutional traditions of its member states.⁷¹⁶ This evidently includes the area of European competition law.

Regarding the relation of the Charter of Fundamental Rights to the European Convention of Human Rights, it should briefly be mentioned that the former had previously⁷¹⁷ been attributed a 'sui generis' legal value.⁷¹⁸ This meant that it essentially fulfilled a declaratory purpose, lacking any legally binding force on the level of the member states or the European institutions. As the ECJ nevertheless referred to the Charter in a number of cases concerning the effective protection of procedural guarantees,⁷¹⁹ it was not surprising that Regulation 1/2003 incorporated the Charter. Hereby it was expressly pointed out that most of the relevant rights were in substance already protected in European Union law even prior to the adoption of the latter. The Regulation insofar specifies that its provisions should be interpreted with respect to the Charter's rights and principles.⁷²⁰ The recently implemented Treaty of Lisbon⁷²¹ finally brought an end to this legal ambiguity, by explicitly ascribing the Charter the "*same value as that of the Treaties*".⁷²²

In light of these principles, any form of sanction changing the legal position of a natural or legal person by burdening it with a pecuniary loss constitutes a decisive incision in the latter's rights of freedom. In this regard, the principle of '**legal certainty**', denoting the basic legal guarantee against unwarranted 'surprise decisions', is of particular importance. This is especially crucial with respect to the Commission's wide-ranging discretion for imposing antitrust fines.⁷²³ This principle not only demands to state precisely the facts upon which a party is held accountable,

⁷¹⁶ Cf. *Schwarze/Bechtold/Bosch*, Deficiencies, *ibid.* The Union itself had so far not been a member of the Convention itself due to its lacking capacity of participating in international treaties on its own account. The newly established TFEU nevertheless changes this situation, attributing it, in Art 47, (international) legal personality. For this reason, accession negotiations have been initiated to change the current situation. In detail, see: *Streinz*, *Europarecht*, (2008), 53 ff.

⁷¹⁷ That relates to the time period before the adoption of the Lisbon Treaty.

⁷¹⁸ ('Solemn proclamation'). Cf. *Scordamaglia*, Cartel Proof, Imputation and Sanctioning, *CompLRev* [2010], Vol 7, Issue1, 9.

⁷¹⁹ See e.g. Opinion of AG Kokott of 23.12.2007 in Case C-413/06 P, *Bertelsmann and Sony Corporation of America vs. Impala*, [2008] ECR II-4951, para. 59, as cited by *Scordamaglia*, *ibid.*: "*Admittedly the Charter of fundamental rights does not yet as such have binding legal effect comparable to that of primary law, but as a source of recognition of law it does shed light on the fundamental rights guaranteed by Community law*".

⁷²⁰ Cf. *Scordamaglia*, Cartel Proof, Imputation and Sanctioning, *CompLRev* [2010], Vol 7, Issue1, 10. On the assessment of 'considerable doubts' whether Art 23, constituting the norm upon which competition fines are imposed in European law, represents such a 'clear and unambiguous legal basis', see *Schwarze/Bechtold/Bosch*, Deficiencies, 16 ff.

⁷²¹ Consolidated Treaties on the European Union and the Functioning of the European Union, OJ [2008], C115/01.

⁷²² Article 6 (1) of the Consolidated Treaty on the European Union, as cited by *Scordamaglia*, *ibid.* Under the principles of the Lisbon Treaty the Union is furthermore authorized to become a member of the ECHR itself. Until that time, the Convention's minimum standard was officially safeguarded by the Community institutions by the means of referring to the Charter.

⁷²³ *Schwarze/Bechtold/Bosch*, Deficiencies in EC Competition Law, *Gleiss/Lutz Rechtsanwälte* (2008), 17; Critically in respect to this amount of 'discretion': see *eadem*, and furthermore *Engelsing*, Die Bußgeldleitlinien der Europäischen Kommission von 2006, [The Fining Guidelines of the European Commission of 2006], *WuW* 2007, 470, 477.

but requires the same amount of clarity in regard to the penalty that is consequently imposed.⁷²⁴ This means that the law must unambiguously describe the legal consequences of an act issued by a public authority.⁷²⁵ The principle is therefore not only an assignment for the legislator, but also serves as a mode of delimitating the procedural scope of adjudicative action, requiring the transparency and conclusiveness of decisions.⁷²⁶

In this regard, the decisions of the Commission, in its unique official character of combining investigative, prosecutorial and adjudicative function,⁷²⁷ are to be ascertained on the basis of the principles laid out in the European Charter of Fundamental Rights.⁷²⁸ Apart from the principle of 'legal certainty', these comprise a variety of procedural rights, such as the principle of 'foreseeability' and 'transparency' of decisions. Their consideration is crucial for assessing the lawfulness of a specific administrative procedure before the Commission. This is necessary, because according to substantiated case law, these procedural rights must also be attributed to 'undertakings'.⁷²⁹

Academia, practitioners, and even the press have nevertheless voiced criticism with regard to the increasingly deficient protection of an undertaking's rights of defense in European antitrust procedures.⁷³⁰ Concerns have been raised on the 'due process' of European antitrust law.⁷³¹

It has convincingly been argued that competition proceedings should no longer be considered administrative but rather criminal in nature,⁷³² thereby triggering the higher level of protection guaranteed by the ECHR.

The question of the 'due process' of European competition procedures has therefore preoccupied the discussion of the Commission's fining practice upon the background of the ever-increasing magnitude of penalties endorsed by it.⁷³³ The critique hereby asserted becomes

⁷²⁴ See ECJ of 12.12.1996, C-74/95, *Strafverfahren gegen X*, [1996] ECR I-6609, paras. 22 and 25, as cited by Soltész, Due Process, Gesetzesvorbehalt und richterliche Kontrolle im Europäischen Kartellbußgeldverfahren, WuW 02/2012, 141 (143).

⁷²⁵ ECtHR of 27.10.1995, *C.R. vs. United Kingdom*, Appl. No 20190/92, para. 33; ECtHR of 27.10.1995, *S.W. vs. United Kingdom*, Appl. No 20166/92, para. 35. On the criticism voiced upon the sufficiency of Art 23 in this regard, see Schwarze/Bechtold/Bosch, *ibid*, 16 ff.

⁷²⁶ Cf. Brettel/Thomas, Unternehmensbußgeld, Bestimmtheitsgrundsatz und Schuldprinzip, ZWeR 1/2009, 25, 41; Schwarze/Bechtold/Bosch, Deficiencies, 16. Considering the ECJ's unique role under the system of the Treaty, it will be ascertained that judgments by ECJ are to be attributed a distinct legal value equivalent to an act of legislation. In detail, see 3. § 1 below.

⁷²⁷ In detail cf. Wouter, Principles of European Antitrust Enforcement, (2005), 151 ff.

⁷²⁸ Cf. Wouter, *ibid*, 70 ff; Scordamaglia, Cartel Proof, Imputation and Sanctioning, CompLRev [2010], Vol 7, Issue1, 8 ff.

⁷²⁹ See also Scordamaglia, Cartel Proof, Imputation and Sanctioning, CompLRev [2010], Vol 7, Issue1, 10: "Generally it is widely accepted that the Convention was conceived to operate in a socio-economic environment characterized by democracy, the rule of law and a free-market economy, the latter justifying the extension of protection of fundamental rights to corporate entities".

⁷³⁰ Scordamaglia, *ibid*, 7; Dannecker, in: Immenga/Mestmäcker, Kommentar zum europäischen Wettbewerbsrecht, Vol I, (2007), Art 23 Reg. 1/2003 para. 14; Nowak, in: Loewenheim/Meessen/Riesenkampff, Kommentar zum europäischen und deutschen Kartellrecht, (2009), Art 23, para. 50.

⁷³¹ Cf. Soltész/Streinle/Bielesz, EuZW 2003, 202, with further references.

⁷³² See Soltész, WuW 02/2012, 141, *supra* note 3, denoting that the debate has, in the meantime reached a dimension making it impossible for the Commission to ignore its assertions and requests.

⁷³³ As the topic of this analysis merely concerns Art 101 (1) TFEU, it should be mentioned that the 'due process'-debate calls for a horizontal appraisal of the current level of procedural safeguards, as the procedural rules cannot be conducted in a fragmented manner, distinguishing between different types of Art. 101 or 102 TFEU infringements. In detail see Scordamaglia, Cartel Proof, Imputation and Sanctioning, CompLRev [2010], Vol 7, Issue1, 8.

particularly prevalent in the area of imposing ‘intragroup’ liability, that is, attributing conduct and responsibility between companies of a corporate group.⁷³⁴

In regard to the imposition of fines on corporate groups, a **variety of principles** come under consideration, which have accordingly been asserted by companies in a number of procedures. The range of rights hereby invoked by far succeeds the classical guarantee of a ‘fair trial’ stipulated by Article 6 ECHR.⁷³⁵ It should be mentioned, however, that most of these constitutional guarantees are essentially derived from this norm.⁷³⁶

Companies attempting to contest an imposition of intragroup liability have for instance criticized:

- the use of insufficient or illegal incriminating evidence;⁷³⁷
- an infringement of the right against self-incrimination;⁷³⁸
- a breach of the right to a fair hearing;⁷³⁹
- an inadequate access to file;⁷⁴⁰ and
- an unequal treatment.⁷⁴¹

Finally, with regard to the criticism of the case of *Akzo Nobel*, Art 6 (1) ECHR has been used to challenge insufficient presentation of evidence before the Court⁷⁴² and the lack of predictability or transparency of antitrust fines.⁷⁴³ Apart from these ‘derivative rights’ of Art 6 (1), an important common claim in the context of the topic of a ‘single economic entity’ is an infringement of the **presumption of innocence**. This essentially refers to an illegal reversal of the Commission’s burden of proof stipulated by Reg. No 1/2003,⁷⁴⁴ and the insufficient probative value of evidence, thereby infringing the principle of *in dubio pro reo* anchored in Art 6 (2) ECHR.⁷⁴⁵

The claims listed above however, can only be relevant for the result of the proceedings in case they are attributed a ‘criminal nature’.⁷⁴⁶ The qualification of the legal nature of antitrust procedures is pertinent not only for determining the procedural guarantees undertakings may

⁷³⁴ For the utilization of the term of ‘intragroup liability’ in cases of ‘piercing the corporate veil’ in general company law, see e.g. *Blumberg*, *The Law of Corporate Groups*, (1987), Vol III, (Substantive Law), 183 ff.

⁷³⁵ This provision nevertheless constitutes the most frequently invoked one by parties subjected to an antitrust procedure.

⁷³⁶ *Scordamaglia*, *Cartel Proof, Imputation and Sanctioning*, *CompLRev* [2010], Vol 7, Issue 1, 11.

⁷³⁷ See Case T-30/91, *Solvay SA vs. Commission*, [1995] ECR II-1775, para. 31.

⁷³⁸ See Case 374/87, *Orkem vs. Commission*, [1989] ECR 3283, paras. 18-30.

⁷³⁹ See Cases T-213/95, *SCK and FNK vs. Commission*, [1997] ECR II-1739, para. 215.

⁷⁴⁰ See Joined Cases C-204/00 P, 205/00 P, 211/00 P, 213/00 P, 217/00 P & 219/00 P, *Aalborg Portland A/S vs. Commission [Cement]*, [2004] ECR I-123, paras. 65-71.

⁷⁴¹ See Case T-347/94, *Mayr-Melnhof Kartongesellschaft vs. Commission*, [1998] ECR II-1751, paras. 9-11, as cited by *Scordamaglia*, *Cartel Proof, Imputation and Sanctioning*, *ECLR* [2010], Vol 7, Issue1, 12.

⁷⁴² For instance with regard to the invitation to submit a common oral defense: see Case C-238/99 P, *Limburgse Vinyl Maschappij and others (PVC II) vs. Commission*, [2002] ECR I-8375, para. 345, or the absence of cross examination of witnesses: Joined cases C 204/00 P, *Aalborg A/S vs. Commission*, [2004] ECR I-123, para. 200 as cited by *Scordamaglia*, *ibid*.

⁷⁴³ Cf. *Scordamaglia*, *Cartel Proof, Imputation and Sanctioning*, *CompLRev* [2010], Vol 7, Issue1, pt. 3.2.

⁷⁴⁴ In particular Art 2 of the said Regulation.

⁷⁴⁵ See Case T-10/89, *Hoechst vs. Commission*, [1992] ECR II-629, para. 525, as cited by *Scordamaglia* in this context. For a list of other procedural rights asserted, which are nevertheless not of an explicit value for the ascertainment of the concept of a ‘single economic entity’: see *idem*, 12.

⁷⁴⁶ In detail on this topic see *König*, *Das Europäische Verwaltungssanktionsrecht und die Anwendbarkeit strafrechtlicher Rechtsgrundsätze*, [The European Administrative Procedure and the Application of Principles of Criminal Law], 2008, as cited by *Maritzen/Bednarczyk*, *OZK* 2009/6, 219.

rely on, but also to determine the rules of proving illicit behavior, in particular the evidential standard inherent to the latter. It is therefore of decisive value for determining the appropriateness of the current practice endorsed by the Commission, and consequently affirmed by the ECJ, of holding parent companies liable on the basis of a legal presumption established upon its amount of shareholding in a subsidiary.

The Charter itself contains no definition of a ‘criminal’ nature.⁷⁴⁷ Primarily, Art 23 (5) of Reg. No. 1/2003 claims that decisions by which the Commission imposes fines on undertakings pursuant to the Regulation “*shall not be of a criminal law nature*”.⁷⁴⁸ The pertinent value of this assertion for procedures imposing fines in antitrust law nevertheless requires a more differentiated analysis.

Even though the ECJ has stated in numerous rulings that the Commission is not to be regarded as a ‘tribunal’ within the meaning of Art 6 ECHR,⁷⁴⁹ Art 23 (5) is nevertheless not decisive for determining whether proceedings based on Regulation No. 1/2003 are of a ‘criminal law nature’ within the meaning of the Convention.⁷⁵⁰ Rather, the substantive value of a decision is pertinent, i.e. whether it has a punitive character.⁷⁵¹ According to the European Court of Human Rights, Art 6 ECHR must rather be interpreted in an ‘autonomous’ manner.⁷⁵² For an offence to be attributed the value of a ‘criminal charge’ it therefore suffices that it amounts to a “*general rule whose purpose is both deterrent and punitive*”.⁷⁵³

Since the Commission’s *Dyestuffs* decision⁷⁵⁴ it has been clear that the ECJ regarded fines imposed on undertakings to fulfill both criteria. In this procedure the parties had argued that “*since fines authorized by [Reg. 1/2003]⁷⁵⁵ are not of a criminal law nature, they should be imposed not in order to punish infringements that have already occurred, but in order to prevent their recurrence*”.⁷⁵⁶

The ECJ rejected this argumentation on the basis that imposing such a limitation would “*considerably reduce the deterrent effect of fines*”.⁷⁵⁷ This assertion of the Court makes apparent that the ultimate purpose of fines imposed for competition law infringements rests in their

⁷⁴⁷ Wils, Principles of European Antitrust Enforcement, (2005), 76.

⁷⁴⁸ Cf. Wils, *ibid*.

⁷⁴⁹ ECJ of 29.10.1980, Joined Cases 209-215, 218/78, *Van Landewyck*, [1980] ECR 3125, para. 81; and ECJ of 7.6.1983, Joined Cases 100-103/80, *SA Musique Diffusion française and others vs. Commission*, [1983] ECR 1825, para. 7.

⁷⁵⁰ Wils, *ibid*, para. 300, 77; Schwarze, EuR 2009, 171, 181.

⁷⁵¹ Soltész/Marquier, EuWZ 2006, 102, as cited by: Schnagl, Die Kronzeugenregelung im Kartellverfahren, Wien (2009), 67. For this reason the Commission’s decisions are often compared to the situation under the German Administrative Offense Act (OwiG) in the German (linguistic) area. See Schwarze, EuZW 2003, 216 f; Dannecker/Biermann in: Immenga/Mestmäcker, Art 23 Vo 1/2003, para. 295; Soltész/Steinle/Bielez, EuZW 2003, 206; Rosbaud, JBl 2003, 907; Reisner, Das kartellrechtliche Geldbußensystem, Wien/Graz (2007), 85.

⁷⁵² See ECtHR of 25.9.1984, *Öztürk vs. Germany*, A/73, para. 55; and ECtHR of 24.2.1994, *Bendenoun vs. France*, A/284, para. 47.

⁷⁵³ See essentially the European Court of Human Rights (hereinafter ECtHR) of 24.2.1994, in *Lutz vs. Germany*, A/284, para. 47 as cited by Wils, *ibid*, 77, (para. 302).

⁷⁵⁴ See COMP69/243, ‘*Dyestuffs*’, [1969] OJ Nr. L 145/11.

⁷⁵⁵ At the time, Reg. No. 17/62 [13 OJ [1962] Nr. 204.

⁷⁵⁶ See Case 49/69, *BASF vs. Commission*, [1972] ECR 713, para. 37 as cited by Scordamaglia, Cartel Proof, Imputation and Sanctioning, CompLRev [2010], Vol 7, Issue1, 13.

⁷⁵⁷ See only recently, ECJ of 18.9.2003, C-338/00 P, *Volkswagen vs. Commission*, [2003] ECR I-9189, para. 97.

‘deterrent value’. If deterrence is the objective as a matter of principle however, it remains unclear why the entire procedure should not be attributed a criminal facet.⁷⁵⁸

Thus, it has been argued that it seems difficult – if not impossible – to deny that the applicability of the criteria set out in the case-law of the ECtHR lead to the conclusion of proceedings based on Regulation 1/2003 to relate to the ‘determination of a criminal charge’ within the meaning of Art. 6 ECHR.⁷⁵⁹

This means that antitrust proceedings arguably⁷⁶⁰ require a ‘double classification’. While under the system of the Treaty they are to adhere to the general principles of ‘administrative law’, they must comply with general principles of ‘criminal law’ under the system of the ECHR.⁷⁶¹ This dual characterization can nevertheless coexist because, in the words of the ECtHR, the “classification as non-criminal law at the national level would not be affected by applying the guarantees of Art. 6 to the said proceedings”.⁷⁶²

§ 2.4. The Ambiguity of the Current Mode of Assessing Parental Responsibility

In the area of ‘criminal’ or ‘criminal-akin’ charges, the legislator is obliged to legally specify the criteria denoting the range of possible sentencing. This is necessary in order to comply with the principle of ‘**legal certainty**’, constituting a basic rule of democratic legal systems.⁷⁶³ In light of the *nature* of competition charges outlined above, this principle not only applies to the competition proceedings before the Commission, but also binds the European Court of Justice. This confinement can be understood as a legal obligation of the Court to appropriately substantiate its line of reasoning in determining antitrust responsibility, thereby granting its decisions a certain amount of legal certainty and foreseeability in accordance with the rule of law. The principles set out in the case of *Akzo Nobel*, comprising a strong legal presumption without appropriately denoting the criteria upon which it may be rebutted, are questionable in regard to the principle of legal certainty and the necessary consistency of European case-law.

⁷⁵⁸ *Scordamaglia*, *ibid*.

⁷⁵⁹ See *Wils*, *La Compatibilité des Procédures Communautaires en Matière de Concurrence Avec la Convention Européenne des Droits de l’Homme*, (1996) 32, *Cahiers de Droit Européen*, 329, as well as *Lenaerts and Vanhamme*, *Procedural Rights of Private Parties in the Community Administrative Process*, (1997), 34 *Common Market Law Review* 531, 557, as cited by *idem* in: *Principles of European Antitrust Enforcement*, 77. Furthermore cf. the Opinion of Judge *Vesterdorf* acting as AG in the Case T-1/89, *Rhône-Poulenc vs. Commission*, [1991] ECR II- 867, 885; and the Opinion of AG *Léger* in Case C-185/95 P, *Baustahlgewerbe vs. Commission*, [1998] ECR I-8422 para. 31. Furthermore see ECJ of 8.7.1999 in C-199/92 P, *Hüls vs. Commission*, [1999] ECR I-4383 paras. 149-50, and most recently the Opinion of AG *Kokott*, in Case 97/08 P, *Akzo Nobel NV vs. Commission*, [2009] ECR I-08237, para. 39.

⁷⁶⁰ The ECJ seems to still ascertain European antitrust procedures as purely ‘administrative’ in nature, see ECJ of 11.6.2002, C-210/00, *Käserei Champignon*, [2002] ECR I-6453, para. 53; CFI of 8.7.2008, T-99/04, *Treuhand AG vs. Commission of the European Community*, [2008] ECR II-1501.

⁷⁶¹ Thus also *Scordamaglia*, *Cartel Proof, Imputation and Sanctioning*, *CompLRev* [2010], Vol 7, Issue1, 19; and *Wils*, (2010), *The Increased Level of EU Antitrust Fines, Judicial Review and the ECHR*, *World Competition*, Vol. 33, 12.

⁷⁶² Judgment of the ECtHR of 21.2.1984, *Öztürk vs. Germany*, A 73, paras. 47 to 49, as cited by *Scordamaglia*, *ibid*, in which the ECtHR outlined its conception of a fine by clarifying the scope of application of Art 6 for procedures interpreted as ‘administrative’ according to national law.

⁷⁶³ *Brettel/Thomas*, *Unternehmensbußgeld, Bestimmtheitsgrundsatz und Schuldprinzip im novellierten deutschen Kartellrecht*, *ZWeR* 1/2009, 25, 40, citing for German law: BVerfGE 105, 135, 156, which requires the legislator to even provide judges with guidelines for endowing sanctions with a certain amount of predictability.

Principally, one cannot insinuate the ECJ to have created a presumption to 'hoax' defendants. Rather, the Court aimed at an appropriate and effective allocation of the onus of proof in light of the above-mentioned difficulty of attesting a cartel agreement.⁷⁶⁴

However, the current situation confronts parent companies with a **dilemma**.⁷⁶⁵ On the one hand, they should be very attentive to their subsidiary's activities and may need to take steps to ensure increased oversight to prevent infringements from occurring in the first place. This is particularly necessary since the Court has not made any form of a parent company's awareness of its subsidiary's antitrust infringement a condition for attributing the latter's conduct to it. In a quite succinct manner, the Court rather referred to 'all relevant factors relating to economic, organizational, and legal links' between the parent and the subsidiary company for denoting the 'decisive elements' of consideration.

If, however, despite all efforts of effective supervision, only one of their subsidiaries is caught to have infringed competition law, a parent company will be trapped by the presumption. That is ironically the case because in closely reviewing their subsidiaries' conduct, parent companies will be found to have in fact exercised 'decisive influence' on them. This is irrespective of whether the parent company thereby only attempted to secure the compliance with European competition rules, but refrained from any other form of influence on the subsidiary's market conduct.⁷⁶⁶ Regarding the criticism, which can be made of the Court's formulation of the presumption, the question has legitimately been raised whether it may not, in certain circumstances, contravene the deterrence objective of European antitrust law.⁷⁶⁷

The mentioned lack of (precise) criteria denoting the factual existence of 'decisive influence' under current European case-law and the dilemma parent companies are hereby confronted with, raises two issues of discussion.

First, it must be analyzed which **type of domination** or 'control' generates such an intrusive amount influence on the market conduct of a subsidiary that it may justifiably be regarded as 'impermissible' to assume the latter's economic independence. It must be examined which features of the commercial interrelation between a parent and a subsidiary are in fact decisive for the common understanding of 'control' in general corporate law. Under principles of 'enterprise law' this assessment must duly take into account the objectives pursued by the antitrust provisions.

Secondly, it must be questioned whether the Court will allow a rebuttal of the legal presumption where substantiated evidence is presented by the parent company showing that it has, in the precise case at stake, refrained from the possibility⁷⁶⁸ of exerting this amount of 'control' on its subsidiary's market conduct. This sort of evidence nevertheless has to consider whether the parent has hereby not infringed a specific obligation to **supervise** its subsidiary's behavior based on its significant amount of shareholding. Generally speaking, it must be

⁷⁶⁴ See § 4.3. above, on the general admissibility of a rebuttable presumption in European competition law. See also the Speech of Ex-Competition Commissioner *Nelie Kroes* of 31.5.2006, Press Release IP/06/698, European Commission Competition: Commission Imposes Fines of € 344.5 Million on Procedures of Acrylic Glass for Price Fixing, as cited by *Scordamaglia*, Cartel Proof, Imputation and Sanctioning, ECLR [2010], Vol 7, Issue1, 7.

⁷⁶⁵ *Bottemann and Atlee*, Steptoe's EU Competition Practice: An update on parent liability for antitrust violations of subsidiaries, 5.

⁷⁶⁶ Cf. *Bottemann and Atlee*, *ibid*.

⁷⁶⁷ Cf. *Bottemann and Atlee*, *ibid*; see furthermore *Hofstetter and Ludescher*, Der Konzern als Adressat von Bussen im EU-Kartellrecht', in: Festschrift für Roland von Büren, (2009), 485.

⁷⁶⁸ The latter may be conferred upon it by the existence of capital or legal links.

ascertained which *supplement factors*, beside the existence of substantial capital links, are required to appropriately disregard the concept of ‘legal separation’ inherent to general corporate law.⁷⁶⁹

§ 2.4.1. Assessment on the Basis of General Legal Principles

It has been indicated above that the Commission has attempted to justify its approach of imposing intragroup liability upon the necessity of appropriately considering the ‘economic realities’ behind the structure of a corporate group or concern. Even if the rationale of this approach cannot be questioned, it must be doubted whether the Commission and the European Courts have employed it in a coherent manner.

The current mode of assessment indicates this not to be the case. By refraining from providing companies with a clear line of assessment on which criteria they may appropriately rely in order to rebut the said presumption, European case law infers from the *possibility* of exerting ‘decisive influence’ on the basis of capital links⁷⁷⁰ that this amount of influence has *factually* been exerted. Hereby, antitrust responsibility is attributed on the basis of mere structural elements existent between companies of a corporate group.⁷⁷¹ The current approach, relying on an extensive application of an allegedly ‘consistent’ concept of an ‘economic entity’ cannot hide the fact that it essentially disregards the onus of proving that the parent company has in fact acted in a culpable way.

In respect to the criminal nature of antitrust decisions,⁷⁷² and the fact that a relationship of ‘control’ typically exists between parent companies and their subsidiaries, the current approach endorsed by the ECJ of holding parent companies liable arguably disregards the standard of ‘**personal responsibility**’. This principle, essentially inherent to European competition law,⁷⁷³ is circumvented by demanding the necessary existence of an ‘economic entity’ between a parent- and subsidiary company in the case of full ownership. The Commission’s obligation to present ‘additional elements’ other than shareholding links for holding parent companies liable has in effect been negated. Least of all, it is sufficient for the parent company to demonstrate that it has not participated in the breach of competition law itself.⁷⁷⁴

For these reasons, the ECJ has been assessed to come dangerously close to a ‘responsibility of status’ for imposing liability on parent companies. Despite the Court’s denial of any interference of the legal presumption with the principle of ‘personal responsibility’,⁷⁷⁵ it nevertheless disregards the necessity of a perpetrating action, essentially required under the ‘fault-based’

⁷⁶⁹ On a detailed analysis why these principles are pertinent likewise for the area of European competition law, see 3. § 2 below.

⁷⁷⁰ See ECJ, C-97/08 P, *Akzo Nobel NV vs. Commission*, [2009] ECR I-08237, para. 60, holding that in this case “[...] the parent undertaking is in a position to exercise decisive influence”.

⁷⁷¹ Cf. *Kling*, Die Haftung der Konzernmutter für Kartellverstöße ihrer Tochterunternehmen, WRP 4/2010, 510.

⁷⁷² Correctly pointed out by AG Kokott, in Case C-97/08 P, *Akzo Nobel NV vs. Commission*, [2009] ECR I-08237, para. 39.

⁷⁷³ For antitrust procedures, this is stipulated by Art 23 of Regulation 1/2003.

⁷⁷⁴ Cf. BeckRS 2009, Konzernweiter Haftung bei Kartellverstößen, EuGH Urteil vom 10.9.2009-C 97/08 P, 70987.

⁷⁷⁵ See in this regard ECJ of 8.7.1999, C-49/92 P, *Anic Partecipazioni*, [1999] ECR I-4125, para. 76.

approach of European antitrust law.⁷⁷⁶ Such a regime of strict liability has therefore been criticized for effectively lacking a legal basis, bringing it in conflict with the principle of '**nulla poena sine lege**' and the '**presumption of innocence**'.⁷⁷⁷ The pertinence of this principle for imposing fines in competition cases nevertheless derives from their criminal nature and the consequent requirement of a clear and unambiguous legal basis for such incriminating decisions.

Apart from a missing substantiation of the specific criteria that parent companies are to bring forward for the rebuttal of the presumption, a further problem of the current approach may be seen in the fact that a parent company's conscience of its subsidiary's infringement is not required. Hereby, the notion of 'decisive influence' was ascertained not to require a parent company's awareness of its subsidiary's anticompetitive behavior. The Court's formulation of a 'necessary consideration of all organizational and legal links' between the affiliated undertakings implies that structural links are ascribed a stronger credence than a legal entity's 'personal' involvement.

In their dogmatic justification of this practice, the European institutions have regularly drawn on the concept of a 'single economic entity', as essentially created for the assessment of intra-group agreements under Art 101 (1) TFEU. In its assessment of existent corporate affiliations for the application of the cartel ban, the Commission has gone so far as to equalize the concept of a 'single economic entity' with the fact of 'an undertaking' in European competition law. From an enforcement point of view, such an approach was deemed necessary in order not to jeopardize the successful enforcement of an antitrust fine by any transfer of assets between the companies of a corporate group.⁷⁷⁸

Even if the telos behind such an approach is to take into account the 'true economic strength' of the undertaking that has actually been involved in an infringement, it will be shown that holding parent companies 'jointly and severally liable' upon this concern is questionable with respect to practical realities. In a democratic legal system, the objective of an 'effective' enforcement of the competition provisions should furthermore be careful not to ignore the pertinence of general legal principles.

The previous analysis has so far shown that parent companies are currently demanded to prove their subsidiary's autonomy on the basis of a presumption comprising self-fulfilling elements. As far as a parent company hereby does not succeed in proving its subsidiaries' independent conduct on the market, it is automatically held liable for its own organizational deficiency. A subsidiary's lacking managerial power is, however, anticipated by the fact that a parent is in a position to control this subsidiary on the basis of existing capital links.⁷⁷⁹

In view of the various attempts parent companies have made to rebut the presumption-rule,⁷⁸⁰ it has been argued that establishing the absence of 'decisive influence' is extremely

⁷⁷⁶ Cf. Art 23 (2) of Reg. 1/2003; see *Kling*, *ibid.*

⁷⁷⁷ Cf. *Kling*, Die Haftung der Konzernmutter, WRP 4/2010, 510, nevertheless pointing out that the principle of *in dubio pro reo* has since long only played a marginal role in the Court's case-law. See e.g. ECJ of 8.7.1999, C-49/92 P, *Anic Partecipazioni*, [1999] ECR I-4125, para. 93 ff, concerning the proof of a participation in a cartel, as well as ECJ 8.7.1999, C-199/92 P *Hüls vs. Commission*, [1999] ECR I-4287, para. 150. On the presumption of innocence in competition law, see also CFI of 12.10.2007, T-474/04, *Pergan Hilfsstoffe*, [2007] ECR II-4225, para. 76.

⁷⁷⁸ *AG Kokott*, in Case 97/08 P, *Akzo Nobel NV vs. Commission*, [2009] ECR I-08237, para. 43. In favor of this position under German antitrust law see e.g. *Menz*, Wirtschaftliche Einheit, 80.

⁷⁷⁹ Cf. ECJ of 10.9.2009, *Akzo Nobel NV vs. Commission*, [2009] ECR I-08237, para. 61.

⁷⁸⁰ See § 4.3. above.

difficult given the fact that the parent company is to provide *negative* evidence.⁷⁸¹ On the basis of the Court's formulation in the case of *Akzo Nobel*, effectively anticipating the results of the legal presumption on the basis of factual circumstances, the latter has regularly been attributed the characterization of a 'probatio diabolica'.⁷⁸² Together with the lack of substantiated criteria, the Court's metaphoric considerations bring it in conflict with the above-mentioned **preconditions of legal certainty and foreseeability** that rulings in antitrust law are to comply with. The relevant question for the further assessment is therefore under which circumstances parent companies should *in praxi* be able to prove the lack of exercising a 'decisive' amount of influence. In order to comply with the above-mentioned legal principles, it will be shown that a consistent dogmatic method of assessing intragroup liability is indispensable.

In regard to the current approach endorsed by the European institutions, it has been debated whether a parent company could, for example, bring forward that it has explicitly **instructed** its subsidiary not to act in an uncompetitive way. It has particularly been questioned whether, according to the principle of 'personal responsibility', a parent could consequently not be held liable for an antitrust breach committed anyhow.⁷⁸³ At first instance, this argumentation seems to be backed up by the Commission's practice of asserting that the noncompliance of a subsidiary with its parent company's business policy proves the latter's market autonomy.⁷⁸⁴ The existence of a 'single economic entity' between the parent company and subsidiary, and consequently the liability of the latter, was negated in this case.

The ECJ, in its assessment of the Commission's argumentation, has nevertheless conceded such a deliberate instruction to be extremely rare, rendering it in practice an inappropriate basis of denoting a subsidiary's factual autonomy.⁷⁸⁵ Furthermore, if one is to take the parent company's exertion of 'decisive influence' on the subsidiary's *market conduct* as the essential basis for attributing liability between group undertakings, the suggested reference to a subsidiary's 'disobedience' of its parent's instruction is doubtful. The legal value of this argumentation is namely discharged by the fact that the parent in fact fails to influence a subsidiary that consequently commits an antitrust infringement. Upon the objective of the European competition provisions to *deter* companies from anticompetitive actions, such an argumentation cannot rationally be approved of.⁷⁸⁶

Duly taking into account the manner in which international corporate groups operate on the market, the question should rather be at which point the influence exerted by the parent can be regarded as so strong that it conversely entails the latter's duty of supervising its subsidiary's

⁷⁸¹ See *Botteman and lee*, Steptoe's EU Competition Practice: "An update on parent liability for antitrust violations of subsidiaries, available at: http://www.step toe.com/assets/tachments/EU%20Comp%20Briefing_%20Dec%202009.pdf.

⁷⁸² See e.g. *Vanderborre, Goetz*, Rebutting the Presumption of Parental Liability- A Probio Diabolica?, in: International Comparative Legal Guide Series, (2012), Cartels & Leniency.

⁷⁸³ *Kling*, WRP 4/2010, 510.

⁷⁸⁴ See e.g. Commission Decision of 21.12.2007, COMP/E-1/38.823, *Elevators and Escalators*, para. 605; CFI of 12.12.2007, Case T-112/05, *Akzo Nobel vs. Commission*, [2007] ECR II-5049, para. 62.

⁷⁸⁵ In the Court's previous assessment this was found to be the case in a single decision: See ECJ of 12.7.1979, joined cases 32/78 et al., *BMW Belgium*, [1979] ECR 2435, as cited by *Kling*, WRP 4/2010, 511.

⁷⁸⁶ Differently, i.e. denoting the 'usefulness' of such an argumentation, despite conceding that it will not very likely be seen in practice due to the rareness of such instructions, see *Montesa/Givaja*, When Parents Pay for their Children's Wrongs, in: *World Competition* 29 (4): 2006, 555, 567.

conduct. According to this standard, the conduct of business in the form of a corporate group arguably entails a certain 'organizational responsibility' of the parent company.⁷⁸⁷

The question of a parent company's supervisory duty has also recently been dealt with by the European institutions in cases of a 'legal succession' of undertakings. In this regard, it was contentious whether a parent company can be made responsible for an antitrust infringement that has occurred before it acquired the legal entity participating in it. Here, the concept of a 'single economic entity' has been employed by the Commission and the CFI in order to grant the payment of a fine to secure an 'effective enforcement' of the competition principles.⁷⁸⁸

The following analysis therefore aims to ascertain whether the concern, regularly articulated by the Community institutions, of companies to elude responsibility by means of the corporate form justifies such an extensive application of the 'single economic entity doctrine'. The wide-ranging employment of this doctrine indeed has **serious legal consequences** for the companies concerned.

§ 2.4.2. The Legal Consequences of an Extensive Application of the 'Single Economic Entity' Doctrine

As outlined above, the '**single economic entity**' doctrine, initially created for the issue of exempting group-internal agreements from Art 101 (1) TFEU, has now been indiscriminately imported into European administrative law by fining undertakings for their subsidiary's antitrust infringements. This has even been declared to be necessary for a 'consistent' application of European antitrust law on corporate groups of undertakings.

The current mode of assessment, relying on an extensive application of the concept of a 'single economic entity' in order to determine the 'correct' addressee of the Commission's decision within a corporate group of companies, has to be examined especially with regard to the increasing amount of fines levied in recent years.⁷⁸⁹ The attribution of conduct and liability between legally separate companies of a corporate group seems to serve the purpose of enlarging the range of addressees, enabling the Commission to considerably raise the amount of the fine levied on companies whose subsidiaries have been found to infringe Art 101 (1) TFEU.⁷⁹⁰ The Commission's argumentation of the alleged 'efficiencies' this approach brings for the enforcement of European competition law must therefore be critically analyzed with regard to its dogmatic accuracy.

According to Art 23 (2) of Regulation 1/2003, the Commission may impose fines up to 10% of an undertaking's worldwide turnover. This is principally restricted to the business volume of the legal entity involved in an infringement. By the means of treating the companies of a corporate group as a 'single economic entity,' however, the maximum ceiling of a fine is susceptible

⁷⁸⁷ For a detailed assessment, see 3. § 2.

⁷⁸⁸ CFI of 11.3.1999, T-134/94, *NHM Stahlwerke*, [1999] ECR II-239, para. 136. For a criticism of this approach, see 3.2.1.2. below.

⁷⁸⁹ *Kling*, Die Haftung der Konzernmutter für Verstöße ihrer Tochterunternehmen, WPR 4/2010, 511; *Gruber*, ÖZK 2012, 26.

⁷⁹⁰ See e.g. *Hofstetter/Ludescher*, Der Konzern als Adressat, in: FS Bühren (2009), 489; *Koch*, Kartellrechtlicher Sanktionsdurchgriff im Unternehmensverbund, ZHR 171 (2007), 554, 556; *Deselaers*, WuW 2006, 118, 122.

increased.⁷⁹¹ This is due to the fact that in effectively basing an attribution of conduct and liability on structural linkages, the Commission is enabled to determine the amount of the fine on the basis of the combined turnover of the entire corporate group.⁷⁹²

In its decision of the *Akzo Nobel* case, the CFI has argued:

*"[90] The fact that several companies are held jointly and severally liable for a fine on the ground that they form an undertaking for the purposes of [Article 101 TFEU] does not mean, as regards the application of the maximum amount of 10% of turnover laid down by Article 23(2) of Regulation No. 1/2003, that the obligation of each of them is limited to 10% of the turnover which it achieved during the last business year. The maximum amount of 10% of turnover within the meaning of that provision must be calculated on the basis of the total turnover of all the companies constituting the single economic entity acting as an undertaking for the purposes of Art 81 [Art 101 TFEU], since only the total turnover of the component companies can constitute an indication of the size and economic power of the undertaking in question."*⁷⁹³

In case that a subsidiary, achieving an annual turnover of 10 million euros is found to have infringed Art 101 (1) TFEU, but is found to constitute a 'single economic entity' with its parent company which achieves an annual turnover of 100 million euros, the business volume of the latter may therefore serve as the basis for calculating the 10% ceiling of the fine.⁷⁹⁴ This means, furthermore, that the Commission may also apply the **deterrence multiplier** on the basis of the financial resources of the entire group where the undertaking in question continues its participation in the collusion even after receiving the Commission's statement of objections.⁷⁹⁵ Moreover, the determination of a parent company's liability plays a role for the calculation of the fine, as the latter may in these cases be increased of up to 100% of the concerned undertaking's business volume.⁷⁹⁶ Accordingly, the imputation of an infringement to a parent company also increases the latter's risk of receiving an augmented fine on the basis of 'recidivism'. This is due to the fact that preceding infractions of competition law of *either* the parent company *or* the subsidiary may be taken into account, irrespective of the commercial sector in which such an infringement occurred.⁷⁹⁷ In addition, the Commission may include an 'extra charge' as a specific deterrent factor in its calculation of the fine for undertakings that have achieved exceedingly high sales volumes for specific goods and services. Furthermore, the profits hereby generated must not necessarily be linked to the commercial area in which the infringement occurred.⁷⁹⁸

⁷⁹¹ Hofstetter/Ludescher, *ibid*, 489.

⁷⁹² See e.g. Kling, *ibid*, 511; Soltesz/Steinle/Bielesz, *EuZW* 2003, 202 ff.

⁷⁹³ CFI Case T-112/05, *Akzo Nobel NV* [2007] ECR II-5049, as cited by Hofstetter/Ludescher in this regard.

⁷⁹⁴ Cf. Hofstetter/Ludescher, 'Der Konzern als Adressat von Bussen im EU-Kartellrecht', in: FS Bühren (2009), 489.

⁷⁹⁵ See Sorinas/Buhart/Brault, ECJ clarifies rules on parental liability for infringements of EU competition law committed by wholly-owned subsidiaries, available at:

http://www.herbertsmith.com/NR/rdonlyres/A27F61FA-BACB-43A3-B9CA-DD74C1BB14D4/12318/EUCompetition_Sept09_Parentalliabilityforinfringem.html. See furthermore Opinion of AG Maz l, of 11.2.2010, in Case C-413/08 P, *Lafarge SA vs. EC Commission*, [2010] ECR I-05361, in paras. 7-9.

⁷⁹⁶ See Commission Guidelines, on the method of setting fines imposed pursuant to Article 23 (2) (a) of Regulation No 1/2003, [O] J C 210, 1.9.2006], para. 28. [Hereinafter cited as 'Commission guidelines'].

⁷⁹⁷ See e.g. Sorinas/Buhart/Brault, *ibid*.

⁷⁹⁸ See Commission guidelines, para. 30, as cited in this regard by Christina Hummer, *ecolx* 2010, 66.

Despite the fact that **private enforcement** is not very developed in Europe,⁷⁹⁹ it should be mentioned in this context that plaintiffs who seek to obtain compensation on the grounds of the infringement will therefore primarily request the charges from the parent company where the latter has been made responsible for the payment of the fine already during an administrative procedure. This exposes parent companies to a substantial procedural risk, not to mention the bureaucratic time, effort, and possible expenses involved for its necessary defense in a civil procedure.

Finally, a parent company's reputation may substantially be affected. This is particularly the case where the concerned company is active on the capital market and thus obliged to inform its stakeholders and other investors of its pending antitrust procedures.⁸⁰⁰

In regard to the 10% upper limit of the fine, **doubts** have furthermore been raised on the **principle legality** of the sanctioning framework of European antitrust fines.⁸⁰¹ On the basis of the above ascertained classification of antitrust sanctions to be of a 'criminal nature', the relevant rule of Art 23 of Reg. 1/2003 is seen to lack the required legal certainty. In European competition practice this norm has nevertheless been justified on a twofold basis.

First, it should create a framework for penalties granting a sufficient degree of deterrence in order to compel companies to comply with the competition rules. Secondly, it should prevent the economic overcharge of the undertaking upon which the fine has been levied.⁸⁰² While, in regard to the existence of a corporate group, the first objective is to be pursued by the Commission's discretionary power of determining the correct addressee within a corporate group to hold liable, the second objective is to be granted on the basis of the said confinement of 10% of the concerned undertaking's business volume. It has nevertheless been outlined above, that the mode of determining the appropriate addressee via the concept of a 'single economic entity' is highly questionable under the principle of legality of decisions. Apart from the dubious extension of the range of addressees, the norm of Art 23 of Regulation 1/2003 has furthermore been criticized to constitute an insufficiently substantiated legal basis.⁸⁰³

Primarily, the provision merely requires an intentional or negligent infringement by an 'undertaking' or 'association of undertakings'⁸⁰⁴ of the essential provisions of Art 101 and 102 TFEU. These provisions are nevertheless explicitly broad, giving them a general clause-like character.⁸⁰⁵ Apart from the fact that the sole criteria the Regulation names for the determination of the amount of the fine are the 'gravity and the duration' of the infringement, it

⁷⁹⁹ For the reasons and argumentation against its further establishment see *Wils*, Principles of European Antitrust Enforcement, particularly Ch 4 ['Should Private Antitrust Enforcement Be Encouraged?'], 111 ff.

⁸⁰⁰ *Sorinas/Buhart/Brault*, *ibid.*

⁸⁰¹ *Brettel/Thomas*, Unternehmensbußgeld, Bestimmtheitsgrundsatz und Schuldprinzip, ZWeR 1/2009, 25 (29); *Schwarze/Bechtold/Bosch*, Deficiencies in European Community Competition Law, Gleiss/Lutz Rechtsanwälte (2008), 16 ff. For a comparable situation under German Law, see: *Koch*, Kartellrechtlicher Sanktionsdurchgriff im Unternehmensverbund, ZHR 171 (2007), 554, 556.

⁸⁰² See ECJ of 28.6.2005, C-189/02, *Dansk Rørindustri*, [2005] ECR I-5425, paras. 280-282, as cited by *Brettel/Thomas*, *ibid.*, 29.

⁸⁰³ See *Schwarze/Bechtold/Bosch*, Deficiencies, Gleiss/Lutz Rechtsanwälte (2008): "There are considerable doubts about the existence of such a 'clear and unambiguous legal basis', because the nature of Art 23 of Reg. 1/2003 as a substantive rule is insufficient with regard to the imposition of fines". See also *Gruber*, ÖZK 2012, 26, asserting that the multitude of factors inevitably gives the Commission various distinct possibilities of ascertaining and weighing the amount of a fine.

⁸⁰⁴ Art 23 (2) of Reg. 1/2003.

⁸⁰⁵ Cf. *Schwarze/Bechtold/Bosch*, *ibid.*, 16.

remains unclear whether the fine's upper limit is effectively justified upon the principle of 'equal treatment'.⁸⁰⁶ The fact that the Commission's guidelines contain a more detailed circumscription of the criteria for determining the amount of the fine does not change the current unsatisfactory legal situation, as these guidelines are neither part of Secondary Union law, nor explicitly authorized by Regulation 1/2003.⁸⁰⁷

Under the aspect of the required legal certainty of the provisions, this situation is furthermore aggravated by the fact that the Commission is given a virtually unlimited discretionary power to ascertain the amount of fines by the European Court of Justice.⁸⁰⁸ This discretionary power of the Commission also comprises the above-mentioned method of determining a repeated infringement, hereby explicitly releasing the Commission from the obligation to observe a limited period of time for imposing the deterrence multiplier.⁸⁰⁹ Finally, this deterrence factor, which the Commission may include in its calculation of the fine, leaves (unwarranted) room for speculation. The ECJ simply postulates that the latter must be assessed "*by taking into account a large number of factors and not merely the particular situation of the undertaking concerned.*"⁸¹⁰

Despite these reservations, the ECJ has only recently declared the calculation of fines in competition cases to be adequately substantiated by the Commission's guidelines on the method of setting fines,⁸¹¹ and by meanwhile existing adjudication.⁸¹² European case law is hereby seen to comprise adequate criteria for their imposition.⁸¹³ Furthermore, the Court held the 10%-limit included in Art 23 to be sufficient for the general economic necessity of an overall confinement of an antitrust penalty. From the Court's very general reference to the 'wording' of the Regulation, and the fact that it has not further dealt with the questionable legal basis of the Commission guidelines,⁸¹⁴ remaining doubts in this context are justified.

Even if it is true that the application of general clauses in European competition law does not constitute a violation of the principle of legal certainty per se,⁸¹⁵ this principle stipulates that a

⁸⁰⁶ See correctly *Brettel/Thomas*, Unternehmensbußgeld, Bestimmtheitsgrundsatz und Schuldprinzip, ZWeR 1/2009, 32. Imprecise with respect to the justification of the norm however: *Schwarze/Bechtold/Bosch*, Deficiencies, at 16, ascertaining that it remains "*unclear in this regard, whether the term 'total turnover' relates to the turnover of the group or that of the individual undertaking [...]*". This assessment nevertheless does not allude to the (lacking) substantiation of the norm itself, but to the ambiguous determination of its addressees within a corporate group of undertakings.

⁸⁰⁷ Cf. *Schwarze/Bechtold/Bosch*, Deficiencies, 17. Critically on the Commission Guidelines from a rule of law aspect, see furthermore *Engelsing*, Die Bußgeldleitlinien der Europäischen Kommission von 2006, WuW 2007, 470, 477.

⁸⁰⁸ See ECJ of 7.6.1983, Joined Cases 100 to 103/80, *Musique Diffusion française vs. Commission*, [1983] ECR 1825, para. 109; ECJ of 28.6.2005, C-189/02, *Dansk Rørindustri*, [2005] ECR I-5425, paras. 228-230; and ECJ of 18.5.2006, C-397/03 P, *Archer Daniels Midland and Archer Daniels Midland Ingredients vs. Commission*, [2006] ECR I-4475, para. 25

⁸⁰⁹ See ECJ of 28.2.2007, Case C-3/06 P, *Groupe Danone vs. Commission*, [2007] ECR I-1331, para. 38.

⁸¹⁰ ECJ 29.6.1006, C-289/04 P, *Showa Denko vs. Commission*, [2006] ECR I-5859, para. 23, as cited by *Schwarze/Bechtold/Bosch*, Deficiencies, 18.

⁸¹¹ Guidelines on the method of setting fines imposed pursuant to Article 23 (2) (a) of Regulation Nr. 1/2003, p. 2-5.

⁸¹² Cf. ECJ of 22.5.2008, Case C-266/06 P, *Evonik Degussa*, [2008] ECR I-81 = WuW/E EU-R 1451, paras. 10 ff.

⁸¹³ See explicitly ECJ of 22-5-2008, C-266/06 P, *Evonik Degussa*, [2008] ECR I-81, para. 46, referring to paras. 40 and 72 of the CFI's decision in the case under appeal (CFI of 5.4.2006, Case T-279/02, *Degussa AG* [Methionine cartel], [2006] ECR II-897).

⁸¹⁴ In detail see *Bechtold/Bosch/Brinker/Hirsbrunner*, EG-Kartellrecht, Art 23 Vo 1/2003, para. 33.

⁸¹⁵ Cf. *Schwarze/Bechtold/Bosch*, Deficiencies, 18.

legal norm which strongly influences the position of its addressee must be formulated precisely enough for the latter to be able to determine not only the specific conduct the norm forbids,⁸¹⁶ but also its inclusion in the range of addressees. Furthermore, a legal provision entailing a financial burden for its addressee must not only be legally precise, but also appropriate.⁸¹⁷ The more aggravating its effects are, the higher the demands posed to its legal distinctiveness become.⁸¹⁸ In consideration of the fact that the norm of Art 23 of Reg. 1/2003 is⁸¹⁹ subjected to a higher standard of certainty due to the indefiniteness of its absolute amount,⁸²⁰ the legality of the Commission's fining practice may well be questioned in regard to the principle of 'legal certainty'.

Inflexible or rigid upper levels of fines furthermore increase the potential of coming into conflict with the principle of **proportionality**. Fines tailored to large (international) corporations may be inopportune for smaller businesses, addressed by the same provision.⁸²¹ The appropriateness of a sanction rather depends on the circumstances of the specific case. In regard to the principle of proportionality, the orientation on an undertaking's worldwide business volume is thus to be reviewed in consideration of the principle of '**equal treatment**'. Even on the basis of the same level of limitation, fines in cartel cases may have a substantially different effect on the concerned companies. This effect is not necessarily proportional to the absolute amount of the fine, but essentially depends on the specific addressee.⁸²²

These deliberations make it clear that a high level of legal clarity is necessary for the dogmatic justification of this addressee on a factual level. Therefore, the existence of clear and unambiguous, that is, dogmatically coherent criteria of attributing conduct are necessary for companies not only to be able to recognize for which acts they may specifically be held liable,⁸²³ but also to act upon this recognition. Only then it is possible for the concerned undertakings to introduce effective means of supervision in order to prevent the occurrence of an antitrust infringement in the first place.

Given objective of the competition provisions to deter undertakings from anticompetitive conduct, the dogmatic consistency of attributing liability is also economically desirable for inducing companies to efficiently review their agents' conduct.⁸²⁴

This is not only pertinent for imputing conduct between legally separate undertakings of a corporate group, but already for the attribution of an agent's conduct on the level of the single legal entity. As far as rules in this regard exist under national law, they all result in the fact that an undertaking can be made accountable for the conduct of an agent explicitly acting on its behalf.⁸²⁵ It cannot be legally justifiable, especially not from the perspective of the legal subjects

⁸¹⁶ On this aspect under national law see e.g.: *Degenhart*, in: Sachs (ed.) Grundgesetz [German Constitutional Law], 3rd ed. (2003), Art 103, para. 67; and *Nolte*, in: Mangoldt/Klein/Starck (eds.), Grundgesetz, 5th ed. (2005), Art 103, para. 140.

⁸¹⁷ For the principle of legal clarity under German law, see e.g. BVerfGE, 105, 135, 135f and 160, as cited by *Brettel/Thomas*, ZWeR 1/2009, 32.

⁸¹⁸ Cf. *Koch*, Kartellrechtlicher Sanktionsdurchgriff im Unternehmensverbund, ZHR 171 (2007), 566.

⁸¹⁹ (- even without the extension of addressees via the 'single economic entity' doctrine -).

⁸²⁰ Cf. *Soltész/Steinle/Bielesz*, EuZW 2003, 202 f; and for the same situation under German antitrust law: *Koch*, *ibid*, 567.

⁸²¹ Cf. *Mundt*, Die Bußgeldleitlinien des Europäischen Kartellamtes, WuW 2007, 458, 465.

⁸²² For German law see again BVerfGE 105, 135, 145, as cited by *Brettel/Thomas*, *ibid*.

⁸²³ Cf. *Koch*, Kartellrechtlicher Sanktionsdurchgriff im Unternehmensverbund, ZHR 171 (2007), 567.

⁸²⁴ On the increased efficiency the consideration of corporate efforts of supervision may entail for the enforcement of European antitrust law, see 4.1. of this thesis.

⁸²⁵ Cf. *Koch*, *ibid*.

concerned, that the consistency of these rules should⁸²⁶ be replaced by an incoherent and ambivalent approach to attributing liability under European antitrust law.⁸²⁷ Accordingly, the principle of legal certainty constitutes a special form of the ban of arbitrary decisions.⁸²⁸

The correlation between the principle of legal certainty and the prohibition of arbitrary decisions at the same time establishes that a deliberate abstention from the traceability of decisions on the basis of an alleged increased factor of deterrence cannot justifiably be endorsed. This argument has nevertheless sometimes been employed by European competition practice to explain the broad wording of Art 23 Reg. 1/2003.⁸²⁹ 'Predictability' in the latter sense does not mean that an exact calculation of the fine, assessing the possible 'advantageous' effects of anticompetitive behavior, is rendered possible.⁸³⁰ In consideration of the vast amount of actions taking place within international corporate groups this contention cannot reasonably be upheld. Furthermore, this sense of legal clarity would by no means be practically achievable, even where competition law followed more clear rules on individual illicit conduct.⁸³¹ The interference of authoritative acts with the freedom of entrepreneurial conduct, including the autonomy of legal entities to structure their conduct⁸³² is particularly unfounded where the aim is the creation of a free market economy,⁸³³ essentially based on commercial autonomy.

In conclusion it can be said that European antitrust law must implement a framework for imposing fines that authorizes the Commission to issue sanctions only on the basis of a precise system of reference, respecting the requisite degree of proportionality in relation to the committed offense.⁸³⁴ The following analysis will examine in which way the assessment of intragroup liability should appropriately be modified in order to comply with the prerequisite of considering general legal principles.

3. The 'Single Economic Entity' Doctrine: An Assessment of 'Privileges and Responsibility' in a Corporate Group

⁸²⁶ (- particularly by means of their interpretation in conformity with EU law -).

⁸²⁷ Koch, ZHR 171, (2007), 567. For this reason, it is furthermore inaccurate to take recourse to the very general deliberation of attributing liability in civil law, as they follow explicitly distinct dogmatic rationales. In detail see: Emmerich/Habersack, Konzernrecht, (2005), § 31 II, 428 ff. In detail see point 3. Of this thesis.

⁸²⁸ For this aspect under German Law, see Rogall, in: Senge, Karlsruher Kommentar zum OWiG, (2006), § 3, para. 4.

⁸²⁹ Cf. e.g. Statement of Objections of AG Mischo of 18.5.2000, in C-238/98 P, *Mo och Domsjö vs. Commission*, [2000] ECR I-9855, para. 64.

⁸³⁰ Differently, see however Wouter, Principles of European Antitrust Enforcement, (2005), 142.

⁸³¹ In detail, see Koch, Der Kartellrechtliche Sanktionsdurchgriff im Unternehmensverbund, ZHR 171 (2007) 554 ff.

⁸³² In detail, see 2.2.1. below.

⁸³³ Cf. Brettel/Thomas, ZWeR 1/2009, 35.

⁸³⁴ For a comparable assessment of the norm of § 81 (4) para. 2 of the German antitrust law, implementing the standard inherent to Art 23, see Brettel/Thomas, ZWeR 1/2009, 36; Critically on the 'constitutionality of this norm in adhering to the European standard, see furthermore Buntscheck, Der 'verunglückte Abschied' von der Mehrerlösgeldbuße für schwere Kartellverstöße", in: FS Bechtold (2006), 81, 87 ff; Deselaers, WuW 2006, 118, 122 ff; Thiele, WRP 2006, 999 ff; Wagner, EWS 2006, 251; Bechtold, Kartellgesetz, 4th ed. (2006), § 81, para. 25 f.

It has been analyzed⁸³⁵ that the consistency and continuity of European case law is an essential requirement of its appropriate application. A legal standard requires a rational basis for its justified demand.⁸³⁶ In regard to the general legal principles mentioned above, the significance of a standard's justification is very clear.

From a normative perspective, legal activity is also an activity of social or economic development. European antitrust law therefore did not come into being all at once.⁸³⁷ Rather, it resulted from multiple acts of analysis, essentially following the aim of fostering competition throughout the area of the Common Market. Since this process must duly include the various conceptions of 'fair competition' in the member states, it also comprised decentralized elements. In order to establish a new legal principle in European antitrust law, its general acceptance by the member states is crucial. The Court's broad understanding of a 'single economic entity' therefore requires a more detailed analysis of the objectives and effects of European adjudication.

§ 1. The Objective and Effect of ECJ Law-Making⁸³⁸

Specifically in the area of competition law, supranational European Union law⁸³⁹ has a large impact due to its categorical priority towards the law of the national member states.⁸⁴⁰ However, possessing only a limited amount of measures to enforce its law, the Union can only be considered a 'legal community' in the sense that it necessarily depends on the acceptance of its rule of law by its member states.⁸⁴¹ For this reason, clear and generally recognized rules determining the development, nature, and application of principles in European law are of specific importance.⁸⁴²

According to the logic of legal standards, positions in common law have required judges to distinguish between 'principles' as requirements of justice, fairness or some other form of morality, and 'policies' which set out a certain goal to be reached, generally improving some economic, political or social feature of the community.'⁸⁴³

⁸³⁵ See 2.2.2.2., § 2.3. above.

⁸³⁶ Cf. *Shue*, Basic Rights, (1996), 13.

⁸³⁷ Cf. *Shapiro*, Legality, (2011), 197.

⁸³⁸ In detail on this topic see, *de Waele*, The Role of the European Court of Justice in the Integration Process: A Contemporary and Normative Assessment, European Law [2010], Vol 6 No (1), p. 3, available at: <http://www.hanselawreview.org/pdf9/Vol6No01Art01.pdf>.

⁸³⁹ Legal Framework of the Union is now the Treaty on the Functioning of the European Union [TFEU], which has been established by the Lisbon Reform Treaty, (2007/ OJ C 306/01). After the abolishment of the 'three-pillar framework', the Union is now the legal successor of the European Community. For this reason it is more appropriate in the future to speak of 'European Union- or European law' instead of the previous term of 'Community law'. Since the current Treaty embodies the law of the previous ECT [OJ C 321 E/1 of 29.12.2006] the two terms are sometimes still be used interchangeably.

⁸⁴⁰ *Oppermann*, Europarecht, 3rd ed., München (2005), § 8, para. 1.

⁸⁴¹ Cf. *Oppermann*, *ibid*; nevertheless, it should be considered that the area of competition law is one of the areas of law, in which the Commission is vested with the most far reaching powers, including that of directly imposing sanctions on juridical entities.

⁸⁴² Cf. *Oppermann*, *ibid*.

⁸⁴³ See *Dworkin*, Taking Rights Seriously, Harvard University Press (1977), 22 as cited by *Dyzenhaus*, in: Hard Cases in Wicked Legal Systems, 2nd ed., Oxford University Press (2010), 23. This citation, even

As the ECJ, in its nature of a supranational Court, is responsible not only for the interpretation of positive European law,⁸⁴⁴ but also for the development of new legal standards in the light of promoting the integration process,⁸⁴⁵ this distinction is well important for the assessment of European law. For an appropriate interpretation of the norms of European antitrust law therefore, recognizing that legal principles should not be misused for the aims of certain policies is essential.

Thus, the ECJ's determination of the concept of a 'single economic entity' needs to be assessed in consideration of the Court's dual task as the law's interpreter and at the same time as judge of a single case. Particularly in positive European law it is unquestionable that all legal texts are not only open to interpretation, but also in need of it. This is due to the fact that the Union's written law is binding in the various languages of the member states, possibly leading to different linguistic perceptions, while at the same time constituting law of a very 'general nature.'⁸⁴⁶ When comparing the situation of European Union law with that of national law, an essential distinction must be made: while the legal order of the various member states has evolved historically over centuries and can thus be considered as comprehensively established, European Union law demonstrates quite an incomplete legal order, which can be seen in a state of constant flux.⁸⁴⁷ Particularly the Treaty on the Functioning of the European Union,⁸⁴⁸ formulating the objectives and aims of the Union, intentionally has been left open to interpretation with respect to the Union's future development. In its function of a 'framework treaty' it therefore contains only rudimentary rules on the determination of European Union law.⁸⁴⁹

The substantiation of this 'legal frame' is primarily the assignment of the Union's political organs by means of issuing legal acts.⁸⁵⁰ However, the essential distinctive feature of the Union's legal order is characterized by the fact that not only these political organs, but rather the European Court of Justice is to enhance and complete the integration process by means of interpreting the Treaties, forming, as a consequence, new law.⁸⁵¹

This requisite of judicial activism especially concerns areas, which so far have not been conceptualized or codified in a meticulous way, such as the proceeding regarding administrative

though covering the discussion of the distinct characterization of legal positivism and common law in regard to their cognition of morality, is nevertheless insightful for the determination of the standard that a norm, including principles of adjudication, should essentially fulfill in order to be conceived legally valid.

⁸⁴⁴ This means, for determining primary and secondary Union law according to its normative sense. See ECJ of 27.3.1980, Case C-61/79, *Denavit Italiana*, [1980] ECR 1205, (1223).

⁸⁴⁵ See *Anweiler*, *Die Auslegungsmethoden des Gerichtshofs der Europäischen Gemeinschaften*, Frankfurt am Main (1997), [herein after: *Auslegungsmethoden*], 35 f.

⁸⁴⁶ *Anweiler*, *ibid*, 34.

⁸⁴⁷ See *Everling*, *RabelsZ* 50 (1986), 193, (206) as cited by *Anweiler*, *Auslegungsmethoden*, 35.

⁸⁴⁸ It has been mentioned that the Treaty mainly constitutes a mere transfer of most substantive provisions of the previous EC-Treaty, however under a new conceptual framework.

⁸⁴⁹ This is primarily done for the aim of not only leading to an ever enhanced economic, but also a political Union. Cf. *Bleckmann*, in: *GS für Constantinesco*, (1983), 61 (65), as cited by *Anweiler*, *Auslegungsmethoden*, 36.

⁸⁵⁰ Commonly in the form of Directives and Regulations (see Art 46 TFEU).

⁸⁵¹ Cf. *Bleckmann*, *ibid*.

fines by the European Commission.⁸⁵² These legal areas are thus in effect formed and determined by *case-law*.⁸⁵³

In the continental European legal tradition, judicial precedents normally amount to acts of judicial authority, but do not constitute a unique source of law.⁸⁵⁴ In this sense, the application of national law has been argued to become ever more difficult, since the previous four canons of interpretation in positivist legal systems - that is, text, context, formation and purpose - are being supplemented not only by their obligation to comply with the Constitution, but also by the 'dogmatically not entirely ensured' comprehension of ECJ precedents in some jurisdictions.⁸⁵⁵ Even if it is true that the process of a 'Europeanization' of national law confronts legal practitioners of all areas with new challenges, it should not be overlooked, that the allegedly unexpected penetration of primarily positivist legal systems with this new source of law is in fact not so extraneous.

First of all, it has been accepted in European legal tradition since the first movements of codification,⁸⁵⁶ that the task of legislation is to establish general principles, essentially broad in their implications, instead of getting lost in detailed regulations in an attempt to cover all possible situations of the law's application.⁸⁵⁷ This fundamentally termed the necessary cooperation between legislation and jurisprudence. It is therefore widely recognized that codified law is yet to be substantiated by active and creative judicial interpretation. Additionally it must be scientifically explained and refined.⁸⁵⁸

Given the dynamic character of the law in light of increasingly globalized markets,⁸⁵⁹ it would be entirely anachronistic to claim the opposite, especially since codification is often neither timely nor desirable in order to determine situations in need of regulation.

Furthermore, common and civil law are not as distinct as often assumed.⁸⁶⁰ Both on the European continent, as well as in Great Britain, the law is determined by the legislator, the

⁸⁵² The currently existing Commission guidelines of 2006 (OJ L 362/1, 20.12.2006) have been criticized under general principles of Community law to be in lack of a legal basis: see *Schwarze/Bechtold/Bosch*, Deficiencies, Gleiss/Lutz Rechtsanwälte (2008), 16 ff.

⁸⁵³ For a detailed analysis against legal 'positivism' as 'higher legal order' see e.g. *Fuller*, The Morality of Law, (1994), as cited by *Murphy*, Legal Positivism and Natural Law History, available at: <http://www.nlnrac.org/critics/legal-positivism>; and *Dworkin*, Essay: The Model of Rules I, in: *Takings Rights Seriously*, London (1978).

⁸⁵⁴ *Lutter*, *ibid.*

⁸⁵⁵ Cf. *Lutter*, Die Auslegung des angeglichenen Rechts, JZ No.12 (1992), 593.

⁸⁵⁶ See *Zimmermann*, Savignys Vermächtnis: Rechtsgeschichte, Rechtsvergleichung und die Begründung einer europäischen Rechtswissenschaft, JBl 1998, 273 (280).

⁸⁵⁷ Cf. *Zweigert-Kötz*, Einführung in die Rechtsvergleichung auf dem Gebiete des Privrechts, 3rd ed. (1996), 89; and more recently *Herman*, Schicksal und Zukunft der Kodifikationsidee in Amerika, in: *Zimmermann*, Amerikanische Rechtskultur und Europäisches Privrecht, 52ff as cited by *Zimmermann*, *ibid.*

⁸⁵⁸ Cf. *Zimmermann*, *ibid.* This must again be regarded as an interrelated process in which one branch of legal practice builds on the other.

⁸⁵⁹ Cf. *Berman*, Law and Revolution: The Formation of the Western Legal Mind (1983), 9, as cited by *Zimmermann*, *ibid.*, 283; on the dynamic character of the European Treaties see ECJ of 5.2.1963, C-26/62, *Van Gend & Loos*, [1963] ECR 24, as cited by *Oppermann*, Europarecht, § 8 para. 23, 208.

⁸⁶⁰ See *Hemmholz*, Continental Law and Common Law: Historical Strangers or Companions?, Duke Law Journal (1990), 1207 ff; Dissenting however *Samuel*, System und Systemdenken: Zu den Unterschieden zwischen kontinentaleuropäischem Recht und Common Law, ZEuP 3 (1995) 375; *Legrand*, Legal Traditions in Western Europe: The Limits of Commonality, in: *Jagtenberg/Örücü/deRoom*, Transfrontier Mobility of Law (1995), 63 ff.

courts and by jurisprudence.⁸⁶¹ While the relative importance of each of these bodies in the process of forming the law may vary in detail, the necessity of the prolific cooperation between these institutions is nevertheless recognized in both legal traditions.⁸⁶²

In this sense, both common law as well as the continental legal systems can be seen as intrinsic formations of European, respectively occidental legal traditions as originally derived from Roman law. Apart from some inherent specificities, both traditions share an immanent flexibility and capacity for further development.⁸⁶³ This means that case-law is on the one hand, not extraneous to positivist legal traditions and, on the other hand that the ECJ does not only fulfill the task of a court in a positivist sense, but also represents a legislative authority.

The ECJ is therefore subject to higher demands than the national courts of the various member states, particularly because the Union's legal system is aimed at the Union's dynamic development, while the Community legislator has occasionally found not to be fully capable of acting.⁸⁶⁴ By interpreting and further developing the law, the ECJ has therefore become the actual warrantor of the functioning of the Union's legal order.⁸⁶⁵ Furthermore, uncodified law is not the exception in European Union law as in most (positivist) legal orders of its member states, but rather the rule.⁸⁶⁶ Hereby the ECJ is granted an exceptional authority of forming the law.

As the European Union's legal order can furthermore be seen to stand between international and national law,⁸⁶⁷ its interpretation was originally considered to necessarily comply not only with existing international rules of interpreting treaties,⁸⁶⁸ but also with the methods of constitutional interpretation inherent to the legal systems of the various member states.⁸⁶⁹ Nevertheless, due to the Court's established practice as an authoritative interpreter of the EC-Treaty⁸⁷⁰ in the past decades, the ECJ has undeniably established a unique form of 'communitarized' interpretation by means of its own standards.⁸⁷¹

⁸⁶¹ Zimmermann, JBl 1998, 273 (283). On the origination of today's legal traditions from Roman law to which the author is referring see: Savigny, System des heutigen Römischen Rechts, Band I, Berlin (1840), 206 ff.

⁸⁶² See Zimmermann, JBl 1998, 283, arguing for a common European legal tradition of jurisprudence in this sense.

⁸⁶³ The German civil law code (BGB) for instance, is substantiated by comprehensive multilayer case-law that must necessarily be considered in order to apply the law correctly, while in English law, one has learned to appreciate academic legal analysis; see Zimmermann, JBl 1998, 273 (282).

⁸⁶⁴ Cf. Everling, RabelsZ 50 (1986), 193 (207); furthermore Schermers/Waelbroeck, § 35, 22: "...within the European Community, the legislator functions so imperfectly that it hardly fills any gaps in the law at all," as cited by Anweiler, Auslegungsmethoden, 37. An example where the ECJ had to 'step into the breach' for the Community legislator is its ruling on the direct application of particular provisions of the TFEU; see Karen Alter, Judicial Politics in the European Community: European Integration and the Pathbreaking Cassis de Dijon Decision, Comparative Political Studies, (1994,) vol. 26 no. 4, 535.

⁸⁶⁵ Cf. Bleckmann, in GS für Constantinesco (1986), 61 (66).

⁸⁶⁶ Stein, in: Richterliche Rechtsfortbildung, FS 600 Jahre Universität Heidelberg, (1986), 619, as cited by Anweiler, Auslegungsmethoden, 38, also pointing to the fact that due to this substantial quest by the ECJ, the distinction between interpretation of the law and its judicial development as termed by positivist methodology cannot be upheld for the characterization of the ECJ, which necessarily incorporates both tasks in its case-law practice.

⁸⁶⁷ It is essentially characterized as 'supranational' law.

⁸⁶⁸ Laid out in Art 31 ff of the Vienna Convention on the Law of Treaties of 1969 (Done, Vienna, 23 May 1969, entered into force on 27 January 1980, United Nations, Treaty Series, Vol. 1155, p. 331).

⁸⁶⁹ Oppermann, Europarecht, § 8, para. 18.

⁸⁷⁰ See Art 220 TFEU.

⁸⁷¹ Cf. Schröder, JuS 44 (2004), 180 ff; See furthermore Franzen, Privatrechtsangleichung durch die Europäische Gemeinschaft, (1999), § 13 Grundsätze der Auslegung von Gemeinschaftsrecht, 445.

This form of legal analysis builds on the methods of interpretation practiced in most legal orders of the member states,⁸⁷² but modifies them in respect to the specific principles and purposes of European Union law. Hereby the terms and phrases used in the Treaty or the Union's secondary law are attributed a unique understanding. The ECJ hence clarified in its *CILFIT*- decision, that:

*"every provision of Community law must be placed in context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied."*⁸⁷³

By interpreting European law, the ECJ has been ascertained to essentially draw on the same criteria which are commonly utilized in most of the positivist legal orders of the member states,⁸⁷⁴ supplemented however by precedents in the form of judicial adjudication.⁸⁷⁵ The fact remains that 'the law's interpretation' in European Union law is to be used in a wider sense than under national law, as it additionally comprises the objective of an enhancement or further development of the Union's legal system.⁸⁷⁶

The ECJ's task of 'interpreting the law' therefore comprises not only the ascertainment or determination of the content of terms and sentences,⁸⁷⁷ but additionally consists of filling 'legal gaps'⁸⁷⁸ in the European legal system, in effect forming *new law*.⁸⁷⁹ As European law nevertheless builds on the legal traditions of its various member states, the principles hereby formulated can only amount to (the standard of) a legal norm in case that they do not infringe generally established principles of the laws of the national member states.⁸⁸⁰

⁸⁷² Cf. *Oppermann*, *ibid.*

⁸⁷³ See ECJ of 6.10.1982, C-283/81, *CILFIT and Lanificio di Gavardo SpA vs. Ministry of Health*, [1982], ECR 3415, 3430, para. 20 (C.I.L.F.I.T.).

⁸⁷⁴ See *Franzen*, *Privatrechtsangleichung durch die Europäische Gemeinschaft*, 445.

⁸⁷⁵ On this notion of interpretation, previously unknown to the positivist jurisdictions of some member states, see *Lutter*, *Die Auslegung angeglichenen Rechts*, JZ 1992, 593.

⁸⁷⁶ *Hoffmann-Becking*, *Normaufbau und Methode: eine Untersuchung zur Rechtsprechung des Gerichtshofs der Europäischen Gemeinschaften*, Tübingen (1973), 151, as cited by *Anweiler*, *Auslegungsmethoden*, 39.

⁸⁷⁷ *Kutscher*, *Thesen zu den Methoden der Auslegung des Gemeinschaftsrechts aus der Sicht eines Richters*, in: *Begegnung von Justiz und Hochschule*, (1976), p. 1-9, as cited by *Anweiler*, *Auslegungsmethoden*, 40.

⁸⁷⁸ See *Krück*, in: *Groeben/Thiesingen/Ehlermann*, (eds.) *Kommentar zum EU-/EG-Vertrag*, (2003), Art 164 [now: Art 180 TFEU], para. 51. This is of course the task of national courts as well, but from the above described specificities of the European legal order it is clear that it becomes pertinent here to a much greater extent.

⁸⁷⁹ See already *Schmitt*, *Der Nomos der Erde im Völkerrecht des Ius Publicum Europaeum*, Dunker & Humblot, Berlin (1960), 79, who already argues that the concrete decisions function as the basis of law. See further *Elina Paunio*, *Conflict, Power and Understanding- Judicial dialogue between the ECJ and National Courts*, available at: <http://www.helsinki.fi/nofo/NoFo7Paunio.pdf>; differently *Buntscheck*, *Konzernprivileg*, 79; see however insightful *Marcisz*, *The Nature and Legality of ECJ Law-Making*, available at: <http://www.europeanpubliclaw.eu/summer-school/summer-school-2009/papers-summer-school-2009/183.html>, clearing up the popular claim that the ECJ does not create, but merely interprets the law.

⁸⁸⁰ Generally, see e.g. *Postema*, *Bentham and the Common Law Tradition*, Oxford (1986); and *Simpson*, *The Common Law and Legal Theory*, in: *Simpson* (ed.), *Oxford Essay in Jurisprudence*, Oxford (1973), as cited by *Dyzenhaus*, *Hard Cases in Wicked Legal Systems: South African, Law in the Perspective of Legal Philosophy*, (1991), 4, asserting furthermore: "Rather, law is the expression of standards of reason embedded in historically evidenced national custom".

§ 2. The Consideration of Corporate Groups in European Competition Law

Though the necessity of considering the existence of **corporate groups** for the purposes of antitrust law has been recognized from the very beginning of implementing competition principles in the body of European law,⁸⁸¹ their dogmatic classification and interpretation has been unclear and contentious since. While the importance of corporate control relationships was initially identified in regard to the so-called ‘concern-privilege,’ it has gained increasing significance in the context of attributing antitrust liability between economically affiliated undertakings.⁸⁸²

Despite the ECJ’s substantiation of the ‘concern-privilege’s’ scope in its decision of *Viho*,⁸⁸³ inconsistencies have remained in its dogmatic classification in regard to the facts of Art 101 (1) TFEU.⁸⁸⁴ While the fact of ‘a distortion of competition’ has been at the core of most discussions of the issue in literature, Community practice has, under the term of a ‘single economic entity’, increasingly drawn on the fact of an ‘undertaking’ for the determination of exempting group-intern agreements from the application range of Art 101 (1) TFEU.⁸⁸⁵

This was however not the approach endorsed from the beginning. In their initial decisions on the matter, the Commission, as well as the ECJ, found agreements between affiliated undertakings to precisely lack the fact of a ‘distortion of competition’.⁸⁸⁶

In *Hydrotherm*,⁸⁸⁷ the Court for the first time drew on the term of an ‘undertaking’, which it then repeatedly applied for emphasizing the existence of an ‘economic entity’ between affiliated undertakings. It is important to note that in its *Viho* judgment, constituting the final precedent on the matter, the Court, however, decided that the existence of an ‘economic entity’ results in the ‘inapplicability’ of Art 101 (1) TFEU, suggesting a *conceptual* understanding of the latter doctrine.⁸⁸⁸

As can be seen from the case-law discussed above, this development has proceeded in a fluent way without any changes concerning the facts of Art 101 (1) TFEU being explicitly addressed by the Commission or the ECJ.⁸⁸⁹

That the responsibility for administrative fines or penalties is not merely subjected to the legal boundaries of the company directly liable for the infringement can thus principally be seen as an

⁸⁸¹ Likewise already *Emmerich*, *Europarecht* 1971, 310; *Huber*, *AWD* 1969, 429; *Harms*, *Entwicklungen des Wettbewerbsrechts*, 168; *idem*, *Konzerne*, 64, as cited by *Buntscheck*, *Konzernprivileg*, 77.

⁸⁸² For an overview of the existent views and opinions in context of the ‘concern-privilege’ see already *Emmerich*, in: Immenga/Mestmäcker, *EG-Wettbewerbsrecht*, Art 85 para. 1, para. A 43 f; and regarding the inconsistent treatment of corporate groups by the Community Institutions e.g. *Gleiss/Hirsch*, Art 85, para. 53; see also *Lev*, *J. Transn'l L.&Pol'y* 2 (1993), 199, 214 (“*The unavoidable conclusion [...] is that there is a certain inconsistency in both the Commission’s and the ECJ’s case-law*”), as cited by *Menz*, *Wirtschaftliche Einheit und Kartellverbot*, 122; *Pohlmann*, *Unternehmensverbund*, 36 f; *Roth/Ackermann* in: *FK*, Art 81 Grundfragen, para. 67 and *Zäch*, *Wettbewerbsrecht der Europäischen Union: Praxis von Kommission und Gerichtshof*, München (1994) 2 ff, for an overview of cases up until this point in time.

⁸⁸³ See point 2.1.2.2. above.

⁸⁸⁴ For the application range of this principle for other situations see 3.1 below.

⁸⁸⁵ Cf. *Buntscheck*, *Konzernprivileg*, 77.

⁸⁸⁶ Commission decision IV/22.548, *Christiani and Nielsen*, [1969] OJ Nr. L 165/12, 13; ECJ of 25.11.1971, C-22/71, *Béguelin Import Co. vs. S.A.G.L. Import Export*, [1971] ECR 949, p. 959, paras. 7-9.

⁸⁸⁷ ECJ of 12.7.1984, C-170/83, *Hydrotherm*, [1984] ECR 2999, 3009.

⁸⁸⁸ ECJ of 24.10.1996, C-73/95, *Viho*, [1996] ECR I-5457; Cf. *Thomas*, *ZWeR* 3/2005.

⁸⁸⁹ Cf. *Buntscheck*, *ibid*.

established principle of European law in antitrust cases.⁸⁹⁰ From the review of the decisions on the concept of a 'single economic entity' it nevertheless becomes evident that the dogmatic principles for the extension of intra-group responsibility remain unsettled.⁸⁹¹

The Commission tends to extensively draw on the 'single economic entity' doctrine, according to which European Union law is virtually blind for a corporation's legal personality under the company law statutes of the national member states.⁸⁹² This practice of using the term of a 'single economic entity' interchangeably for both problem issues concerning corporate groups⁸⁹³ demonstrates to an even further extent the need of critically reviewing the standards of its implementation in European practice. Likewise, the amount of arbitrariness with which the ECJ has justified the special treatment of corporate groups for the purposes of European antitrust law has been astonishing. Attempting to justify the application of the 'concern-privilege' in a particular case, the Court has, for instance, based the lack of one fact of Art 101 (1) TFEU on the non-existence of another under the pretense of an 'economic approach'.⁸⁹⁴

As shown by the implications this practice may have on the policy of corporate groups, the discussion on the appropriate assessment of these topic issues in regard to the facts of Art 101 (1) TFEU is by no means of a mere academic nature.⁸⁹⁵ A consistent case review following comprehensible and clear criteria is essential for granting a traceable and therefore revisable decision free from arbitrariness.⁸⁹⁶ Furthermore, the current practice may be criticized for its result-orientated mode of assessment, preventing legal certainty and foreseeability as essential elements of the rule-of-law principle.⁸⁹⁷ These latter preconditions are nevertheless essential for the recognition of the ECJ's adjudication, which, as a 'supranational' court, is to a great extent dependent on the acceptance and compliance of its judgments by the member states.

This is not only due to the fact that European law does not provide for any other means of coercion for the implementation of its decisions than the imposition of fines under Art 187 TFEU. More important than the enforcement aspect therefore, is the ECJ's acceptance as a unique

⁸⁹⁰ Cf. *Zimmer, Paul*, Kartellbußgeldrechtliche Haftung und Haftungsbefreiung im Konzern, [hereinafter: Bußgeldzurechnung im Konzern], WuW 10/2007, 970 (971); See also *Dannecker/Biermann*, in: Immenga/Mestmäcker, Vorbem. Zu Art 23. Vo 1/2003, paras. 70 ff; against many, see however *Sura*, in: Lange/Bunte, Art 23 Vo 1/2003, para. 10. It is important to note, however, that this is to be determined solely according to European law and not according to possibly diverging principles of national law: see CFI of 11.3.1999, Case T-134/94, *NHM Stahlwerke GmbH*, [1999] ECR II-239, para. 44, as cited by *Zimmer/Paul*, *ibid*.

⁸⁹¹ Cf. also *Zimmer/Paul*, Bußgeldzurechnung im Konzern, WuW 10/2007, 971. On the criticism of the principles laid out by the ECJ in its decision of *Akzo Nobel* see 2.2.2.2, § 2. above.

⁸⁹² Thus explicitly Commission Decision of 27.11.2002, Case COMP/E-2/37.978, *Methylglucamine*, [2004] OJ Nr. L 38, p.18, para. 211 ff; On the fact that the decision's addressee needs to necessarily possess legal personality in order to guarantee its proper enforcement, see Art 256 (2) ECT, as well as CFI of 20.4.1999, T-305/94 a.o., *Limburgse Vinyl Maschappij*, [1999] ECR II-931, para. 978, as cited by *Zimmer/Paul*, *ibid*. In detail see 2.2.1. § 2.2. below.

⁸⁹³ By a way of comparison to Community practice this is done likewise in literature, see e.g. *Thomas*, Konzernprivileg und Gemeinschaftsunternehmen, ZWeR 3/2005.

⁸⁹⁴ Cf. *Buntscheck*, Das Konzernprivileg, 78, citing GA *Dutheillet* in: *Béguelin Import Co. vs. S.A.G.L. Import Export*, [EC] of 25.11.1971, C-22/71, [1971] ECR 949, p. 967].

⁸⁹⁵ See also *Buntscheck*, Das Konzernprivileg, 78 f; *Zimmer/Paul*, Bußgeldzurechnung im Konzern', WuW 10/2007, 971 f. Differently: *Thomas*, Konzernprivileg und Gemeinschaftsunternehmen, ZWeR 3/2005, 236 (242), who assumes that the various views in literature may diverge on their methodology, but essentially all lead to the same result of the ban on cartels not to be applicable in case that a company cannot independently determine its conduct on the market due to its corporate affiliation with another company. On a detailed assessment of this view see however 3.1. below.

⁸⁹⁶ Cf. *Larenz/Canaris*, Methodenlehre, 140 as cited by *Buntscheck*, *ibid*.

⁸⁹⁷ See *Rittner*, Die Rechtssicherheit im Kartellrecht, WuW 2/1969, 65.

judicial authority, promoting the Union's declared goals as well as the latter's eminence as a comprehensive legal order also on an international level. Hence, the ECJ should be anxious to avoid provoking criticism that its interpretation can be seen as the 'result of its result-oriented mode of assessment',⁸⁹⁸ which is why rationally not tenable elements of its case-law should be repelled as far as possible.⁸⁹⁹

§ 3. The Development and Application of the Single Economic Entity in European Case-Law

For the ascertainment of the appropriate approach of considering corporate groups in European competition law, the analysis of the Court's interpretation of the concept of a 'single economic entity' in regard to Art 101 (1) TFEU is well insightful. The concept of a 'single economic entity' is namely not determined by existing substantive law.⁹⁰⁰ The Treaty itself does not contain a precise indication of whether the term of an 'undertaking' is to be understood in an institutional or in an economic manner. In the former case this would exclusively comprise the legal entity or representative of the undertaking; the second interpretation however refers to the operative or economic unit, which is incapable of holding rights.⁹⁰¹ Just as the provisions of the TFEU, mentioning solely the term of 'an undertaking' without explicitly substantiating the reference object of this fact of Art 101 (1) TFEU, secondary Union law also lacks of a definition of this term.⁹⁰² An answer to this question can therefore only be attained by the means of interpretation.⁹⁰³

As in national or international law, the text of the TFEU law is to be interpreted primarily according to its wording.⁹⁰⁴ Therefore, in a first step, the 'natural sense' of its words is to be determined in context of the content of a phrase.⁹⁰⁵ According to the 'Acte Clair'-doctrine of the ECJ, a further interpretation is redundant when already the wording of the norm leaves no doubts in regard to the meaning or substance of its facts.⁹⁰⁶ It is to be considered however that this meaning, even if it must be reviewed upon the background of its conception in the various member states, refers to an understanding of the term in a 'European Union-law' sense.⁹⁰⁷ A deviation from the wording of a provision is therefore only possible where the grammatical interpretation is not capable of illuminating its meaning.

⁸⁹⁸ *Radbruch*, Einführung in die Rechtswissenschaft, Stuttgart (1958), as cited in this context by *Anweiler*, Auslegungsmethoden, 76.

⁸⁹⁹ *Zuleeg*, Die Auslegung des Europäischen Gemeinschaftsrechts, in: EuR 1969, 97 (99).

⁹⁰⁰ See *Schroeder*, Die Anwendung des Kartellverbots auf verbundene Unternehmen, WuW 4/1988, 274 (275).

⁹⁰¹ *Thomas*, Unternehmensverantwortlichkeit und -umstrukturierungen nach EG-Kartellrecht [hereinafter cited as: Unternehmensverantwortlichkeit], (2005), 10.

⁹⁰² Cf. *Thomas*, *ibid.*

⁹⁰³ For the comprehensive consideration of the term of an 'undertaking' in competition law, see 3.1.1.2. § 2.

⁹⁰⁴ See *Oppermann*, Europarecht, § 8 para. 20, (207); *Anweiler*, Die Auslegungsmethoden des Gerichtshofs der Europäischen Gemeinschaften, 145; *Lutter*, JZ 1992, 593 (599).

⁹⁰⁵ *Oppermann*, *ibid.*

⁹⁰⁶ *Oppermann*, Europarecht, § 7, para. 682.

⁹⁰⁷ See *Groux*, in: FS Pescore, (1987), 275 ff, as cited by *Oppermann*, § 8 para. 20.

Even if the ECJ must, in this case, act upon its task as a ‘motor of integration,’⁹⁰⁸ clarifying terms or principles in the sense of a dynamic interpretation of the law,⁹⁰⁹ any aberration from the *wording* of the Treaty and a possible transition to a further development of the law requires a particular justification.⁹¹⁰ The ECJ’s specific role of substantiating the Treaty provisions by the means of creating contemporary and appropriate principles for situations which could not have been, or rather have intentionally not been regulated, does not free the Court from providing comprehensible reasons for a justification of its decision in a particular case.⁹¹¹

In a second step of interpretation therefore, the ECJ is required to take into account the sense of a norm in regard to the system of the Treaty. In case this also leads to an ambiguous result due to a lack of comparability, the Court must in a final step apply the method of a teleologic interpretation.⁹¹² Again, this can only be deemed necessary where the wording of a provision is plainly incapable of giving a clear guidance.⁹¹³

Considering the fact that the treatment of corporate groups in European antitrust law is judged upon the concept of a ‘single economic entity’, the development of this term in regard to the facts of Art 101 (1) TFEU is well important. Even if the various methodological explanations for the necessity of the so-called ‘concern-privilege’ may essentially lead to the result that the cartel-ban is not applicable to agreements between undertakings of a corporate group,⁹¹⁴ this does not make the dogmatic classification of this doctrine redundant. The alleged clarity of this problem issue particularly ends for instances of partially owned subsidiaries.⁹¹⁵ The reference to a teleological reasoning may therefore justify the necessity of the ‘concern-privilege’ in terms of a general principle of competition law, but may not suffice for a clear application of this principle in a particular case. This situation requires that more attention be given to the concept of corporate ‘control’ when assessing the interrelation of corporate group companies in European antitrust law.

Furthermore, it is questionable whether the term of an ‘economic entity’ may be used interchangeably for both the non-application of Art 101 (1) TFEU on agreements between group companies and for the assessment for determining the correct legal entity responsible for committing an anticompetitive conduct within such a corporate group. Recent case-law has shown that this approach may lead to ambiguous results and thus prevents legal clarity. Therefore, the current practice of the Commission and the ECJ of indifferently referring to the term of a ‘single economic entity’ in an undifferentiated manner for both problem issues⁹¹⁶ is to be reviewed critically from a methodological point of view.

⁹⁰⁸ Thus, *Schweitzer/Hummer*, *Europarecht*, 104, as cited by *Buntscheck*, *Konzernprivileg*, 79.

⁹⁰⁹ (- filling, where necessary, ‘legal gaps’ in the Union’s legal order -).

⁹¹⁰ Cf. *Buntscheck*, *ibid.*

⁹¹¹ Cf. *Schweitzer/Hummer*, *Europarecht*, 106, as cited by *idem.*

⁹¹² Cf. *Oppermann*, *Europarecht*, § 8 para. 23.

⁹¹³ Likewise *Lübbig*, *Einseitige Maßnahmen als Vereinbarungen im Sinne von Art 85 (1) EWG-Vertrag*, *WuW* 1991, 566.

⁹¹⁴ On the basis of teleologic reasons, see *Koppensteiner*, *Kartellrecht im Unternehmensverbund*, in *FS Mailänder* (2006), 125 (135 f) and *Thomas*, *ZWeR* 3/2005, 236 (242).

⁹¹⁵ See e.g. *Meyers*, *Partial Ownership of Subsidiaries, Unity of Purpose and Antitrust Liability*, 68 *U.Chi.L.Rev.* (2001), 1401, (1402).

⁹¹⁶ Apart from decisions named above (such as *AEG*) see e.g. Commission Decision of 23.11.1984, *Peroxyd Products* [1985] OJ Nr. L 35/1, para. 49; Commission Decision of 13.7.1994, *Karton*, [1994] OJ Nr. L 243/1; ECJ of 14.5.1998, Joined cases T-339/94, T-340/94, T-341-94 and T-342/94, *Metsä-Serla*, [1998] ECR II-1727, para. 58 f; ECJ of 16.11.2000, C-294/98, *Metsä-Serla*, [2000] ECR I-10065, para. 28; Commission

After analyzing the introduction of the concept of a 'single economic entity' into European antitrust law on the basis of the 'concern-privilege', the standard inherent in this latter doctrine will be examined in regard to the appropriateness of its application for the issue of imputing liability between corporate group undertakings.

3.1. Dogmatic Classification of the 'Single Economic Entity Doctrine': A Unitary Term in European Competition Law?

Articles 101 and 102 TFEU constitute the sole provisions in primary European competition law that determine the competitive conduct of 'undertakings'.⁹¹⁷ By its structure, Art 101 TFEU is meant to prevent concerted conduct, which is not compatible with the competition policy of the Common Market.⁹¹⁸ In the sense of a comprehensive protection of competition these provisions have been, as outlined above, substantiated by case-law, which has hereby created a number of principles supplementing its positive law.

In regard to the exemption of group-internal agreements from the application of Art 101 (1) TFEU, the substantive norms of competition law have in common that they restrict the principle of private autonomy⁹¹⁹ as far as this comes into conflict with the principle of free competition.⁹²⁰ The competition provisions have the task of granting the competitive freedom of companies on the market. Thus, for any restriction of a company's private autonomy in competition law the principle of *legal certainty* requires more than a mere certitude of orientation: it denotes the border of autonomous responsibility, or stated differently, of the principles of private law in respect to the acts of a public authority.⁹²¹ 'Undertakings' in the sense of European competition law must therefore be capable to determine their market conduct in a sovereign manner. This protection of competitive freedom is nevertheless not required where one of the parties participating in the agreement does not dispose of this form of economic autonomy.⁹²² As far as an undertaking is dependent on another and follows the latter's instructions, it will not be restricted in its discretionary range of action by contractual agreements entered into with this dominant company.⁹²³ These circumstances leave no room for an application of the ban on cartels.

Decision of 27.7.1994, PVC II, [1994] OJ Nr.L 239/14; para. 45; and Commission Decision of 11.12.2001, *Zinkphosphat*, [2003], OJ Nr. L 153/1, para. 236.

⁹¹⁷ For secondary Union law however, the Merger Regulation, which is not part of this analysis, is nevertheless an important basis of reference for determining the competitive conduct of undertakings.

⁹¹⁸ Cf. *Lübbig*, Einseitige Maßnahmen nach Art 85 (1), WuW 7 u. 8/1991, 568.

⁹¹⁹ This is also referred to as 'freedom of contract'.

⁹²⁰ Cf. *Rittner*, Die Rechtssicherheit im Kartellrecht, [hereinafter: Rechtssicherheit] WuW 2/1969, 65 (68).

⁹²¹ *Rittner*, *ibid* (original wording: „[...] markiert die Grenzlinie der eigenverantwortlichen Ordnung, oder anders gesagt, der Institute des Privrechts gegenüber der Rechtsgestaltung durch hoheitlichen Akt“).

⁹²² See ECJ of 24.10.1996, C-73/95, *Viho*, [1996] ECR I-5457; ECJ of 11.4.1989, C-66/86, *Ahmed Saeed Flugreisen* [1989] ECR 803; and joined cases ECJ of 10.3.1992, T-68/89, T-77/89 and T-78/89, *Società Italiana*, [1992] ECR II-1403. *Emmerich* in: Immenga/Mestmäcker, EG-Wettbewerbsrecht, Art 85 (1), para. 53; *Hirsch/Burkert*, in: Gleiss/Hirsch, Art 85, para. 191; *Roth/Ackermann*, in: Frankfurter Kommentar, Art 81 (1) EGV, Grundfragen, para. 212; *Schroeder*, Verbundene Unternehmen, WuW 4/1988, 278.

⁹²³ *Schroeder* in: Wiedemann, Handbuch, § 8, para. 3. For the aspect of agreements between two subsidiary companies of the same parent company, see page 3.1.1.3., § 3.3.1 below.

Therefore, the required degree of the restriction of a company's autonomy that leads to the formation of a 'single economic entity' must primarily be determined by the wording of the norm upon which this fact is based.⁹²⁴ For this reason, the application of the so called 'group- or concern-privilege' must be assessed upon the facts of Art 101 (1) TFEU, including 'agreements and concerted practices', 'undertakings and associations of undertakings', as well as 'restrictions or distortions of competition'. Due to the possibility of high fines, European cartel law is nevertheless particularly sensitive for its conformity with the principle of law, or 'general legal principles' of European Union law. For this reason, a particularly consistent and accurate interpretation of its liability regime is essential.⁹²⁵

The crucial question in regard to the 'group-privilege' is whether the doctrine of a 'single economic entity' leads to the formation of a 'unitary undertaking' in the sense of European competition law, or whether the inapplicability of Art 101 TFEU is necessary in the sense of a teleologic reduction, because no competition worth protecting exists between a parent and its controlled subsidiary company.⁹²⁶ Whether the latter case remains the exception of a principal application of Art 101 (1) TFEU on affiliated undertakings 'requiring a specific justification in each case' as suggested by some authors,⁹²⁷ is in fact of marginal importance, if one appropriately determines the relationship of control existing between the affiliated undertakings concerned.⁹²⁸

The prevalent views in literature are consistent in their conclusion that Art 101 (1) TFEU must methodologically be reduced for agreements between affiliated undertakings constituting an 'economic entity,' which would otherwise be problematic under aspects of competition law.⁹²⁹ The dogmatic justifications for this necessary inapplicability of the provision nevertheless vary substantially.

In dealing with the question whether the 'economic entity'-doctrine leads to the existence of a 'unitary undertaking' in the sense of European competition law one point must already be anticipated: the affiliation of an undertaking does not change its legal independence and therefore its status as an 'undertaking' under general corporate law.⁹³⁰ As economic independence is not a constitutive element of the term of an 'undertaking,'⁹³¹ legally independent but economically dependent group-companies can therefore likewise be assessed to constitute separately active undertakings in the sense of Art 101 (1) TFEU.⁹³² Subsidiary companies are therefore well capable of adopting measures of coordinated conduct in an independent manner. This is unquestionable for their relation to third parties.⁹³³ As the existence of an 'economic entity' nevertheless hinges upon a subsidiary's lacking autonomy, i.e.

⁹²⁴ Thus also *Lübbig*, WuW 1991, 566 ff.

⁹²⁵ Cf. *Lübbig*, Einseitige Maßnahmen, WuW 7 u. 8/1991, 562.

⁹²⁶ Cf. *Thomas*, ZWeR 3/2005, 241. In favor of the latter approach, see insightful *Schroeder* in: Wiedemann, Handbuch (1999) § 8, para. 7.

⁹²⁷ See *Emmerich* in: Immenga/Mestmäcker, Art 85 (1), para. 50.

⁹²⁸ The question is in fact not the frequency of Art 101 (1) TFEU's application or non-application on agreements or practices between affiliated undertakings, but how to justify the 'concern-privilege' in the assessment of the respective undertaking's particular relation.

⁹²⁹ See already *Schroeder*, WuW 4/1988, 274 (276) on this fact; *Thomas*, *ibid*, 240.

⁹³⁰ For competition law cf. likewise *Emmerich* *ibid*, para. 50; *Stockmann* in: Wiedemann, Handbuch § 7, para. 2.

⁹³¹ Cf. *Gleiss/Hirsch*, Kommentar zum EG-Kartellrecht, Art 85, para. 48; *Schröter* in: Groeben/Thiesingen/Ehlermann, Vorbem. [preliminary remarks to] Arts. 85-89; para. 31.

⁹³² Cf. *Stockenhuber*, in: Grabitz/Hilf, Art. 81 EGV, para. 62.

⁹³³ ECJ of 12.7.1979, joined cases 32, 36 to 82/78, *BMW Belgium*, [1979] ECR 2435, 2475 f.

the amount of decisive influence exerted by the parent company,⁹³⁴ agreements between companies of the same group principally remain subject to Art 101 (1) TFEU.⁹³⁵

As illustrated in the discussion of case-law above, the CFI and ECJ have modified their conceptual justification of the ‘concern privilege’ several times, in effect drawing on all three facts of Art 101 TFEU.⁹³⁶ In the past decade, however, the Commission and the CFI have increasingly judged the dependent and the controlling undertaking to constitute ‘a single undertaking’,⁹³⁷ concluding that the application of Art 101 (1) TFEU must conceptually fail due to a lack of addressee(s). All the same it has been mentioned that the ECJ, in its *Viho* judgment, found the concept of a ‘single economic entity’ to ‘prevent the provision’s application’.⁹³⁸ This rather indicates that the ECJ assumes the view of a necessary teleologic reduction of the ban on cartels stipulated by Art 101 (1) TFEU.⁹³⁹

The way in which both the ECJ and the European Commission use the ‘single economic entity’-doctrine interchangeably for both the indispensable teleologic reduction of Art 101 (1) TFEU, as well as the extension of liability in a concern shows that the analysis of its methodological foundation is well important. Furthermore, it is still contentiously discussed where the border of the ‘concern-privilege’ should be drawn for majority, or common shareholdings in the case of joint ventures.⁹⁴⁰ The prevalent dogmatic contradictions in the evaluation of the ‘single economic entity’-doctrine in European practice must therefore be assessed in order to demonstrate that the employment of this doctrine for the current principles of attributing liability is not free from critique. Even though the legal foundation of the so-called ‘concern-privilege’ is not at the center of this assessment, it must be mentioned in order to denote the dogmatic inconsistency of European case law in regard to the concept of a ‘single economic entity’.⁹⁴¹ In a second step, the pertinent legal and economic foundations underlying the attribution of conduct between affiliated undertakings will be outlined.⁹⁴²

3.1.1. The Justification of an ‘Economic Entity’ under the Facts of Art 101 TFEU

⁹³⁴ In this regard the CFI has defined an ‘economic unit’ to “*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 of the kind referred to in the provision.*” (CFI of C-11/89-*Shell*, [1992] ECR II-757; CFI of 17.12.1991, T-6/89, *Enichem*, [1991] ECR II-1623, in an obvious reference to the definition of an ‘undertaking’ under the EC-Treaty). See *Stockenhuber* in Grabitz/Hilf; Art. 81 EGV, para. 51.

⁹³⁵ Likewise, *Emmerich* in: Immenga/Mestmäcker, Art 85 (1), para. 50.

⁹³⁶ See 1.2. above.

⁹³⁷ See e.g. CFI T-102/92, *Viho vs. EC Commission*, [1996] ECR I-5457 = ZIP 1997, 87, para. 17. For single views in this regard in literature, see e.g. *Harms*, *Konzerne im Recht der Wettbewerbsbeschränkungen*, (1986); *Potrafke*, *Kartellrechtswidrigkeit konzerninterner Vereinbarungen und darauf beruhender Verhaltensweisen*, (1991), *Menz*, *Wirtschaftliche Einheit und Kartellverbot*, (2004), 58 ff.

⁹³⁸ See ECJ of 24.10.1996, C-73/95, *Viho* [1996] ECR I-5472, para. 17.

⁹³⁹ *Thomas*, ZWeR 3/2005, 240.

⁹⁴⁰ See *Thomas*, ZWeR 3/2005, 236; *Sander*, *Das Konzernprivileg im Europäischen und Österreichischem Wettbewerbsrecht*, OZK 2008, 20; *Meyers*, 68 U.Ch.L.Rev. 1401, 2001; *Koppensteiner*, in FS Mailänder (2006), 125; for previous analysis on this, see furthermore *Buntscheck*, *Konzernprivileg*, 2001 and *Schroeder*, *ibid.*

⁹⁴¹ In detail see *Buntscheck*, *Konzernprivileg*, 2001; *Pohlmann*, *Der Unternehmensverbund im Europäischen Kartellrecht*, 1999; *Menz*, *Wirtschaftliche Einheit und Kartellverbot*, [with critiqueworthy conclusions]; *Schroeder*, WuW 4/1988, 274; *Sander*, OZK 2008, 20; and *Thomas*, ZWeR 3/2005, 236.

⁹⁴² See § 2 of this point.

Art 101 (1) TFEU states:

„The following shall be prohibited as incompatible with the Common Market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the Common Market, [...]”

Hence, the primary fact of the provision refers to ‘agreements and concerted practices’. While for common business transactions the form of contracts constitute the sole means with which legal entities determine their mutual obligations, in corporate groups a number of other instruments exist for the governance of intra-company business relationships.⁹⁴³ These include formal instruments of guidance such as internal rules of procedure as well as mere directions. In case parent companies are capable of producing binding instructions under the rules of corporate law, these governing instruments equal contracts in their compulsory effects.⁹⁴⁴ Some opinions in literature have therefore attempted to base the dogmatic foundation of an ‘economic entity’ on this fact of Art 101 TFEU. Upon this view, a flow of information, which is merely considered as ‘group-internal’, should accordingly not be subjected to Art 101 TFEU.⁹⁴⁵

3.1.1.1. The Fact of ‘Agreements or Concerted Practices’

In antitrust practice, the Commission as well as the European Courts argue for an extensive understanding of the fact of an ‘agreement’ in the sense of European cartel law.⁹⁴⁶ Accordingly, it is not required that the parties involved have concluded a binding contract. It rather suffices that one of them demonstrates its intention to voluntarily restrict its (competitive) freedom of action towards the other party.⁹⁴⁷

The two components of this fact of Art 101 (1) TFEU, namely ‘agreements’ on the one side and ‘concerted practices’ on the other, have in common that they merely demand a deliberate coordination of conduct between at least two undertakings on the market. Therefore, a concurrence of wills, i.e. a consensus, between two legally distinct undertakings is necessary.⁹⁴⁸ The element of ‘concerted practices’ consequently provides a catchall element for those cases in which the proof of a legal or factual element of an agreement fails.⁹⁴⁹

In order to determine the **appropriateness** of drawing on the element of ‘agreements or concerted practices’ for assessing the existence of a ‘single economic entity’, previous

⁹⁴³ Cf. *Schroeder*, *Verbundene Unternehmen*, WuW 4/1988, 275.

⁹⁴⁴ *Schroeder*, *ibid.*

⁹⁴⁵ See *Potrafke*, *Kartellrechtswidrigkeit konzerninterner Verhaltensweisen*, 251.

⁹⁴⁶ See *Stockmann* in: *Wiedemann*, *Handbuch*, § 7, para. 7; *Emmerich* in: *Immenga/Mestmäcker*, *EG-Wettbewerbsrecht*, Art 85 (1), para. 62; *Lübbig*, WuW 7 u. 8/1991, 564.

⁹⁴⁷ See Commission of 21.12.1974, *Franco-Japanese Ball-bearings*, OJ [1974] Nr. L 343/19, as cited by *Lübbig*, WuW 7 u. 8/1991, 564.

⁹⁴⁸ [Translation of] *Emmerich*, in: *Immenga/Mestmäcker*, *EG-Wettbewerbsrecht*, Art 85 (1), para. A 86, 103.

⁹⁴⁹ *Emmerich* in: *Immenga/Mestmäcker*, *EG-Wettbewerbsrecht*, Art 85 (1), para. A 100, as cited by *Buntscheck*, *Konzernprivileg*, 82.

assessments have referred to the *degree* of consensus in specifying the amount of control existing between affiliated companies.⁹⁵⁰

This approach is plausible under the aspect that the determination of Art 101 (1) TFEU's application range depends on the amount of the respective subsidiary's degree of legal and economic autonomy. In drawing on the means and possibilities to issue instructions or other means of one-sided influence in company law, this methodology builds, to a strong extent, on the group's organization under national law.⁹⁵¹ The means of determining instructions and control relationship under national corporate law nevertheless differ to a great extent.⁹⁵²

In business deals between corporate group companies it is often a mere coincidence whether the instrument of a direction is chosen over the form of a legal contract. Often tax or other strategic considerations are at the core of a parent company's choice of opting for one form or the other.⁹⁵³ For international corporate groups it is furthermore important to note that subsidiaries are not solely subjected to the influence of their parent companies. Political or strategic conditions or constraints of the host country may modify or relativize the degree of a subsidiary's independence.⁹⁵⁴ Hence, environmental factors affecting the organizational relationship between a concern's management and its single parts are manifold.⁹⁵⁵

For the determination of the inapplicability of Art 101 (1) TFEU between companies of a corporate group, the element of a 'concurrence of wills' leaves too much legal uncertainty to constitute a reliable base of reference. Despite the necessity of comprehending the fact of agreements or concerted practices in a 'broad sense',⁹⁵⁶ the suggestion that a parent company's authority to issue binding directions or exerting other modes of unilateral influence must be considered as 'group-internal' constitutes by no means a reliable orientation for undertakings to assess whether their corporate policy⁹⁵⁷ is subjected to the ban of Art 101 (1) TFEU.

Finally, it is regularly up to the parent company whether it chooses the form of a binding directive or other more subtle instruments of corporate law, in the latter case allowing the subsidiary room for a sovereign determination of its market policy in the sense of an 'independent decision-making unit'.⁹⁵⁸ In order not to leave the ban of Art 101 (1) TFEU to the

⁹⁵⁰ See *Buntscheck*, Konzernprivileg, 82 ff; *Pohlmann*, Unternehmensverbund, 397; *Menz*, Wirtschaftliche Einheit, 228; *Potrafke*, Kartellrechtswidrigkeit konzerninterner Vereinbarungen, 96.

⁹⁵¹ In essence, this approach alludes to the possibility of a parent company issuing instructions or exerting unilateral (one-sided) influence. The application of the 'concern-privilege' for situations in which parent companies merely exert factual influence (such as appointing a subsidiary's board of directors) is nevertheless ruled out with the argument that such a restrictive interpretation of the term of an 'agreement' abstracts from the intended purpose of the postulate of autonomy in competition law to broaden – by means of the catchall element of 'concerted practices' – the application range of Art 101 (1) TFEU. See *Buntscheck*, Konzernprivileg.

⁹⁵² See *Forum Europaeum Konzernrecht: Corporate Group Law for Europe*, European Business Organization Law Review, Vol. 1 (2000): 165-264, 169.

⁹⁵³ *Axster* in: Gemeinschaftskommentar, (1978), §§ 29, 21 of the German antitrust code (GWB), para. 13 as cited by *Schroeder*, WuW 4/1988, 275.

⁹⁵⁴ *Hofstetter*, *ibid*, 19.

⁹⁵⁵ See OECD, Structure and Organization of Multinational Enterprises, Paris, 1987 [hereinafter cited as: OECD, Structure], as cited by *Hofstetter*, Sachgerechte Haftungsregeln für Multinationale Konzerne, [hereinafter: Sachgerechte Haftungsregeln], Tübingen: Mohr, 1995, 17.

⁹⁵⁶ Mere factual measures of parental influence must nevertheless be ruled out.

⁹⁵⁷ In the majority of cases, this concerns their common distribution policy.

⁹⁵⁸ Under German corporate law, for instance, the latter situation is known under the notion of a 'factual concern'. On the formation of this term see *Emmerich/Sonnenschein*, Konzernrecht, 3rd ed., (1989), 318. It is furthermore the most proliferated form of corporate groups despite the existence of precise regulations for 'integrated concerns' (§§ 319-327 of the German Company Code – 'AktG') or 'contracted concerns' (§§ 291-310 AktG). For these forms of corporate groups, a rebuttable presumption of a

disposition of the undertakings concerned, the existence of an 'economic entity' must be determined by a more precise element than the 'concurrence of wills' between affiliated companies.⁹⁵⁹ For assessing the scope of the so-called 'concern-privilege' dogmatically, the fact of an 'agreement or concerted practice' does not constitute a reasonable point of reference.

In regard to the objective of the current analysis it must be emphasized once more that neither the principal necessity of the 'group- or concern-privilege', nor its essential application between parent companies and their wholly-owned subsidiaries are to be questioned. Rather, the appropriate dogmatic determination of the 'single economic entity' doctrine is to be reviewed in its various applications in European cartel law.

For the purposes of European competition law, this fact of Art 101 (1) TFEU therefore solely constitutes an appropriate reference for determining the border between mere *unilateral* acts of a company and consensual agreements with its distributors, including its partly owned subsidiaries.⁹⁶⁰ The assessment of the relationship between parent companies and their partially owned subsidiaries hereby essentially depends on the amount of influence a parent company factually exerts.

In European practice it has soon been recognized that the application of Art 101 (1) TFEU does not fail in cases in which the approval of one of the parties to follow the desired anticompetitive conduct is merely granted for the fear of economic sanctions.⁹⁶¹ In its *AEG* judgment,⁹⁶² the Court explicitly accepted the permissibility of selective distribution systems upon certain conditions. In this procedure it had been contended whether the non-admittance of certain retailers to *AEG*'s distribution network was, as a mere unilateral conduct, exempted from Art 101 (1) TFEU's application scope, or whether it actually amounted to a 'concurrence of wills'.

Interestingly, the Court pronounced the denial of certain retailers to the distribution network of the *AEG*-firm to be part of the 'contractual relationship' the company maintained to the retailers already admitted to its distribution network and therefore ruled that the company's decision infringed Art 101 (1) TFEU.⁹⁶³ This ruling was followed by a series of decisions in which the Court susceptibly extended the provision's application range. Hereby the Court assessed that the term of an 'agreement' did not require the 'formal acceptance' of the other party but could already be assumed in cases of sustained business relations that were consequently 'substantiated' by declarations and actions of one of the parties.⁹⁶⁴

subsidiary's dependence exists for cases of majority shareholdings. See § 17 (2) AktG) and in detail: *Emmerich/Sonnenschein*, 39 ff.

⁹⁵⁹ For a similar assessment in regard to the superfluous circumstance of an 'internal allocation of tasks', previously considered a requirement by the European institutions for exempting group-intern agreements from Art 101 TFEU, see

Stockmann in: Wiedemann, Handbuch, § 7 para. 14 and 3.1.1.2., § 2 below.

⁹⁶⁰ Cf. *Lübbig*, Einseitige Maßnahmen, WuW 7 u. 8/1991.

⁹⁶¹ See Commission of 5.12.1971 in *Pittsburg Corning Europe*, [1972] OJ Nr. L 272/35; Commission of 18.12.1982, *Hasselbad*, [1982] OJ Nr. L 161/19, p. 26 as cited by *Lübbig*, *ibid.*

⁹⁶² See ECJ, 107/82, *AEG-Telefunken AG vs. Commission*, [1983] ECR 3151, see 2.2.2. above.

⁹⁶³ ECJ, *ibid.*, 3195, as cited by *Lübbig*, WuW 7 u. 8/1991, 566; *Roth/Ackermann*, Grundfragen Art 81(1) EG, para. 178.

⁹⁶⁴ Cf. ECJ of 17.9.1985, C-25 & 26/84, *Ford*, [1985] ECR 2725, 2743; COM of 25.9.1986, *Peugot*, [1986] OJ Nr. L295/19, 22f para. 37; COM of 10.7.1987, *Tipp-Ex*, [1987] OJ Nr. L 222/1, 3 (affirmed by the ECJ of 8.2.1990, [1990] ECR I-261); COM of 13.7.1987, *Sandoz*, [1987], OJ Nr. L 222/28, 31 para. 26f (affirmed by the ECJ of 11.1.1990, [1990] ECR I-45); COM of 18.12.1987, *Fisher Price*, [1988] OJ Nr. L 49/19, 21, para. 19; and COM of 18.12.1987, *Konica*, [1988], OJ Nr. L 78/34.

The justification of applying Art 101 (1) TFEU in these cases all followed a similar scheme: the respective conduct was ascertained to be part of the ‘contractual relations’ that otherwise subsisted between two legally independent entities.⁹⁶⁵ The admittance of one of the retailing companies to the respective distribution network was then equated with the dealer’s alleged explicit or tacit acceptance of the dominant company’s further distribution or business policy.⁹⁶⁶

Especially the decision of *Sandoz P.F.* resulted in a sequence of procedures in which it was to be decided whether the conduct of a producer, requiring a certain anticompetitive behavior of its retailers, amounted to an infringement of Art 101 (1) TFEU. In none of the procedures the retailers had reacted in a way that would have suggested the acceptance or approval of the respective request.⁹⁶⁷ In most cases the retailers had merely continued the previous business relation without expressly commenting on the desired conduct.

The practice of qualifying these factual circumstances to constitute ‘agreements’ in the sense of Art 101 (1) TFEU is not unobjectionable. Even if the term of an agreement in European antitrust law is to be determined independent of the concept of a ‘contract’ under civil law, a comprehensible understanding of this term will not subsist without the concurrence of at least two autonomous wills.⁹⁶⁸ Any other perception of the fact, essentially lacking this necessary consensus between two parties, is evidently incompatible with the wording of Art 101 (1) TFEU.⁹⁶⁹

On the one side, this means that the rationale of the ‘concern-privilege’ already finds its basis in the first fact of Art 101 (1) TFEU insofar as the element of ‘agreements or concerted practices’ serves to distinguish cases of a mutual restriction of corporate autonomy from acts of mere unilateral conduct.⁹⁷⁰ On the other side, the above assessment has shown that - apart from the existence of clear instructions by a parent company leaving no room for a subsidiary’s autonomous conduct - a mere ‘congruence of wills’ is insufficient for determining the privilege’s application-scope in a specific case. The wording of the term of an ‘agreement’ is nevertheless pertinent for determining the border of Art 101 TFEU towards unilateral conduct for market-based relationships of dependence, consequentially reflecting its delineation towards Art 102 TFEU.⁹⁷¹

Among the possible means of applying pressure are notably cutoffs from delivery, credit blockings, a selective increase of market-list prices, or the threat of not renewing an exclusive right of distribution.⁹⁷² In the procedures named above, all these aspects had been subsumed under the fact of ‘an agreement’ in the sense of Art 101 (1) TFEU. Such an understanding of the fact nevertheless seems ultimately beyond the provision’s wording.⁹⁷³ Unilateral measures of the specified type can only be considered in conflict with Art 101 (1) TFEU, in case that the parties of the measure have declared their explicit *consent* with it, or where the questionable measure is

⁹⁶⁵ Cf. *Lübbig*, WuW 7 u. 8/1991, 566;

⁹⁶⁶ See ECJ, 107/82, *AEF-Telefunken AG vs. Commission*, [1983] ECR 3195.

⁹⁶⁷ Cf. *Lübbig*, *ibid.*

⁹⁶⁸ *Lübbig*, WuW 7 u. 8/1991, 567.

⁹⁶⁹ Cf. *Emmerich* in: Immenga/Mestmäcker, EG-Wettbewerbsrecht, Art 85 (1), para. 89.

⁹⁷⁰ Cf. *Buntscheck*, Konzernprivileg, 89.

⁹⁷¹ Thus correctly *Emmerich*, *ibid.*; likewise in his conclusion, but differing in his (disapproving) ascertainment of the Commission’s and Court’s extensive interpretation of the term see *Lübbig*, WuW 7 u. 8/1991, 567 ff.

⁹⁷² *Belke*, *ibid.*

⁹⁷³ Cf. *Emmerich*, in Immenga/Mestmäcker, EG-Wettbewerbsrecht, Art 85 (1), para. 89.

destined⁹⁷⁴ for a concretion of their already existent contractual relationship.⁹⁷⁵ The problem of a circular letter by the manufacturers in the case of *Sandoz*, requesting a certain conduct of its distributors for their future supply with the respective product, should therefore correctly have been dealt with on the basis of Art 102 TFEU.⁹⁷⁶

As the fact of ‘agreements or concerted practices’ neither leads to satisfactory conclusions for the determination of the necessary scope of exempting group-intern agreements from Art 101 (1) TFEU, nor to a precise the classification of an ‘economic entity’, a further assessment of the facts of this provision is vital.

For the sake of completeness it should finally be mentioned that previously it had been argued that group-intern agreements could only be exempted from the ban of Art 101 (1) TFEU where they additionally fulfilled the purpose of an ‘internal allocation of tasks’.⁹⁷⁷ By means of this confinement of the ‘group, or concern-privilege’ the Community institutions had originally intended to grant any restriction of Art 101 (1) TFEU’s application scope a ‘group-intern’ characterization. On the one side, this approach aimed to prevent any distortion of the position of third parties on the market by means of concern-intern restrictions of competition, and on the other side, an artificial fragmentation of the Common Market into several national markets for the respective subsidiaries.⁹⁷⁸

The reference to an ‘internal allocation of tasks’ is nevertheless redundant. As every agreement that would normally be subjected to Art 101 (1) TFEU prescribes a certain kind of conduct or omission and thus necessarily serves the purpose of an ‘internal allocation of tasks’, the abolishment of this fact in the ECJ’s decision of *Viho* can only be approved of.⁹⁷⁹ Possible effects of group-intern restrictions of competition on the position of third parties are to be strictly measured on the basis of Art 102 TFEU. This finds its justification in the fact that Art 101 TFEU, as already mentioned above, is not aimed at protecting the Common Market from *any* form of anticompetitive harm, but aims at preserving the latter by the means of granting undistorted competition throughout the latter.⁹⁸⁰ Agreements between parent companies and their subsidiaries nevertheless do not restrict the scope of action or decision of an autonomous entity on the market. Art 101 (1) TFEU therefore does not provide an appropriate basis for

⁹⁷⁴ This means, intended according to the parties’ understanding or factual practice.

⁹⁷⁵ *Emmerich*, *ibid.* In most cases, however, Community practice seems to have followed these parameters. Nevertheless, the above assessment denotes the importance of Art 101 (1) TFEU’s wording for determining its scope and relevance for distinguishing unilateral conduct from a ‘collusion’ between two autonomous parties.

⁹⁷⁶ Thus also *Roth/Ackermann*, *Frankfurter Kommentar*, Art. 81 Abs. 1 – Grundfragen, para. 178.

⁹⁷⁷ See ECJ of 31.10.1974, C-15/74, *Centrafarm I*, [1974] ECR 1147, para. 41 and ECJ of 31.10.1974, C-16/74, *Centrafarm/Winthorp* (*Centrafarm II*), [1974] ECR 1183, para. 32, and ECJ of 4.5.1988, C-30/87, *Corinne Bodson vs. Pompes funèbres* [1988] ECR 2479, para. 19. Originally affirmative of this element see *Schröter* in: Groeben/Thiesingen/Ehlermann, Art 85 I para. 49; against this, (already) *Gleiss/Hirsch*, Art 85, para. 199; *Heilbronner/Müller-Graff*, Art 85, para. 73; *Emmerich* in: Immenga/Mestmäcker, Art 85 (1), para. 58; *Schroeder* in: Wiedemann, *Handbuch*, § 8, para. 6.

⁹⁷⁸ See *Emmerich*, *EuR* 1971, 295, 311; *Reich*, *Europäisches Verbraucherschutzrecht*, para. 74 (p.134); *Schröter*, in: Groeben/Thiesingen/Ehlermann [hereinafter cited as GTE], Art 85, para. 92, as cited by *Emmerich*, *ibid.*

⁹⁷⁹ Cf. *Schröder*, in: Wiedemann, *Handbuch*, § 8, para. 6.

⁹⁸⁰ See *Emmerich*, in: Immenga/Mestmäcker, Art 85 (1), para. 3; *Stockmann*, in: Wiedemann, *Handbuch*, § 7 para. 18; *Stockenhuber*, in: Grabitz/Hilf, *EG-Wettbewerbsrecht*, Art 81 EGV, para. 116, referring to the ECJ’s paradigm of Art 101 TFEU requiring (merely) ‘workable competition’ (ECJ in C-26/76, *Metro vs. ABA I*, [1977] ECR-1875, para. 20: “that is to say the amount of competition necessary to ensure the observance of the basic requirements and the attainment of the objectives of the Treaty [i.e. Art 3 TFEU], in particular the creation of a single market achieving conditions similar to those on a domestic market”).

considering their effects on the Common Market.⁹⁸¹ As these third-party effects can only be regarded where the respective facts of the latter provision are fulfilled, the necessity of a strict delineation of Art 101 and 102 TFEU for the assessment of group-intern conduct becomes once more evident.⁹⁸²

3.1.1.2. The Fact of an 'Undertaking' in the Sense of Art 101 (1) TFEU

In its decision in the case of *Viho* the European Court of Justice stated in a final manner that the ban on cartels was not to be applied for agreements between parent companies and their wholly-owned subsidiaries where these constitute an 'economic entity'.⁹⁸³ According to settled case law the latter exists in cases in which the subsidiary does not independently determine its conduct on the market, but merely follows the instructions of its parent company. Upon this reference to an 'economic entity', the relationship of corporate group companies is therefore principally comprised by the wording of Art 101 (1) TFEU.⁹⁸⁴ This fact is of essential importance for the further assessment of 'economic entities' in European antitrust law and accordingly for the definition of an 'undertaking' in the sense of Art 101 (1) TFEU. Because some opinions in literature have attempted to ascertain corporate control relationships and thus the existence of a 'single economic entity' upon the term of an 'undertaking',⁹⁸⁵ the criteria and arguments behind this approach require to be assessed in detail.

As mentioned above, it cannot be inferred from the wording of the Treaty whether the fact of an 'undertaking' in Art 101 (1) TFEU is to be comprehended in an 'institutional' or in an 'economic' manner.⁹⁸⁶ In the former case this would comprise the legal entity or agent in charge of the undertaking, while in the latter case it addresses the economic entity at its operational level.⁹⁸⁷ This essentially alludes to the question of whether the term of an 'undertaking' in European competition law requires legal personality.⁹⁸⁸

According to the purpose of the cartel ban to grant undistorted competition throughout the area of the Common Market, the term of an 'undertaking' is interpreted in an extensive economic and functional manner.⁹⁸⁹ Consequently, the application range of the ban is said to vitally depend on whether the term of an 'undertaking' is to be understood in a broad or rather a

⁹⁸¹ Cf. *Schröder*, *ibid.*

⁹⁸² In case a corporate group therefore maintains a dominant position on the market, Art 102 TFEU remains principally applicable. See ECJ of 24.10.1996, C-73/95 P, *Viho vs. Commission*, [1996] ECR I-5457, para. 17. See likewise *Gleiss/Hirsch*, EG-Kartellrecht, Art 85, para. 202; *Schröder*, in: Wiedemann, Handbuch, § 8, para. 6; *Müller-Graff*, in: Hailbronner/Kein/Magiera/Müller-Graff, Art 85, para. 73.

⁹⁸³ See ECJ of 24.10.1996, C-73/95, *Viho Europe BV*, [1996] ECR I-5457, para. 17. Thus already *Harms*, *Konzerne im Recht der Wettbewerbsbeschränkungen*, Köln (1968), 88.

⁹⁸⁴ Cf. *Sander*, Das Konzernprivileg im Europäischen und Österreichischen Wettbewerbsrecht, OZK 2008, 20 (22): "[...] according to the ECJ [therefore] a concern is comprised by the wording of the ban in Art 101 (1) TFEU just like a single undertaking".

⁹⁸⁵ See e.g. *Funck*, *Konzerneinheit und Kartellverbot: Die kartellrechtliche Beurteilung von konzerninternen Verträgen*, (1964); *Harms*, in: FS Hartmann, 165, 178; *Potrafke*, *Kartellrechtswidrigkeit konzerninterner Verhaltensweisen*, (1991), 95 ff.

⁹⁸⁶ See e.g. *Emmerich*, in: Immenga/Mestmäcker, Art 85 (1), para. 13; *Thomas*, *Unternehmensverantwortlichkeit*, 10; *Buntscheck*, *Konzernprivileg*, 90.

⁹⁸⁷ Cf. *Thomas*, *Unternehmensverantwortlichkeit*, 10 (50).

⁹⁸⁸ Cf. *Thomas*, *Konzernprivileg und Gemeinschaftsunternehmen*, ZWeR 3/2005, 236 (241).

⁹⁸⁹ See *Stockmann*, in: Wiedemann, Handbuch (1999), § 7, para. 1.

narrow understanding of this fact.⁹⁹⁰ Essentially the same for both Art 101 and 102 TFEU,⁹⁹¹ the concept of an ‘undertaking’ is therefore not necessarily congruent with that of an incorporated company possessing separate legal personality.⁹⁹²

In European competition law the **definition of an undertaking** therefore covers any physical or juridical entity⁹⁹³ engaged in an economic activity, regardless of its legal status and the way in which it is financed.⁹⁹⁴ The term of an economic activity in this sense implies that the (legal) person or plurality of persons offer or purchase goods or services of a certain value against remuneration.⁹⁹⁵ The intention to realize profits in the sense of an actual financial gain is not a precondition for the term of an undertaking. Meaningless to the fact’s assessment in antitrust law is also its legal form or status,⁹⁹⁶ which is why legal personality under national law is principally not essential for the existence of an ‘undertaking’ in the sense of EU competition law.⁹⁹⁷ In case the conduct of third-country companies has a significant effect⁹⁹⁸ on the territory of the Common Market, they are likewise comprised by the fact of an undertaking.⁹⁹⁹

For the purpose of interpreting the fact of an undertaking under Art 101 (1) TFEU, attention must nevertheless also be paid to the fact that European competition law does not comprise a universally valid definition of the latter in its ‘natural sense of meaning,’¹⁰⁰⁰ but rather regards it as an earmarked concept that is to be determined upon the spirit and purpose of the respective area of regulation. Therefore, any recourse to other areas of the law is neither instructive nor reasonable for the term’s ascertainment in European antitrust law.¹⁰⁰¹

According to this functional concept of an undertaking in European competition law, the Commission and the ECJ regularly treat legally autonomous, but economically dependent companies that are integrated into the structure of a corporate group as ‘economic entities’.¹⁰⁰²

⁹⁹⁰ *Emmerich*, in: Immenga/Mestmäcker, Art 85 (1), para. 13; *Schröter*, in: GTE, Vorbem. zu den Artt. 85-89, para. 16.

⁹⁹¹ See *Lübbig*, in: Wiedemann, Handbuch, § 7, para. 1.

⁹⁹² See Commission Decision in Case IV/C/33.833, *Cartonboard*, [1994] OJ Nr. L 243, para. 140; ECJ of 28.6.2005, joined cases C-189/02 P a.o., *Dansk Rørindustri a.o. vs. Commission*, [2005] ECR I-5425, para. 112 f; Critically *Steinle*, EWS 2004, p. 118, 121 f.

⁹⁹³ See Commission of 23.4.1986, *Polypropylen*, [1986] OJ Nr. L230/1, 32; *Schröter*, in: GTE, preliminary remarks to Art 85-89, para. 12; *Langen/Bunte*, Art 85, para. 6, as cited by *Stockmann*, *ibid*.

⁹⁹⁴ Cf. ECJ of 11.7.2006, C-205/03 P, *FENIN vs. EC Commission*, [2006] ECR 1213, summary para. 1; initially ECJ of 13.7.1962, *Klöckner & Hösch vs. Hohe Behörde*, [1962] ECR 653 (685ff), and furthermore ECJ of 23.4.1991, Case C-41/90, *Höfner and Elser vs. Macroton*, [1991] ECR 1-1979.

⁹⁹⁵ *Lübbig*, in: Wiedemann, Handbuch, § 7, para. 1. While it is sufficient for the ECJ that the services of a state are offered against a certain fee (ECJ of 23.4.1991, Case C-41/90, *Höfner & Elser*, [1991] ECR 1-1979, para. 22), the Commission examines whether the respective activity could have been performed by a private person in an attempt to gain profits (Comm. Decision of 28.6.1995, *Régie des Voies Aériennes*, [1995] OJ Nr. 216/8, para. 2.).

⁹⁹⁶ *Lübbig*, in: Wiedemann, Handbuch, § 7, para. 2.

⁹⁹⁷ See Commission IV/31.149, *Polypropylen* [1986] OJ Nr. L 230/1, 32; IV/31.866, *LDPE*, [1989], Nr. L 74/21, 35; IV/31.865, *PVC*, [1989], Nr. L 74/1, 14.

⁹⁹⁸ For this term’s assessment in detail, see 3.1.1.3. below.

⁹⁹⁹ In detail see *Schwarze*, *Die extraterritoriale Anwendung des EG-Wettbewerbsrechts*, WuW 12/2001, 1190, and 2.2.2. below.

¹⁰⁰⁰ Cf. *Harms*, *Konzerne*, p. 92 f [Zweckbegriff], as cited by *Buntscheck*, *Konzernprivileg*, 90.

¹⁰⁰¹ *Koch*, in: Grabitz/Hilf, Art. 85, para. 7; *Bunte*, in: *Langen/Bunte*, Art 85 - Generelle Prinzipien, para. 5; *Roth/Ackermann*, *Frankfurter Kommentar*, Grundfragen Art. 81 Abs. 1 EGV, para. 11, referring to the so-called ‘functional’ concept of an ‘enterprise’. For a comparison of corporate group relations in antitrust law with other areas of the law see however: *Menz*, *Wirtschaftliche Einheit und Kartellverbot*, 84 f.

¹⁰⁰² ECJ of 14.7.1972, C-48/69, *ICI vs. EC Commission*, [1972], ECR 619; ECJ of 6.3.1973, C-6 and 7/73 *Istituto Chemioterapico Italiano and Commercial Solvents Corporation vs. Commission*, [1974] ECR 223; ECJ of 31.10.1974, C-15/74, *Centrafarm I*, [1974] ECR 1147; ECJ of 12.7.1984, C-170/83, *Hydrotherm vs.*

Hereby, it is not always clear whether this leads to the general impossibility of characterizing the single legally independent parts of a corporate group as ‘undertakings’ themselves, or whether - regarding the inapplicability of Art 101 TFEU for group-internal agreements - solely a competitive relation is denied.¹⁰⁰³

§ 1. Legal Personality as a Precondition of an ‘Undertaking’?

This again refers to the question of whether the term of an ‘undertaking’ presupposes legal personality. The views in literature ascertaining Art 101 (1) TFEU’s application scope upon the definition of an ‘undertaking’ ascertain this not to be the case.

Because, according to this approach, mere ‘economic dependence’ is pertinent for the term’s determination, a controlled subsidiary company cannot be regarded as an individual undertaking.¹⁰⁰⁴ A parent and a subsidiary company are thus seen to constitute a ‘unitary undertaking’ for the purpose of applying the competition provisions.¹⁰⁰⁵ A competitive relationship between them is hereby negated from the start.

If, on the other hand, merely an entity’s legal personality is required for the term’s definition, the single subsidiaries of a corporate group maintain their characterization as an ‘undertaking’ and Art 101 (1) TFEU remains principally applicable.¹⁰⁰⁶ Only in case that the parent company controls its subsidiaries to an ‘intrusive’ extent, agreements between them may be exempted from the cartel ban.

In consideration of the vital functional assessment of the competition principles, the second alternative is more convincing, since it appropriately indicates the true issue of relevance for the existence of an ‘economic entity’ in respect to Art 101 (1) TFEU.¹⁰⁰⁷ As the objective of the European competition principles is the preservice of competition throughout the Internal Market by the protection of a company’s entrepreneurial autonomy,¹⁰⁰⁸ the pertinent basis of the ‘group, or concern-privilege’ can only be the lack of a ‘distortion of competition’ between the

Compact, [1984] ECR 02999; ECJ of 4.5.1988, C-30/87, *Corinne Bodson vs. Pompes funèbres*, [1988] ECR 2479; *Emmerich*, in: Immenga/Mestmäcker, EG-Kartellrecht, Art 85 Abs. 1, para. 43 ff.

¹⁰⁰³ See *Lübbig*, in: Wiedemann, Handbuch (1999), § 7, para. 2.

¹⁰⁰⁴ Thus *Zäch*, Grundzüge des Europäischen Wirtschaftsrechts (1996), 233; *Zäch*, Wettbewerbsrecht der Europäischen Union, (1994), Erster Teil, B I 2, 2; *Thomas*, Unternehmensverantwortlichkeit (2005), 143 ff (especially 151); *Harms*, Konzerne, (1968), 158; in this sense also *Lasok*, ECLR 2004, 383; see furthermore already *Neumann*, WuW 1957, 562f, as cited by *Thomas*, ZWeR 3/2005, 241; and *Schollmeier/Krimphove* in: Bleckmann, para. 1835 f; *Hui*, Am.J.Comp.L 36 (1988); *Faull/Nikpay*, EC Competition Law, para. 2.35, as cited by *Menz*, Wirtschaftliche Einheit, 226.

¹⁰⁰⁵ For this frequent formulation in European case-law see pt. 2.1. above. Cf. e.g. ECJ of 14.7.1972, C-52/69, *Geigy AG*, [1972] ECR 787, para. 13; ECJ of 12.7.1984, C-170/83, *Hydrotherm*, [1984] ECR 2999, para. 11; CFI of 15.6.2005, joined cases T-71/03, T-74/03 and T-91/03, *Tokai Carbon*, [2005] ECR II-10, para. 59, 62 (assessing that: “It would amount to a false terminology’ to denominate the single group companies as ‘undertakings’”).

¹⁰⁰⁶ Thus, see already *Westwick/Loewenheim*, in: Loewenheim/Belke, GWB, Losebl., (1979), § 1, para. 26; *Rittner/Dreher*, Europäisches und deutsches Wirtschaftsrecht, (1987), § 14, para. 17; *Bunte*, in: Lange/Bunte, Kommentar zum deutschen und europäischen Kartellrecht, 9th edition, § 1 GWB (for a comparable assessment under the German antitrust code), as cited by *Thomas*, ZWeR 3/2005, 241.

¹⁰⁰⁷ *Lübbig*, in: Wiedemann, Handbuch, § 7, para. 2.

¹⁰⁰⁸ See *Mestmäcker*, Europäisches Wettbewerbsrecht, 199, as cited by *Buntscheck*, Konzernprivileg, 95, according to which the ban on cartels aims to grant an undertaking’s ‘managerial independence’.

respective companies.¹⁰⁰⁹ The rationale of this assessment is based on the fact that the term of ‘an undertaking’ is not essential for determining the correct addressee of Art 101 (1) TFEU but rather requires a ‘teleologic reduction’ of the provision’s application range.¹⁰¹⁰

This aim of protecting autonomous corporate decision-making is further evident in the conception of ‘liberal market economics’, according to which competition is created by conferring competence and responsibility on (individual) market actors. In centrally planned economies this task is attributed to a public authority.¹⁰¹¹ Since the protection of autonomous decision-making therefore constitutes the core rationale for the ban on cartels, the competition principles should be addressed to the entrepreneurial entity responsible for the formation of a company’s market strategy.¹⁰¹² This is essentially the legal entity capable of determining the assignment of production factors, or generally, the company’s economic strategy according to (national) company law.

§ 2. The Necessity of an Autonomous ‘Entity’ with Legal Personality as an Addressee of Art 101 (1) TFEU

Due to the fact, that the Commission does not get around the necessity of addressing its decision to an entity with legal personality for the enforcement of its decision,¹⁰¹³ the question whether legal personality is required for the definition of an ‘undertaking’ is in effect of little practical relevance.¹⁰¹⁴ It only becomes pertinent in case the inapplicability of Art 101 (1) TFEU is judged on the basis of the definition of an ‘undertaking’.

According to Art 299 TFEU, the enforcement of antitrust decisions is carried out according to the rules of national procedural law and therefore requires a juridic entity vested with legal capacity.¹⁰¹⁵ The Commission’s practice of treating affiliated companies as ‘economic entities’ and accordingly ‘unitary undertakings’ compels it to determine the natural or juridic person against whom its decision may be enforced.¹⁰¹⁶ In case the responsible legal entity is directly in charge of the respective economic entity responsible for the breach of Art 101 (1) TFEU, a further assessment is unnecessary.¹⁰¹⁷

¹⁰⁰⁹ Thus, e.g. *Buntscheck*, Konzernprivileg, 104 ff; *Menz*, Wirtschaftliche Einheit, 225 ff. In detail see § 1.3. below.

¹⁰¹⁰ Likewise, *Schröter*, in: *Schröter/Jakob/Mederer*, Kommentar zum europäischen Wettbewerbsrecht, Art 81 Abs.1, para. 123 ff; *Lübbig*, in: *Wiedemann*, Handbuch, § 7, para. 2; *Buntscheck*, Konzernprivileg, 104. In detail see 3.1.1.3. below.

¹⁰¹¹ *Pohlmann*, Unternehmensverbund, 49, and in detail 3.1.1.3. below.

¹⁰¹² *Buntscheck*, Konzernprivileg, 95.

¹⁰¹³ Cf. *Steinle*, in: *FS Bechtold* (2006), 541 (543); see already 1.2. on the Commission’s practice of a two-step approach of addressing its Decision on economically affiliated companies.

¹⁰¹⁴ Thus correctly, *Stockmann*, in: *Wiedemann*, Handbuch, (1999) § 7, para. 1.

¹⁰¹⁵ On this issue see Commission Decision, IV/31.865, *PVC*, [1989] OJ Nr. L 71/1, para. 15, with reference to the difficulties that could otherwise result in context of the enforcement of fines. Furthermore, Commission of 27.7.1994, *PVC II*, [1994] OJ Nr. 239/12, para. 44; CFI of 12.12.1991, *Enichem Anic vs. Commission*, [1991] ECR II-1623, para. 237; approved by the ECJ on 8.7.1999, C-49/92, *Commission vs. Anic Partecipazioni*, [1999] ECR I-4125.

¹⁰¹⁶ Cf. *Buntscheck*, Konzernprivileg, 95; Critically on the Commission’s practice *Steinle*, in: *FS Bechtold* (2006), 541 f.

¹⁰¹⁷ Cf. *Pohlmann*, Unternehmensverbund, 49, as cited by *Buntscheck*, 95.

However, in cases in which a different legal entity¹⁰¹⁸ than the one directly involved is made accountable for the breach, any further appraisal of the responsible legal entity effectively amounts to an attribution of conduct or liability and should also be disclosed as such in the respective decision.¹⁰¹⁹ Already at this stage of the analysis it must be noted that in this case essentially different criteria become pertinent than for the necessary teleologic reduction of Art 101 (1) TFEU in regard to group-internal agreements.¹⁰²⁰

Regarding the **separate legal existence** of the different entities of a corporate group, no practical reason exists for denying the single group undertakings the status of an ‘undertaking’ under European competition law.¹⁰²¹ This is furthermore reasonable as the single companies of a corporate group are well capable of conspiring - that is, entering into agreements in the sense of Art 101 (1) TFEU - with third parties.¹⁰²²

The assessment of ‘economic entities’ in European competition law therefore does not hinge on the question of legal personality, and thus the definition of an ‘undertaking’. Rather, it is necessary to ascertain the appropriate legal or economic *control* exerted by one of the group’s undertakings over the other. In this sense it is settled practice that corporate groups are addressed by the competition principles in their entirety in case that one of the companies of the group determines the competitive conduct of the others to such an (intrusive) extent that the latter are incapable of autonomously determining their behavior on the market.¹⁰²³ In most cases this will be a parent company¹⁰²⁴ or even the head of the corporate group. As the concept of an ‘economic entity’ merely requires the determination of a company’s market conduct by another, this may also be a sister company or an immediate subsidiary in control of a sub-subsidiary. Appropriately considering this control relationship between companies of a corporate group, Art 101 (1) TFEU is essentially addressed to **independent entities**. Therefore, the question whether corporate groups constituting such an ‘economic entity’ must necessarily be subsumed under the term of ‘an undertaking’ is irrelevant in practice.¹⁰²⁵

The Commission has sometimes stepped in for the necessity of characterizing a corporate group or concern as an ‘undertaking’.¹⁰²⁶ In other decisions, however, it attributes to economic entities and undertakings a ‘distinct understanding’¹⁰²⁷ or limits its assessment to factually making the parent company responsible for its subsidiary’s illicit conduct. Even though the Court describes economic entities as ‘undertakings’ only in rare instances, its formulations regularly lack a consistent justification of the concept’s application with regard to corporate groups.

¹⁰¹⁸ (This must not be confused with an economic entity).

¹⁰¹⁹ *Buntscheck*, Konzernprivileg, 5.

¹⁰²⁰ For an exact assessment of this aspect, see § 2 below.

¹⁰²¹ Thus in effect *Lübbig*, in: Wiedemann, Handbuch, § 7, para. 2; See *Emmerich*, in: Immenga/Mestmäcker, Art 85 (1), para. 53: “A company’s affiliation in effect does not change its legal personality and therefore characterization as an ‘undertaking’ in the sense of Art 101 (1) TFEU”.

¹⁰²² ECJ of 12.7.1979, joined cases C-32/78 a.o., *BMW Belgium*, [1979] ECR 2435, 2475 f.

¹⁰²³ CFI of 13.12.2001, T-45/98 and T-47/98, *Krupp Thyssen Stainless vs. Commission*, [2001] ECR II-3757, para. 189; ECJ of 2.10.2003, *Aristrain vs. EC Commission*, [2003] ECR I-1105, para. 96; See *Lübbig*, *ibid.*

¹⁰²⁴ (The latter is habitually characterized as a company holding a substantial shareholding in another. See *Black’s Law Dictionary*, 344 (West 7th ed 1999)).

¹⁰²⁵ See *Gleiss/Hirsch*, EG-Kartellrecht, Art 85 (1), para. 56; Likewise in effect: *Lübbig*, in: Wiedemann, Handbuch, § 7, para. 2.

¹⁰²⁶ See Commission of 8.12.1977, *Hugin vs. Lippingtons*, [1978] OJ Nr. L 22/23, para. 30; 23.4.1986, *Polypropylen*, [1986] OJ Nr. L 230/1, para. 32; Comm. of 22.12.1987, *Eurofix-Bauco vs. Hilti*, [1987] OJ Nr. L 65/19; 21.12.1988, *PVC*, [1988] OJ Nr. L 74/1, para. 14 and *LDPE*, [1988] OJ Nr. L 74/21, para. 35.

¹⁰²⁷ Comm. of 14.12.1972, *Zoja/CSC-ICI*, [1972] OJ Nr. L 299/51, 54.

From the previous analysis it may be deduced, however, that the concept of an ‘economic entity’ in respect to the so-called ‘group, or concern privilege’ is only relevant for a delineation of group-internal conduct from that of independent third parties. The concept is furthermore employed for the attribution of market shares,¹⁰²⁸ revenue, conduct, and responsibility between group companies. This assessment is nevertheless possible without qualifying the entire group or concern as an ‘undertaking’.¹⁰²⁹

According to settled case law, it is uncontested that the competition principles are addressed to ‘economic entities’ comprising several legally independent undertakings in the sense of European competition law. These are therefore comprised by the fact of an ‘undertaking’ in the sense of Art 101 (1) TFEU. For determining the provision’s application scope, there is hence no dogmatic necessity of equalizing an ‘economic entity’ with an ‘undertaking’ in the juridical sense.¹⁰³⁰ This also becomes evident given that even the looser form of an economic affiliation, namely ‘associations of undertakings’, is explicitly addressed by Art 101 (1) TFEU.¹⁰³¹

The distinction between associations of undertakings and corporate groups or concerns in European competition law is sometimes not entirely clear.¹⁰³² It has therefore been argued in literature that this classification should again be made along the line of determining a ‘single economic entity’.

Hereby it must nevertheless be differentiated: in case a concern constitutes a ‘single economic entity’ it can no longer be qualified as an ‘association of undertakings’ for the purpose of European antitrust law.¹⁰³³ Where, conversely, the Commission is confronted with a loose association of undertakings in which the respective entities dispose of a sufficient amount of economic freedom to autonomously determine their conduct on the market, their ‘privileged’ treatment under Art 101 (1) TFEU is not feasible. Agreements between these undertakings must therefore be assessed upon the facts of the cartel ban. The question of identifying whether the respective corporate group constitutes a ‘single economic entity’ must again be answered by an assessment of the respective control-relationship between them.¹⁰³⁴

The essential reason for including ‘associations of undertakings’ in Art 101 (1) TFEU is to cover anticompetitive forms of cooperation that are not explicitly concluded between competitors, but rather adopted by means of an establishment, which may, but must not amount to an undertaking itself.¹⁰³⁵ The latter situation may for example be the case where this facility only serves the administration or enforcement of this distortive agreement.¹⁰³⁶ In such instances,

¹⁰²⁸ See ECJ of 21.3.1973, C-6/72, *Europemballage Corporation and Continental Can vs. Commission*, [1973] ECR 215; CFI of 10.3.1992, joined cases T-68/89, T-77/89 and T-78/89, *Società Italiana Vetro SpA* [1992], ECR-1403; and Comm. IV/26.699, *Chiquita*, [1976] OJ Nr. L 95/1, p. 11, as cited by *Buntscheck*, Konzernprivileg, 98. See also *Schroeder*, in: Wiedemann, Handbuch, § 8, para. 6.

¹⁰²⁹ Cf. *Gleiss/Hirsch*, *ibid.* For this reason it is also irrelevant whether a concern is attributed ‘legal personality’ and can thus be assessed to constitute an ‘undertaking’ in the sense of European competition law.

¹⁰³⁰ Therefore, any potential ‘danger’ of a two-tiered definition of this term already becomes irrelevant. For this argumentation as a counterargument to the equalization of ‘economic entities’ with the fact of an ‘undertaking’, see e.g. *Schroeder*: Verbundene Unternehmen, WuW 4/1988, 274 (276).

¹⁰³¹ According to the protection aim of the ban on cartels, the term of an ‘association of undertakings’ must also be interpreted in a wide sense, whereby its legal form is once more meaningless (See ECJ of 30.1.1985, C-123/83, *BNIC vs. Clair*, [1985] ECR-391, 423, as cited by *Lübbig*, in: Wiedemann, Handbuch, § 7, para. 8).

¹⁰³² *Gleiss/Hirsch*, EG-Kartellrecht, Art 85 (1), para. 70; *Schröter*, in: GTE Art 85 I, para. 17.

¹⁰³³ *Emmerich* in Immenga/Mestmäcker, Art 85 (1), para. 38.

¹⁰³⁴ In detail, see point 4 of this thesis.

¹⁰³⁵ Cf. *Lübbig*, in: Wiedemann, Handbuch, § 7, para. 8.

¹⁰³⁶ ECJ of 15.5.1975, *Frubo vs. Commission*, [1975] ECR 563, 583f; ECJ of 29.10.1980, *van Landewyck a.o. vs. Commission* [1980], ECR- 3125, 3250; ECJ of 8.11.1983, *IAZ a.o. vs. Commission*, [1983], ECR 3369, 3410;

the provision's application does not depend on the (possibly difficult) proof of 'concerted conduct' between these independent undertakings.¹⁰³⁷ In case the association additionally fulfills the requirements of an 'undertaking' in the sense of Art 101 (1) TFEU, it is addressed in both characteristics. Where the association lacks separate legal capacity, the single members function as the direct addressees of the Commission's decision.¹⁰³⁸ From this assessment it may be derived that the term of an 'undertaking' is not an essential precondition for the application range of Art 101 (1) TFEU.

The opposite view, arguing for the necessary assessment of an 'economic entity' upon the fact of an 'undertaking' in Art 101 (1) TFEU¹⁰³⁹ becomes questionable considering that the concept of an 'undertaking' has a unique meaning for the area of antitrust law. This becomes evident as it is regularly referred to as '*in the sense of European competition law*'.¹⁰⁴⁰ The practice of attributing responsibility for breaches of the competition principles to another legal entity of a corporate group should therefore not be misused under the pretense of determining the appropriate economic entity by the definition of an 'undertaking'.¹⁰⁴¹ For the qualification of a legal entity as an 'undertaking', reference should therefore be made to **the juridical entity possessing legal personality** under the principles of national law, in order to avoid an unnecessary discrepancy between substantive and procedural law.¹⁰⁴²

For the application of the so-called 'group, or concern-privilege' this implies the following. Where the Commission finds Art 101 (1) TFEU to be inapplicable to agreements between undertakings of the same corporate group, its decision should be addressed to the legal entity functioning as the controlling company of the group. Where the amount or intensity of possible control is nevertheless insufficient for an inapplicability of Art 101 (1) TFEU, the decision should appropriately be addressed to the legal entities actually involved in the infringement.

This would require the Commission to explicitly determine the culpable company of a corporate group upon the existence of a faulty breach or negligent conduct, thus revealing the factual criteria of an attribution of responsibility in the precise case.

Schröter, in: *Schröter/Jakob/Mederer*, preliminary remarks to Arts 81 to 85 [now Articles 101-105 TFEU], para. 38.

¹⁰³⁷ *Lübbig*, *ibid.*

¹⁰³⁸ Commission of 13.3.1969, *EWA*, [1969] OJ Nr. L 69/15; 25.6.1969, *VVVF*, [1969] OJ Nr. L 168/22; 17.7.1986, *Bodenfliesen*, [1986] OJ Nr. L 10/15, as cited by *Gleiss/Hirsch*, EG-Kartellrecht, Art 85 (1), para. 70. This is the case likewise where the association acts on the market on behalf of its members (Comm. Dec. 74/634/EEC of 29.11.1974, *Franco-Japanese Ballbearings Agreement*, [1974] OJ Nr. L 343/19).

¹⁰³⁹ Sometimes it was alleged that this is necessary in order to adhere to the provision's wording.

¹⁰⁴⁰ See e.g. Opinion of the AG in case C-67/96, *Albany Internional BV vs. Stichting Bedrijfspensionenfonds Textilindustrie*, [1999] ECR I-5751, para. 206.

¹⁰⁴¹ Thus *Steinle*, Kartellgeldbußen gegen Konzernunternehmen nach dem 'Aristrain'-Urteil des EuGH, *Europäisches Wirtschafts- und Steuerrecht*, Vol. 15, 3/2004, section 6, as cited by *Kerstin Fischer*: Gesamtschuldnerische Haftung von Unternehmen für die Zahlung von Geldbußen bei Kartellverstößen, *OZK* 2011/3, 99 (100).

¹⁰⁴² Cf. *Buntscheck*, Konzernprivileg, 96; Likewise *Steinle*, in: *FS Bechtold* (2006), 556, (in regard to the aspect of an entity's liability after corporate restructurings). Incidentally it can be noted that national judges are confronted with the same problem of attributing antitrust responsibility for the assessment of damages claims under civil law. This is due to the fact that it has to essentially be determined to which separate legal entity the infringement committed by an 'economic entity' may be attributed to. On a first approach to this problem see *Bulst*, *European Business Organization Law Review* 4, (2003) 623 (635), as cited by *Steinle*, *ibid.*

In literature the equalization of ‘economic entities’ with the term ‘undertaking’ has sometimes been rejected with the argument that such an approach would lead to a **‘two-tiered’ definition** of the term ‘undertaking’.¹⁰⁴³ The objection was that the disadvantage of operating with the term ‘undertaking’ for determining an ‘economic entity’ leads to its ambiguous understanding. This was seen to result from the necessity of denying the single group companies their characterization of an ‘undertaking’ inter se, while at the same time acknowledging that their dependence on the controlling parent company does not alter their characterization of an undertaking towards third parties.¹⁰⁴⁴

Looked at more closely, it becomes clear, however, that determining the existence of an ‘economic entity’ by using the term of an ‘undertaking’ does not lead to such a two-tiered approach. In principal it is correct that the fact that a subsidiary is controlled by an undertaking of the same corporate group does not alter its capability to independently enter into agreements with third parties. The consideration of its ‘relative economic independence’, namely in relation to the respective contracting party, is nevertheless only appropriate for situations which must be assessed upon Art 101 (1) TFEU anyhow. Therefore, it is not the term ‘undertaking’ that is ascertained in an ambivalent way, but the characterization of the single group company. The characterization of the latter as an ‘undertaking’ would thus depend on the respective relation to its contracting partner, which is either another group company or a third party on the market.¹⁰⁴⁵

Thus, in case two companies of the same group enter into an illicit agreement with a separate third company on the market, the two undertakings of the group or concern would be considered as unitary undertakings inter se, but as two separate undertakings in their relation to the third party. In this case, Art 101 (1) TFEU would inevitably be applicable between all three companies.¹⁰⁴⁶ As this conclusion does not lead to appropriate results for the concerned companies, the criticism of a two-tiered definition of an ‘undertaking’ is not apt for describing the essential problem of assessing the concept of ‘economic entities’ via the fact of an ‘undertaking’.¹⁰⁴⁷

§ 3. The Ambivalent Criteria for the Existence of an ‘Economic Entity’ between Companies of a Corporate Group under Current European Practice

The assessment of corporate groups on the basis of ‘an undertaking,’ increasingly practiced by the Commission and the CFI¹⁰⁴⁸ in fact amounts to a variation of the necessary functional

¹⁰⁴³ *Buntscheck*, Konzernprivileg, 93.

¹⁰⁴⁴ Cf. *Leo*, Kartellrundschaue, Heft 8, 1966, 12, 15 f, with reference to a ‘janus-faced’ definition of this term. See furthermore, *Harms*, Konzerne, 104f; *Goyder*, EC Competition Law, 91; *Karl*, Zusammenschlussbegriff, 79; and critically *Emmerich*, in: Dausen, Handbuch des EU-Wirtschaftsrechts, (1999), para. 66.

¹⁰⁴⁵ Thus, *Buntscheck*, Konzernprivileg, 93.

¹⁰⁴⁶ Likewise already *Mailänder*, Gemeinschaftskommentar, 3rd ed. (1972), Art 85 EWGV; furthermore see *Lübbig*, in: Wiedemann, Handbuch, § 7, para. 2; *Emmerich*, in: Immenga/Mestmäcker, Art 85 (1), para. 53; and for German antitrust law: *Götz/Rieger*, JuS 1968, 395, *Immenga*, in: Immenga/Mestmäcker, §1 GWB, para 211; as well as *Köhler*, NJW 1978, 2473, 2479, and *Langen/Niederleithinger/Ritter/Schmidt*, §1 GWB, para. 7.

¹⁰⁴⁷ Similarly, *Buntscheck*, Konzernprivileg, 94.

¹⁰⁴⁸ The ECJ itself is explicitly unclear on this precise determination. For a critique of the ECJ’s assessment in this regard see e.g. *Sander*, Das Konzernprivileg im Europäischen und Österreichischen Wettbewerbsrecht, OZK 2008, 20 (27).

determination of this term in an attempt to overcome specific legal problem issues.¹⁰⁴⁹ According to settled case-law, any form of economic activity on the market is sufficient for the definition of an ‘undertaking’ in the sense of European competition law.¹⁰⁵⁰ As this functional understanding of the term serves the purpose of separating the application scope of the competition provisions from the area of private consumption and sovereign acts of the member states,¹⁰⁵¹ it merely fulfills a ‘threshold function.’¹⁰⁵² Note that this functional understanding of the term should not be misused for disregarding the appropriate legal entity that is capable of adopting independent decisions.

§ 3.1. The Practice of Equalizing ‘Economic Entities’ with a Unitary Undertaking

Arguably, the frequent formulations of the European institutions alleging that corporate groups constitute a ‘single economic entity’ and *therefore* a unitary undertaking in the sense of European competition law do seem to speak in favor of assessing relations between affiliated companies upon the fact of an ‘undertaking’. Apart from the necessity of attributing the term of an ‘undertaking’ a unique understanding in EU competition law there are nevertheless a **number of reasons against** the position of equalizing the concept of an economic entity with an ‘undertaking’.

First of all, this terminological equalization does not appropriately reflect the Court’s perception of a ‘single economic entity’. In its decisive judgment in the case of *Viho* the Court explicitly left open which fact of Art 101 (1) TFEU was to be pertinent for the application of the so-called ‘group privilege’, and thus the determination of a ‘single economic entity’ for this specific legal issue of assessment. Rather, the Court held that the existence of an economic entity “*prevents the provision’s application*”.¹⁰⁵³ As outlined above, this formulation indicates a necessary ‘teleologic reduction’ of the provision that cannot be explained differently than by the spirit and purpose of the cartel ban.¹⁰⁵⁴

Secondly, the arbitrariness with which the Community institutions apply the concept of a ‘single economic entity’ under the pretense of a ‘unitary undertaking’ on corporate groups is striking. Hereby it is often not distinguished between the different criteria for the inapplicability of Art 101 (1) TFEU on the one side, and the attribution of liability between legally separate entities of a corporate group on the other side. In this way the Commission and the Courts have argued for an application of the concern-privilege by citing decisions concerning an attribution of liability between group companies and vice versa.¹⁰⁵⁵ Considering the essentially distinct legal problem issues treated under the cue of an ‘economic entity’ however, it is evident that this is by no means a homogeneous doctrine making the treatment of corporate groups as unitary

¹⁰⁴⁹ Cf. *Buntscheck*, Konzernprivileg, 91.

¹⁰⁵⁰ Likewise *Schröter*, in: GTE, preliminary remarks to Arts 85-89, para. 21.

¹⁰⁵¹ On this aspect see however *F.-J. Säcker*, Grundlagen der Wettbewerbstheorie: Materialien zum deutschen und europäischen Wettbewerbsrecht, available at: <http://web.fu-berlin.de/iww/downloads/skript-wettbr2011.pdf>.

¹⁰⁵² Cf. *Gleiss/Hirsch*, EG-Kartellrecht, Art 85, para. 4.

¹⁰⁵³ See ECJ of 24.10.1996, C-73/95, *Viho*, [1996] ECR I-5472, para. 17.

¹⁰⁵⁴ In detail, see 3.1.1.3. below; likewise *Emmerich*, in: Immenga/Mestmäcker, (2007), Art 81 (1), para. 54 f; With a different assessment of the Court’s case-law, but in effect the same conclusion, see *Buntscheck*, Konzernprivileg, 92 ff. Reluctantly: *Roth/Ackermann*, in: Frankfurter Kommentar, Grundfragen Art 81 (1) EG-Vertrag, para. 68.

¹⁰⁵⁵ See 2.2.

‘undertakings’ a compulsory requirement.¹⁰⁵⁶ The different cases of applying the concept of an ‘economic entity’ thus essentially depend on the particular legal issue at stake.

The equalization of ‘economic entities’ with the fact of an ‘undertaking’ for different areas of European competition law has sometimes been justified by the argument that the benefit of exempting corporate groups from the scope of Art 101 (1) TFEU should in return lead to the necessity of recognizing the ‘disadvantageous effects’ of corporate affiliations.¹⁰⁵⁷ At times, the European institutions did not even explicitly take recourse to the concept of an ‘economic entity’, but rather qualified the legally separate group companies *de facto* as unitary ‘undertakings,’ consequentially attributing conduct and liability between them.¹⁰⁵⁸ This practice however lacks of an objective justification based on the regulatory purpose of the provision.¹⁰⁵⁹

§ 3.2. The Notion of ‘Control’ Requiring a Differentiated Assessment

Even if it is correct that both legal issues assessed by employing the term of an ‘economic entity’ under Art 101 (1) TFEU ultimately depend on the respective relationship of ‘control’ between economically affiliated undertakings, it should not be overlooked that they are subject to different legal criteria. While for the purpose of applying the ‘group-privilege’ a teleologic reduction of Art 101 (1) TFEU is necessary, the correct addressee who may be held responsible for a form of culpable behavior is to be determined for attributing liability.

The way in which the European antitrust institutions nevertheless assess this relationship of control between affiliated undertakings often remains unclear. The notion of ‘decisive influence’ is regularly assessed by a mere citation of the common principle according to which this form of intrusive control may be assumed “*where an undertaking determines the conduct of another in such a way that the latter is incapable of determining autonomously its conduct on the market*”.¹⁰⁶⁰

A clear scheme of assessment for the critical form of control on a case-by case basis cannot be deduced from existent case law. While it is correct that both legal issues determining the application of Art 101 (1) TFEU on separate legal entities of a corporate group essentially depend on the concept of ‘control’, it is dogmatically inconsistent to assess them using the same criteria under an allegedly consistent concept of a ‘single economic entity’.

The lack of a comprehensible assessment of control for these two distinct legal issues becomes particularly evident when regarding the way in which a legal presumption for the assessment of the control relationship between companies of a corporate group has recently been reinforced on the basis of mere ownership criteria. The custom of increasingly equalizing the existence of corporate affiliations with the concept of an ‘economic entity’ on the basis of

¹⁰⁵⁶ *Buntscheck*, Konzernprivileg, 101.

¹⁰⁵⁷ This entails the possibility of an attribution of responsibility with all punitive consequences. See Statement of the Commission in: *Imperial Chemical Industries vs. Commission*, C-48/69, ECJ of 14.7.1972, ECR- 619, 634; likewise *Menz*, Wirtschaftliche Einheit, (2004), 121, reasoning for the necessity of uniform criteria of an economic entity for both issues (i.e. the exemption of group-internal agreements and the attribution of conduct and liability) in EU competition law. Similarly *Potrafke*, Kartellrechtswidrigkeit konzerninterner Vereinbarungen, (1991), 183 and 259 f.

¹⁰⁵⁸ See *Buntscheck*, Konzernprivileg, *supra* note 456.

¹⁰⁵⁹ See *Gleiss/Hirsch*, EG-Kartellrecht, Art 85 (1), para. 56; Likewise in effect: *Lübbig*, in: Wiedemann, Handbuch, § 7, para. 2 (explicitly *supra* note 194) and *Emmerich*, in: Immenga/Mestmäcker, Art 81 (1) EGV, para. 55 f.

¹⁰⁶⁰ See ECJ of 14.7.1972, C-48/69, *ICI*, [1972] ECR-619, para. 132.

mere shareholding participation and conferring upon this the definition of an ‘undertaking’ in the sense of European competition law is legally precarious. The resulting creation of ‘joint and several liability’ under the pretense of a common concept of an ‘undertaking’ has already been criticized as doubtful from a general principles point of view.¹⁰⁶¹ This is due to the fact that this form of structural liability is not only extrinsic to the principles of European competition law, but also negates precise conditions of procedural law, namely the prerequisite of personal liability.¹⁰⁶²

While the creation of legal presumptions essentially fulfills the purpose of aiding the Commission in alleviating its burden of proof under current procedural law, it should not replace the institution’s obligation to substantiate its decision.¹⁰⁶³ Generally held formulations under the pretense of an established legal concept should thus be rejected.¹⁰⁶⁴

The problem of establishing a legal presumption of ‘decisive influence’ upon equalizing an ‘economic entity’ with a unitary ‘undertaking’ becomes evident upon the following **two aspects**.

First, it seems to legally enable the conferral of the decisive criterion of ‘control’ from one specific issue of assessment, that is a teleologic reduction of Art 101 (1) TFEU’s application range, to the explicitly different problem of determining the correct legal entity responsible for an illicit conduct in an affiliated group of companies.

At this point it must be reminded that a parent company’s mere *possibility* to exert decisive influence is principally sufficient for the application of the so-called ‘concern, or group-privilege’.¹⁰⁶⁵ It is not relevant whether the parent company makes use of its opportunity to issue legally binding instructions.¹⁰⁶⁶ This is due to the fact that any ‘residual’ competition worth protecting does not exist between a dominant company and its subsidiaries, which are otherwise left a distinguished amount of independence to determine their conduct on the respective market sector of activity. The ultimate parent company possesses the means and possibilities to abolish this decision upon strategic considerations any time.¹⁰⁶⁷ It would thus be economically inappropriate to ‘punish’ the dominant company of the group for conceding its affiliated group undertakings a certain scope of autonomous decision-making by denying the application of the ‘concern-privilege’.¹⁰⁶⁸

For the issue of attributing anticompetitive conduct between corporate group undertakings, however, attention must be paid to the fact that the characterization of decisions in European competition law as ‘criminal-akin’ charges necessitates the consideration of general legal principles for determining the preconditions of complicity or perpetration.¹⁰⁶⁹ The fining of companies must hereby suffice the principle of *nulla poena sine culpa*, also pertinent on a

¹⁰⁶¹ See 2.1.2. § 2.2. See also *Steinle*, Kartellgeldbußen, in: Europäisches Wirtschafts- und Steuerrecht, Vol. 15/3, 2004, 10; *Heinichen*, Unternehmensbegriff und Haftungsnachfolge im europäischen Kartellrecht, [hereinafter cited as: *Heinichen*, Unternehmensbegriff], (2011), 26.

¹⁰⁶² See 2.2.2.2. above.

¹⁰⁶³ See already *Riesenkampff*, Haftung der Muttergesellschaft, WuW 4/2001, 357 f.

¹⁰⁶⁴ Critically with regard to the regularly lacking reasons of the Commission for the presumption of an ‘economic entity’ in the context of an attribution of liability see *Dannecker/Fischer-Fritsch*, Das EG-Kartellrecht in der Bußgeldpraxis [hereinafter cited as: *Bußgeldpraxis*], (1989) 277, as cited by *Buntscheck*, 101.

¹⁰⁶⁵ See *Schroeder*, in: Wiedemann, Handbuch, § 8, para. 7.

¹⁰⁶⁶ Thus correctly *Gleiss/Hirsch*, EG-Kartellrecht, Art 85, para. 196 f; *Fleischer*, AG 1997, 491 (500f.); *Mestmäcker/Schweitzer*, § 8, para. 46, 50; *Stockenhuber* in: Grabitz/Hilf, Art 81, para. 167; differently *Schröter* in: von der Groeben/Schwarze, Art 81 (1), para. 109.

¹⁰⁶⁷ Thus, *Schroeder*, in: Wiedemann, Handbuch, § 8, para. 7.

¹⁰⁶⁸ In more detail, see § 1.3.3. below.

¹⁰⁶⁹ See *Pohlmann*, Unternehmensverbund, 363 f.

European level.¹⁰⁷⁰ This is particularly relevant for determining the concept's scope of application in regard to third country undertakings.¹⁰⁷¹ The extraterritorial application of Art 101 (1) TFEU should furthermore not be extended to foreign parent companies under the facade of an 'economic entity' without taking into account standards of international law.¹⁰⁷²

A controlling company's mere opportunity to exert decisive influence does not fulfill the precondition of fault, essentially preconditioned by Art 23 (1) of Regulation No. 1/2003 for holding a company liable.¹⁰⁷³ The opposite view effectively disregards that this opportunity is in fact inherent to every parent-subsidiary relationship,¹⁰⁷⁴ thus creating responsibility on the basis of plain structural criteria.

From this analysis, denoting that a differentiated assessment of 'corporate control' is in fact necessary for an appropriate application of the concept of a 'single economic entity', the **second** problem of equalizing the term of an 'economic entity' with that of an 'undertaking' becomes evident. The approach bears the danger of concealing the concrete legal considerations of its application to essentially different issues of assessment in European competition law by a formulaic reference to the term of an 'undertaking'.¹⁰⁷⁵ From the notion of an 'undertaking', a conclusion is drawn not only in regard to the legal conception of a corporate group, but also for the specific conduct of its legally separate parts. This evidently conceals the necessary substantiation of the facts of a specific case of assessment. Especially the Courts' succinct general formulations, for instance in the case of *Viho*, asserting it to be apparent from the very text of Art 101 (1) TFEU "[that the provision] does not apply to conduct which is in fact performed by an 'economic unit'",¹⁰⁷⁶ illustrates the legal hazard of such metaphoric formulations.

This approach may furthermore not be justified upon an allegedly increased level of legal certainty, or a facilitation of the provision's application.¹⁰⁷⁷ The Court's recent approval of a legal presumption that essentially disregards the separate incorporation of a parent company and its wholly-owned subsidiary, has shown that a certain hazard of ignoring basic legal conditions of procedural law by an extensive application of the concept of an 'undertaking' cannot be denied.

As illustrated by the criticism of recent case law above,¹⁰⁷⁸ this creation of a legal presumption on the basis of mere structural criteria, which by their very nature are in fact difficult to rebut, casts doubt on the Court's diligence of employing the concept of an 'undertaking' in an appropriate manner for so-called 'economic entities'. Similar to the ambivalent formulation of necessarily exempting 'economic entities' from Art 101 (1) TFEU, the Court's assessment of the pertinent principles for disregarding the legal separation between companies of a corporate group does not remain free from contradictions.¹⁰⁷⁹

¹⁰⁷⁰ *Buntscheck*, Konzernprivileg, 101.

¹⁰⁷¹ See *Emmerich*, in: Immenga/Mestmäcker, Art 81 (1) EGV, para. 50 and in detail under 2.2.2. below.

¹⁰⁷² See 4.2. below. Cf. also *Rehbinder*, in: Immenga/Mestmäcker, EG-Wettbewerbsrecht, Einl., para. 50.

¹⁰⁷³ See *Mestmäcker/Schweitzer*, Europäisches Wettbewerbsrecht, § 21, para. 17. For the exact preconditions see *Papakiriakou*, Das Europäische Unternehmensstrafrecht in Kartellsachen, [hereinafter: Unternehmensstrafrecht], (2002), 174.

¹⁰⁷⁴ See *Blumberg*, The Law of Corporate Groups, (1987), Vol III (Substantive Law), § 6.02, 114.

¹⁰⁷⁵ Cf. *Mestmäcker/Schweitzer*, Europäisches Wettbewerbsrecht, 195; *Pohlmann*, Unternehmensverbund, 41 and *Buntscheck*, *ibid.*

¹⁰⁷⁶ See CFI of 12.1.1995, T-102/92, *Viho*, [1996] ECR II-17, para. 54, as cited in this regard by *Buntscheck*, Konzernprivileg, 102.

¹⁰⁷⁷ For this view e.g. *Harms*, Entwicklung des Wettbewerbsrechts, 178.

¹⁰⁷⁸ See the discussion of Case C-97/08 P, *Akzo Nobel vs. Commission*, [2009] I-8237 under 2.2.2.2. above.

¹⁰⁷⁹ Likewise for this second aspect of consideration *Riesenkampff*, Haftung der Muttergesellschaft, WuW 4/2001, 357; *Dannecker/Fischer-Fritsch*, Bußgeldpraxis, 262, 273; *Papakiriakou*, Unternehmensstrafrecht, 162 f.

Finally it should be noted that the stereotype-like reference to an ‘undertaking’ has also been criticized for the similar topic of **commercial agents**. In today’s various modes of marketing products and services, producers do not necessarily engage subsidiary companies for the sale and distribution of their commercial products.¹⁰⁸⁰ The appointment of commercial agents is therefore a habitual practice for the purpose of distributing or marketing specified products. Hereby, agency agreements cover the situation in which a legal or physical person (the agent) is vested with the power to negotiate and/or conclude contracts on behalf of another person (the principal), either in the agent’s own name or in the name of the principal, for the

- purchase of goods or services by the principal, or
- the sale of goods or services supplied by the principal.¹⁰⁸¹

The Commission has dealt with the assessment of agency agreements for the purpose of an effective enforcement of European antitrust law for over forty years now.¹⁰⁸² In regard to the application of Art 101 (1) TFEU on agreements between commercial agents and their principals, the ECJ had originally ruled on the provision’s inapplicability at least for those cases in which the agent was ‘incorporated’ into the business of its principal.¹⁰⁸³ Because the agent was hereby attributed a mere ‘auxiliary’ function, making an independent decision-making of the latter impossible, the business and the agent were regularly assessed to constitute a ‘single economic entity’.¹⁰⁸⁴ For the principal this is of vital importance not only with regard to the possibility of including a non-competition clause or restraining the activity of its agents to a certain geographic area.¹⁰⁸⁵ In literature, this approach has nevertheless been criticized for several reasons.¹⁰⁸⁶

On the one hand, it was questioned whether this precondition could be fulfilled by agents operating for more than one or even several principals.¹⁰⁸⁷ Even if this is usually the case in practice, neither the CFI nor the ECJ have articulated a final opinion on this matter.¹⁰⁸⁸ On the other hand, some authors disapproved of the fact that the Court endorsed a strictly adjective

¹⁰⁸⁰ Cf. *Kirchhoff* in: Wiedemann, Handbuch des Kartellrechts, § 10, para. 1.

¹⁰⁸¹ Commentary on the Commission Guidelines for vertical restraints, [COM (2000/C 291/01) of 13.10.2000] para. 12.

¹⁰⁸² See *Lotze*, Handelsvertreter-und Kartellrecht, available at: http://www.aulinger.eu/pdfs/mandantenbriefe/Mandanteninformion_September_2008.pdf.

¹⁰⁸³ See originally ECJ of 13.7.1966, joined cases C-56 & 58/64, *Consten Grundig vs. Commission*, [1966] ECR 321, 388 f; and C-32/65, *Italian Republic vs. Council of the European Community*, [1966] ECR 457, 485 f.

¹⁰⁸⁴ See e.g. *Kirchhoff*, in: Wiedemann, Handbuch des Kartellrechts, § 10, para. 1; *Wish*, EC Competition Law, (2009), 81 f and *Faull/Nikpay*, The EC Law of Competition, (2007), 9.169 f.

¹⁰⁸⁵ See *Lotze*, *ibid*.

¹⁰⁸⁶ See *Kirchhoff*, in: Wiedemann, Handbuch des Kartellrechts, § 10, para. 11 ff; *Kapp*, EG-Kartellrechtliche Fehlentwicklung bei Handelsvertreterverträgen, WuW 10/1990, 814 (820ff).

¹⁰⁸⁷ Even though the Commission’s Communication is principally applicable to agents representing multiple firms, the Commission seems to subject relations in which the agent is active for least two concurring principals to Art 101 (1) TFEU: see Comm Dec. 2.1.1973, *European Sugar Industry*, [1973] OJ No.L 140/17. The ECJ consequently approved the Commission’s view that commercial agents, which were active on the same product market in the form of an independent dealer could not be regarded to perform the necessary auxiliary function in order to be exempted from Art 101 (1) TFEU (See ECJ of 16.12.1975, joined cases 40/73-48/73, 50/73, 54/73 bis 56/73, 111/73, 113/73 and 114/73 a.o., *Suiker Unie a.o. vs. Commission*, [1975] ECR 1663, WuW/E EWG/MUV 347, 372]. Nevertheless, it must be mentioned that this case concerned a ‘producer cartel’ and cannot therefore be seen as decisive for the above-mentioned question.

¹⁰⁸⁸ *Kirchhoff*, in: Wiedemann, Handbuch des Kartellrechts, § 10, para. 13.

point of view, referring to structural criteria, and thus impeding a predictable and comprehensible consideration on the basis of factual realities.¹⁰⁸⁹

According to the dominant view in literature, the precondition of a (genuine) commercial agent should therefore also be fulfilled by commercial agents operating for several principals.¹⁰⁹⁰ Thus, irrespective of the commercial agent's 'incorporation' into the business of its principal, agency agreements should be exempted from Art 101 (1) TFEU where the risks of the respective agent's activity are in fact borne by the principal.¹⁰⁹¹ According to this *functional approach*, it should be decisive which task(s) the agent exercises on the particular market.¹⁰⁹² This functional assessment of agency agreements, which has now explicitly been endorsed by the Commission Guidelines,¹⁰⁹³ is furthermore congruent with the consideration of the pertinent control relationship between subsidiaries and their dominant parent companies for the purpose of applying Art 101 (1) TFEU.¹⁰⁹⁴ The assessment whether a principal therefore essentially carries the risks of its agent's commercial activity could hereby be made in line with the assessment of a parent company's intrusive amount of control required for the concept of an 'actual exercise of decisive influence'.¹⁰⁹⁵ This shows that the precondition of the agents' incorporation into the business organization of the principle is void.¹⁰⁹⁶

In respect to the ever more stringent approach of attributing anticompetitive conduct under the pretense of a 'single economic entity', it may finally be questioned whether the assessment of antitrust liability on the basis of mere structural criteria in recent case-law¹⁰⁹⁷ conversely leads to the principal undertaking's increased hazard of being held liable for their appointed agent's conduct. Even though this question has been highly debated in practice,¹⁰⁹⁸ the ECJ's final viewpoint on this matter must yet be awaited. In regard to the common reference of 'corporate control' for attributing antitrust liability between separate legal entities, essentially the same points of critique as for the attribution of subsidiarial conduct are justified in substance.¹⁰⁹⁹

§ 4. Intermediate Result

¹⁰⁸⁹ See e.g. *Kapp*, WuW 10/1990, 814 (819ff).

¹⁰⁹⁰ For a detailed assessment of the distinction of genuine commercial agents from so-called 'authorized dealers', who essentially bear the (financial) risk of their conduct on the market, see: *Kapp*, ibid, 816.

¹⁰⁹¹ *Kapp*, WuW 10/1990, 820.

¹⁰⁹² See *Kirchhoff*, in: Wiedemann, Handbuch des Kartellrechts, § 10, para. 14.

¹⁰⁹³ See Commission Notice of 13.10.2000: 'Guidelines on vertical restraints' (COM [2000/C 291/01], OJ Nr. C 291 of 13.10.2000), particularly para. 16, now renewed by the Commission Guidelines on Vertical Restraints of 10.5.1010, OJ [2010] Nr. C 130/01, 1 [hereinafter Commission Guidelines 2010].

¹⁰⁹⁴ Cf. Commission Guidelines 2010, para. 18. In detail see *Schultze/Pautke/Wagener*, Vertikal-GVO (20110, para. 274, as cited by *Gruber*, Der Handelsvertreter im Wettbewerbsrecht, OZK 2012/1, supra note 8).

¹⁰⁹⁵ On a detailed assessment of this aspect for the possibility of attributing liability between parent and subsidiary companies, see 3.2.1.2. below.

¹⁰⁹⁶ In favor of this assessment, see also CFI of 15.9.2000, T-325/01, *Daimler Chrysler vs. Commission*, [2005] ECR II-3319, asserting in para. 116 that the Commission was wrong to assimilate German agents with Belgian and Spanish dealers and to find that these dealers were as strongly *integrated* into the Mercedes distribution system as the German agents.

¹⁰⁹⁷ See ECJ, Case 97/08 P, *Akzo Nobel NV vs. Commission*, [2009] ECR I-08237.

¹⁰⁹⁸ See only the most recent Decision of the Commission of 30.6.2010, in case COMP/38.344, *Prestressing Steel*, against which the concerned undertakings have appealed to the ECJ (which has at the termination of this analysis not been reported yet). (For the final report of the Hearing Officer in this case see: OJ Nr. C339/5 of 19.11.2011).

¹⁰⁹⁹ See 2.2.2.2, § 2.

The functional concept of an ‘undertaking’ in European competition law effectively refers to ‘economic entities’ that are factually capable of exercising the types of illicit conduct prohibited by the competition rules, hereby constituting the ‘origin of anticompetitive behavior’.¹¹⁰⁰ In situations in which an autonomous decision-making by the subsidiary company is - legally or factually - verifiably impossible in regard to the infringement committed, the subsidiary cannot be the correct addressee of Art 101 (1) TFEU. This is furthermore the reason that the ban on cartels has been ascertained to be applicable to the separate companies of a corporate group only in a ‘confined manner’.¹¹⁰¹

In the context of corporate groups therefore, any of the following structures of companies have been treated as an ‘undertaking’ *in the sense of* European competition law:

- the entire corporate group consisting of a parent company and its direct, or indirect subsidiary companies;
- the parent or holding company of a corporate group;
- intermediate holding companies;
- the subgroups or sub-divisions formed by such holding companies and their subsidiaries, and finally
- the individual subsidiary companies themselves.¹¹⁰²

The concept of an ‘economic entity’ therefore enables the Commission to determine the organizational conception of a corporate group by ascertaining the allocation of tasks and responsibilities between them for an effective application of the antitrust provisions.¹¹⁰³ This practice must again appropriately allude to the respective relationship of control, namely the amount or degree of ‘decisive influence’ a controlling company exerts on its subsidiary companies.

Consequently, the undertakings of a corporate group may be assessed to constitute a ‘single economic entity’ where the amount of influence exerted by the ‘controlling’ company of the group leaves no room for the controlled company to be regarded as an autonomous market participant. The appropriate attribution of responsibility within a concern must nevertheless meet the additional requirements of Regulation No. 1/2003, in order to comply with ‘general principles’ of European Union law. This distinct point of reference for the determination of ‘control’ is not only favorable, but also essential for a consistent application of the concept of an ‘economic entity’ in European competition law.

This degree of ‘control’ must appropriately be assessed on a case-by-case basis, which should nevertheless follow a coherent **general method**. Such an approach is necessary in order to grant a consistent application of the concept of a ‘single economic entity’, essentially ensuring legal certainty.

¹¹⁰⁰ Thomas, Unternehmensverantwortlichkeit (2005), 39, as cited by Lehner, Haftung für europarechtliche Kartell- und Wettbewerbsverstöße nach Umstrukturierungen oder Unternehmensübertragung, ÖZK 2011/5, 163.

¹¹⁰¹ Cf. Schroeder, in: Wiedemann, Handbuch, § 8, para. 2.

¹¹⁰² Cf. Commission Decision of 19.9.1994, 94/601/EC of 13.7.1994, Case IV/C/33.833, *Cartonboard*, OJ Nr. L 243, *ibid*.

¹¹⁰³ Cf. Steinle, Lassen sich Kartellverstöße ‚ausgliedern‘?, in: FS Bechtold (2006), 541 (542).

3.1.1.3. The Fact of 'Distortions to Competition'

Art 101 (1) TFEU interdicts agreements between undertakings, and concerted practices “*which have as their object or effect the prevention, restriction, or distortion of competition within the internal market*”.¹¹⁰⁴

According to Art 3 TFEU, one of the European Union's main tasks is the “*establishment of competition rules necessary for the functioning of the Internal Market*”. In addition, Art 5 TFEU obliges the member states to coordinate their economic policy with that of the Union, for which purpose the Council may adopt measures and broad guidelines. The formulation of these provisions confirms the orientation of European competition law to the foundations of free market economics, essentially pursued since the Treaties' creation.¹¹⁰⁵

The dogma of free competition is nevertheless not a general principle of order for the organization of all sectors of society,¹¹⁰⁶ but rather an economic principle for the guarantee of an effective market economy.¹¹⁰⁷ The principle of free competition¹¹⁰⁸ therefore cannot be considered as a means to its own end,¹¹⁰⁹ but serves as an effective standard for the establishment and sustainment of the Common Market. The provisions on unfair competition fulfill the aim of preserving the functioning of an effective market economy, protecting it from being removed by acts of individual market participants.¹¹¹⁰

These considerations clarify why the fact of a 'distortion to competition' has been considered the central point of reference for the application of Art 101 (1) TFEU in most cases.¹¹¹¹ This fact seems particularly apt to serve as a point of reference for a restrictive, telolologic interpretation of the provision's application range, necessary for the consideration of group-intern requirements.¹¹¹²

¹¹⁰⁴ See *Faull/Nikpay*, EC Competition Law, (2007), Art 81, § 3.129.

¹¹⁰⁵ In regard to the fundamental freedoms, see e.g. *Estorff/Molitor*, in: Groeben/Thiesingen/Ehlermann, Art 3a, para. 18 f; critically on the interpretation of these principles previous to their explicit establishment by the Treaty of Maastricht, see however *Everling*, *Europarecht*, (1982), 313 f, as cited by *Buntscheck*, *Konzernprivileg*, 104.

¹¹⁰⁶ These comprise, for instance, the protection of the environment, social security or cultural issues. (For a detailed assessment of the *ordo-liberal* view of competition law termed by German lawyers and its impact on the European competition principles see e.g. *Gerber*, *Law and Competition in Twentieth Century Europe – Protecting Prometheus*, (1998), 356-357).

¹¹⁰⁷ See already *Böhm*, *Der vollständige Wettbewerb und die Antimonopolgesetzgebung*, WuW 1953, 178. For this reason, it has, for instance, been argued that existing specific exemptions for the energy market, the water and waste industry, the agricultural sector, as well as for the area of insurance companies or banks are to be abolished insofar as they are not necessary for the assurance of services of a 'general public interest' in the sense of Art 106 TFEU. See *Säcker*, *Grundlagen der Wettbewerbstheorie: Materialien zum deutschen und europäischen Wettbewerbsrecht*, available at: <http://web.fu-berlin.de/iww/downloads/skript-wettbr2010.pdf>.

¹¹⁰⁸ The concept of free competition of course has its origin in socioeconomics as outlined by Adam Smith: see *Smith*, *An Inquiry into the Nature and Causes of the Wealth of Nations*, 1776, as cited by *Emmerich*, *Kartellrecht* (2008), 7.

¹¹⁰⁹ Cf. *Säcker*, *ibid*, 26.

¹¹¹⁰ Cf. originally *Böhm*, WuW 1953, 178; *Günther*, ZHR 125 (1962), 38 ff; *Hoppmann*, in: *Wettbewerb als Aufgabe* (1968), 61 ff; For the program of European economic policy for Arts 101 ff TFEU see already OJ Nr. 79 of 25.4.1967, at 1521/67.

¹¹¹¹ *Emmerich*, in: *Immenga/Mestmäcker*, *EG-Wettbewerbsrecht*, Art 81 (1), para. 132; For a detailed evaluation of the consideration of this fact's assessment see *Faull/Nikpay*, *EC Competition Law*, (2007), Art 81, § 3.129 f.

¹¹¹² *Buntscheck*, *Konzernprivileg*, 105.

§ 1. The Structure and Purpose of the Fact of a ‘Prevention, Restriction or Distortion of Competition’

According to the wording of the provision, the restraint of competition constituent for Art 101 (1) TFEU’s application is to comprise ‘preventions, restrictions, and distortions of competition,’ suggesting an equal status of these terms.¹¹¹³ The precise delineation of these forms of anticompetitive conduct nevertheless remains unclear and has, in practice, lead to different evaluations justifying the provision’s application range.¹¹¹⁴

In this way, it has been contentious whether the term of a ‘distortion’ of competition is to be attributed an independent meaning under the provision, or whether it is to be understood as a generic term indicating a ‘prevention or restriction’ of competition. While the previous system of the competition principles seemed to speak for such a differentiated understanding pointing to distinct grades of impediments to competition,¹¹¹⁵ this discussion is of little practical relevance.¹¹¹⁶ The interpretation of these terms’ precise meaning rather amounts to a self-determining assignment, regularly underlying an essential re-orientation, that is, the ever-changing perception of the objective of **competition**.¹¹¹⁷

Of critical significance in this regard is the question what determines ‘undistorted competition’, or put another way: what is the provision’s ultimate protection aim?¹¹¹⁸ A number of assertions have been made in this respect. Some attribute to the European competition rules the purpose of maximizing consumer welfare,¹¹¹⁹ while others turn to the *ordo-liberal* view under which the aim of competition law is to control private economic power.¹¹²⁰ Alternatively it has been argued that the purpose of Articles 101 and 102 TFEU is to protect the ‘process of rivalry itself,’¹¹²¹ or, as indicated above, that ‘competition’ essentially functions as a tool for the attainment of the overarching objectives of the European Union, such as market integration.¹¹²²

¹¹¹³ Cf. *Lübbig*, in: Wiedemann, Handbuch, § 7, para. 20; *Buntscheck*, *ibid*.

¹¹¹⁴ See *Gleiss/Hirsch*, EG-Kartellrecht, Art 85, para. 118.

¹¹¹⁵ Particularly Ex-Art 3 (1) lit. g ECT spoke of the necessary aim of preventing ‘distortions to competition’ under the system of competition law, which seemed to suggest this form of anticompetitive conduct to be of a general character, comprising all other forms of illicit behavior. In detail see *Buntscheck*, Konzernprivileg, 106 f.

¹¹¹⁶ See *Lübbig*, *ibid*. This is also affirmed by the lack of a comparative formulation under the newly established Treaty of Lisbon (TFEU). Even though it may be systemically comprehensible to cite the notion of a ‘distortion’ of competition as a general benchmark for this provision, its terms will therefore be used interchangeably for the purpose of the following analysis.

¹¹¹⁷ See *Emmerich*, in: Dausen (ed.), Handbuch des EG Wirtschaftsrecht, H I, § 1, para. 90; *ibid*, in: Kartellrecht, § 4, para. 31ff. For an overview of this discussion see also *Ackermann*, Rule of Reason, 86 ff; furthermore *Roth/Ackermann*, Art 81, para. 221 ff; *Schröter*, in: GTE, Art 81 (1), para. 84 ff.

¹¹¹⁸ See *Faull/Nikpay*, EC Competition Law, (2007), § 3.129.

¹¹¹⁹ For a critical assessment on this see *Katalin Judith Cseres*, Competition Law and Consumer Protection, (2005).

¹¹²⁰ On this conception see *Möschel*, Competition Policy from an Ordo Point of View, in: Peacock and Willgerodt (eds.): German Neo-liberals and the Social Market Economy, Macmillan, London (1989), as cited by *Faull/Nikpay*, *ibid*.

¹¹²¹ The Commission itself added an economic element to these ideas by arguing that the process of competition, understood in the process of rivalry between [independent] undertakings, produced the best economic results; see Report on Competition Policy, 1971 (Vol. I), as cited by *Faull/Nikpay*, EC Competition Law, (2007), § 3.132.

¹¹²² See *Böhm*, WuW 1953, 178; *Emmerich*, in: Dausen, Handbuch, H I § 1, paras. 94 ff; *Roth/Ackermann*, Art 81 (1) EG, paras. 222 ff; *Emmerich*, in: Immenga/Mestmäcker, Art 81 (1) EGV, paras. 139 ff.

The existent complexity of determining the concept of competition has various sources of cause. Primarily it should be mentioned that the general approaches to competition law, upon which a restriction or distortion of competition is established, are subject to constant change.¹¹²³ Therefore, the conception of a 'distortion of competition' requires a previous determination of 'competition'. Economic theory so far lacks an explicit definition of this term. It has therefore sometimes been questioned whether a definition is even desirable.¹¹²⁴ The Treaty likewise restricts itself to the postulation of 'fair competition',¹¹²⁵ or emphasizes 'free competition' as a constituent element of an open market economy, essentially aspired by the Treaty for the area of the various member states.¹¹²⁶

As mentioned above however, 'competition' does not constitute a standard worth attaining *per se*, but serves the formulation of pertinent principles of order in a free market society. The objectives of competition law can therefore not be exclusively determined by economic theory.¹¹²⁷ Rather, they are to be attained through the framework of this order. European competition law in this sense is effectively based on the legal order of the national member states, essentially determining its content.¹¹²⁸ In a well-developed liberal system of **private law**, in which the balance of interest between individuals is sufficiently established by autonomously negotiated exchange agreements, and the value of the individual goods determined upon the law of supply and demand, 'competition' is the essential element which institutionally warrants the market participant's mutual independence¹¹²⁹ and freedom of choosing their contracting partner.¹¹³⁰

This clearly indicates the interdependence of the economic foundations of the concept of competition determined by *ordo-liberalism* with that of general private law.¹¹³¹ This aspect of restraints on competition has nevertheless regularly been disregarded.¹¹³²

§ 2. The Protection of Economic Freedom and Competition

¹¹²³ *Emmerich*, in: Immenga/Mestmäcker, Art 81 (1) EGV, para. 132; *Eilmansberger*, How to Distinguish Good from Bad Competition Under Article 82 EC: In Search for Clearer and More Coherent Standards for Anticompetitive Behavior, in: *Common Market Law Review* 42, 129-177, (129 f).

¹¹²⁴ Thus e.g. *Hoppmann*, Wettbewerb als Norm der Wettbewerbspolitik, ORDO 18 (1967), 77 ff; *idem* in: *Grundlagen der Wettbewerbspolitik*, Schriften des Vereins für Sozialpolitik, N.F. Band 48 (1968), 9 ff; *Möschel*, Das Wirtschaftsrecht der Banken, in: *Wirtschaftsrecht und Wirtschaftspolitik*, Band 29 (1972), 342.

¹¹²⁵ See the preamble of the TFEU.

¹¹²⁶ Particularly Art 119 TFEU, as cited for the ECT (Art 4, section 2) by *Emmerich*, *ibid*.

¹¹²⁷ On the economic foundations of competition law see e.g.: *Emmerich*, *Kartellrecht*, (2008), p. 7 f; *Schmidt*, *Wettbewerbspolitik und Kartellrecht*, (2005), 3f.

¹¹²⁸ Cf. *Baumol*, *Welfare Economics and the Theory of the State*, (1955), 123ff; *Pahlke*, *Welfare Economics and Competition*, (1958), *Mestmäcker*, in: *FS Böhm* (1965), as cited by *Säcker*, *Grundlagen der Wettbewerbstheorie*, 26. In this regard it should be mentioned however that this assertion merely relates to its very general principles and objectives, as competition policy in fact constitutes the area of law that is 'communitarized' to the furthest extent.

¹¹²⁹ This may also be paraphrased as their relative powerlessness.

¹¹³⁰ *Säcker*, *Grundlagen der Wettbewerbstheorie*, 27.

¹¹³¹ See originally *Böhm*, *Wettbewerb und Monopolkampf*, 1933, 187 f.

¹¹³² On the pertinence of this position see however *Böhm*, *Demokratie und ökonomische Macht*, in: *Kartelle und Monopole im modernen Recht*, Bd I (1961), 3ff; *Hayek*, *Rechtsordnung und Handelsordnung*, in: *E. Streissler (Hrsg.), Zur Einheit der Rechts- und Staswissenschaften*, Müller (1967), Karlsruhe, 195-230; *Mestmäcker*, *JZ* 1964, 441 ff; *Biedenkopf*, in: *Festschrift für Böhm* (1965), 113 ff; *Fikentscher*, *Wettbewerb und gesetzlicher Rechtsschutz* (1958), 241; *Großfeld*, *WuW* 1968, 719, as cited by *Säcker*, *ibid*.

The Commission and the ECJ have substantiated the term ‘distortions to competition’ in a vast number of cases on the basis of Art 101 (1) TFEU.¹¹³³ However, the institutions have hereby avoided a fundamental statement on the content or nature of ‘competition’ as protected by the Treaty provisions.¹¹³⁴ In choosing a strict case-by-case assessment, European case-law and administrative practice does not remain free from inconsistencies and contradictions.¹¹³⁵ Thus, the perception of the ‘correct understanding’ of a ‘restriction of competition’ has essentially been based upon two distinct modes of consideration, braced by a number of additional requirements in the form of supportive criteria.

Motivated by the consideration of necessarily granting the individual market actors their right to freedom of contract,¹¹³⁶ the ECJ has on the one side emphasized the element of economic independence (that is, entrepreneurial freedom of action), as central for the term of a restriction of competition.¹¹³⁷ Thus, the ECJ has held that the competition principles must be understood in the light of their objective according to which “*each economic operator must determine independently the policy which he intends to adopt on the Common Market, including the choice of persons and undertakings to which he makes offers or sells*”.¹¹³⁸

Due to this postulate of **economic autonomy** the ECJ has assumed the existence of a ‘distortion’ to competition in case that the market-based freedom of action has been restricted for at least one of the undertakings participating in the agreement.¹¹³⁹ Where this restriction of economic independence has an ‘appreciable effect’ on competition within the Common Market, the fact of a ‘distortion’ to competition is fulfilled regardless of whether these effects are encountered by the participating parties or by third parties on the market.¹¹⁴⁰

Upon this last notion of an ‘effect’ on the level of competition in the Common Market however, the position of **third parties** on the market has sometimes been deemed essential for determining a ‘distortion’ to competition under Art 101 (1) TFEU in respect of the provision’s protection aim.¹¹⁴¹ Propagators of the latter view see the purpose of the cartel ban in the protection of third-party interests, including the range of action of the opposite party, thus

¹¹³³ For a detailed assessment of the various considerations in this regard: *Faull/Nikpay*, EC Competition Law (2007), Art 81, § 3.145 f.

¹¹³⁴ *Gleiss/Hirsch*, EG-Kartellrecht, Art 85, para.114; *Bunte*, in: Langen/Bunte, Art 85- Generelle Prinzipien, para. 36.

¹¹³⁵ Cf. *Lübbig*, in: Wiedemann, Handbuch, § 7, para. 21.

¹¹³⁶ See above on the ordo-liberal view on this interrelation of freedom of contract with the concept of competition.

¹¹³⁷ ECJ of 14.7.1981, C-172/80, *Züchner vs. Bayrische Vereinsbank*, [1981], ECR 2021 (2031), ECJ of 28.5.1998, C-7/95 P, *John Deree Ltd. vs. Commission*, [1998] ECR I-31111 (3163).

¹¹³⁸ ECJ of 16.12.1975, joined cases C-40-48,50,54-56, 111, 113 and 114/73, ‘*Suiker Unie*’ a.o. vs. *Commission*, [1975] ECR 1663, 1965, para. 173, as cited in this regard by *Buntscheck*, Konzernprivileg, 13.

¹¹³⁹ *Buntscheck*, *ibid.* In this regard, a ‘restriction’ of competition can be seen as identical with the restriction of the economic freedom of action of one of the undertakings involved in the measure: see, *Emmerich*, in: Dausen, Handbuch, H I § 1, para. 89 ff.

¹¹⁴⁰ See Commission Decision of 10.7.1985, V/31.029, *French inland waterway charter traffic: EE levy*, [1985] OJ Nr. L 219/35, 41, as cited by *Lübbig*, in: Wiedemann, Handbuch, § 7, para. 21.

¹¹⁴¹ See for instance ECJ of 29.10.1980, joined cases C-209-215 and 218/78, *Heintz van Landewyck Sàrl a.o. vs. Commission*, [1980] ECR-3125, 3263, para. 131. And insofar ambivalent, ECJ of 14.7.1981, C-172/80, *Züchner vs. Bayrische Vereinsbank*, [1981], ECR 2021, 2033, para. 20, as cited by *Buntscheck*, Konzernprivileg, 114.

assessing a 'distortion' of competition either additionally or exclusively¹¹⁴² in their effects on other market participants.

The European institutions tend to follow the former approach,¹¹⁴³ justifying the application of Art 101 (1) TFEU by a restriction of the 'freedom of action or contract' of one of the parties concerned,¹¹⁴⁴ and alluding to the detrimental effects of the agreement on third parties only in a second instance.

Even though the Commission has, in most of its decisions,¹¹⁴⁵ put emphasis on the fact that a 'distortion' of competition was effectuated by the agreement upon the *restriction of entrepreneurial freedom* of one of the parties involved, it has nevertheless generalized the reference to third-party effects in some of its guidelines on the application of Art 101 (1) TFEU¹¹⁴⁶ to a questionable extent. In this latter sense it has sometimes determined contracts guaranteeing the sole right of distribution to a respective party exclusively by its effects on the position of third parties under Art 101 (1) TFEU.¹¹⁴⁷

The inconsistency of this latter view with the wording of the Treaty is also made apparent by the fact that, unlike Art 102 TFEU, Art 101 TFEU does not establish the interdiction of corporate agreements upon the market power of the parties involved, or even upon the effect the agreement may generate on the market.¹¹⁴⁸ Likewise, the assertion that the 'objective' of Art 101 TFEU is to comprise the enhancement of consumer welfare,¹¹⁴⁹ though principally correct, should not be misunderstood as an indispensable point of reference for the assessment of a particular case.

Despite the fact that the consideration of these negative effects on the market¹¹⁵⁰ lacks of basic comprehensible criteria,¹¹⁵¹ the fundamental *purpose* of Art 101 (3) TFEU may be questioned upon this view. Furthermore, no reliable set of measures exists for guaranteeing that alleged efficiencies by principally 'distortive' agreements are reliably passed on to consumers, in this sense enhancing consumer welfare.¹¹⁵² Under the system of the Treaty, an appreciation of the advantages and disadvantages of an alleged 'anticompetitive' agreement must strictly be carried out on the basis of Art 101 (3) TFEU, in this way incorporating the 'rule-of reason' approach of this topic issue under US antitrust law into a norm of positive law.¹¹⁵³

In respect to these reflections, the Court has, in some instances, determined the nature of competition as protected by Art 101 (1) TFEU by the fact that:

¹¹⁴² In the latter sense, see for instance *Roth/Ackermann*, Art 81 (1) EG, para. 229 ff.

¹¹⁴³ See *Emmerich*, in: Immenga/Mestmäcker, Art 81 (1) EGV, para. 135 ff.

¹¹⁴⁴ See Comm. Dec. IV/A-00004-03344, *Grundig-Consten*, 23.9.1964, [1964] OJ Nr. 161/ 2545, 2547.

¹¹⁴⁵ See e.g. *Buntscheck*, Konzernprivileg, supra note 553.

¹¹⁴⁶ See Commission Guidelines of 6.1.2001, on the Applicability of Article 101 of the Treaty to Horizontal Co-operation Agreements [2001] OJ C/3/2, paras. 17-20, as well as its Communication of 27.4.2004, 'Guidelines on the Application of Art 101 (3) of the Treaty, [2004] Nr. C 101/97, 99, paras. 25 ff, as cited by *Emmerich*, in: Immenga/Mestmäcker, Art 81 (1) EGV, para. 144.

¹¹⁴⁷ Cf. *Emmerich*, *ibid*, para. 143.

¹¹⁴⁸ *Emmerich*, *ibid*, para. 145. For the necessity of an appropriate delineation of Art 101 and Art 102 TFEU for the purpose of determining the exemption of group-intern conduct see already page 20 f above.

¹¹⁴⁹ See Commission Guidelines, [2004] OJ C101/97, para. 13.

¹¹⁵⁰ (These are nevertheless regularly postulated by the Commission).

¹¹⁵¹ The model of 'perfect competition' does not constitute a practically reliable orientation for this purpose. See e.g. *Hildebrand*, The Role of Economic Analysis in the EC Competition Rules, (2009), 142 ff.

¹¹⁵² *Säcker*, Grundlagen der Wettbewerbstheorie, 29.

¹¹⁵³ On a detailed assessment of this problem issue see *Emmerich*, in: Immenga/Mestmäcker, Art 81 (1), paras. 246 ff; For a comparison to the European approach: *Fleischer/Körber*, Der Einfluss des amerikanischen Antitrust Rechts auf das Europäische Wettbewerbsrecht, WuW 6/2001, 6.

*“the requirement [...] that competition shall not be distorted implies the existence on the market of **workable** competition, that is to say the degree of competition necessary to ensure the observance of the basic requirements and the attainment of the objectives of the Treaty, in particular the creation of a single market creating conditions similar to those of a domestic market.”*¹¹⁵⁴

The different concepts of ‘workability’ of competition on ‘incomplete’ markets seek to create criteria for realizing the effects of a practically unattainable situation of ‘perfect competition’ to the furthest possible extent.¹¹⁵⁵ In case that a ‘distortion’ of competition may lead to economic ‘efficiencies’¹¹⁵⁶ that are to be attributed a higher value than the entrepreneurial freedom of action (i.e. the principal of corporate autonomy), this consideration must again be made under the comprehensive criteria of Art 101 (3) TFEU.¹¹⁵⁷

In general, such a consideration of ‘workability’-aspects has been employed by the Court in situations in which a distortion of competition would have to be assumed under a liberal understanding of competition.¹¹⁵⁸ Sometimes the Court has reasoned in a more general way that not every agreement between undertakings, by which the freedom of action of one of the parties concerned is restricted, is to necessarily lead to the application of the ban of Art 101 (1) TFEU.¹¹⁵⁹ Rather, the subsumption of an agreement under the said provision is to be carried out on the basis of an appropriate assessment of its general context, namely its objective as well as a consideration of the prevalent conditions on the pertinent market.¹¹⁶⁰

These scattered deliberations on ‘workability’-aspects by the Court on the basis of Art 101 (1) TFEU, effectively contrary to the system of the Treaty, nevertheless become comprehensible when regarding the previous allocation of competences under the Treaty:¹¹⁶¹ before the implementation of Reg. 1/2003 namely, the exemption of agreements on the basis of Art 101 (3) TFEU fell into the exclusive competence of the Commission.¹¹⁶² Especially in the course of preliminary reference procedures, the Court, following the genuine liberal understanding of competition, was nevertheless obliged to consider possible positive macroeconomic aspects on the basis of Art 101 (1) TFEU, thus allowing a more flexible employment of the norm. In case the Court hereby came to the conclusion that the Commission had not appropriately regarded these significant positive aspects of an agreement on the Common Market, thus failing to exempt it

¹¹⁵⁴ ECJ of 25.10.1977, C.26/77, *Metro vs. Commission*, [1977], ECR 1875, 1905, para. 20, as cited in this regard by *Buntscheck*, Konzernprivileg, 115.

¹¹⁵⁵ *Machlup*, HDSW 12 (1965), 36 (46) referring to *Clark*, Toward a Concept of ‘Workable Competition’ (Lecture before the American Economic Association 1939), AER 30 (1940), 241 ff; for German law see e.g.: *Katzenbach*, Die Funktionsfähigkeit des Wettbewerbs, (1967); critically *Heuß*, ORDO XVIII (1967), 411 ff; *Hoppmann*, Jb.N.St.179 (1966), 286; *Kaufer*, *ibid*, 242; positively *Schmidt*, WuW 1966, 699, 1967, 635, as cited by *Säcker*, Grundlagen der Wettbewerbstheorie, *supra* note 89.

¹¹⁵⁶ See however critically on the necessity considering these alleged ‘efficiencies’ *Säcker*, Grundlagen der Wettbewerbstheorie, (2010), 29; furthermore *Mestmäcker/Schweitzer*, Europäisches Wettbewerbsrecht, (2004), 46.

¹¹⁵⁷ *Säcker*, BB 1967, 681 (684 f); Likewise for German law: *Sandrock*, Grundbegriffe des GWB, 1968, 277 ff.

¹¹⁵⁸ *Gleiss/Hirsch*, EG-Kartellrecht, Art 85, para. 117.

¹¹⁵⁹ Cf. *Lübbig*, in: Wiedemann, Handbuch, § 7, para. 21.

¹¹⁶⁰ See ECJ of 19.2.2002, C-309/99, *Wouters*, [2002], ECR I-1577 (1688), para. 97; similarly, ECJ of 18.7.2006, *Meca-Medina and Majcen vs. Comm.*, [2006] ECR I-6991, para. 42.

¹¹⁶¹ Cf. *Buntscheck*, Konzernprivileg, 116.

¹¹⁶² See Art 9 (1) of Regulation No. 17 (Council Regulation No. 17 of 6.2.1962, OJ 13, 21.2.1962, p. 204/62, as last amended by Regulation (EC) No 1216/1999 (OJ L 148, 15.6.1999).

from the general ban on cartels, it assessed these effectively advantageous agreements on the basis of Art 101 (1) TFEU. Hereby the Court was able to permit the respective agreement despite its nature of restricting the freedom of action and decision-making of the concerned undertakings.¹¹⁶³

This situation was nevertheless abolished by Reg. 1/2003, replacing the centralized system of notification and authorization by a system of directly applicable exemptions.¹¹⁶⁴ The more recent considerations of the ‘general conditions on the market’ therefore merely state that the ECJ intends to amplify the so-called **postulate of corporate autonomy** by a consideration of the potential consequences of the respective measure on the future development of the Common Market.¹¹⁶⁵

Thus it becomes clear that the term of ‘distortion of competition’, in congruence with ECJ case-law, primarily is to be determined by the **purpose** of the competition provisions to comprehensively protect the individual undertaking’s *freedom of action*. Because additional scopes of action are to be generated by the creation of a ‘Common Market,’ the latter must be protected from its replacement by private measures essentially aimed at artificially generating barriers to trade.¹¹⁶⁶ Anticompetitive private actions are hence detrimental to the effective implementation of the single market. The special emphasis on the restriction of the single undertaking’s ‘freedom of choice and action’ on the market in most decisions points to the fact that the European institutions follow the (ordo-) liberal model of competition.¹¹⁶⁷ This model, building on general democratic principles and the balance of power between the legal subjects of private law,¹¹⁶⁸ has the essential advantage that it subsists without a prognosis of the precise ‘functionality’ of competition. It therefore constitutes a practical and easily applicable dogmatic method both from a practitioner’s point of view, as well as for the individual market participants.

Through the competition principles, ‘competition’ has therefore evolved to a norm for companies to determine their corporate policy, that is to say, against which they assess their general economic decisions.¹¹⁶⁹ In a liberal system of private law, in substance committed to the

¹¹⁶³ Cf. *Buntscheck*, *ibid.*

¹¹⁶⁴ In detail see *Wils*, *Principles of European Antitrust Enforcement* (2005), 3 ff.

¹¹⁶⁵ Thus *Lübbig*, in: *Wiedemann, Handbuch*, § 7, para. 20; *Emmerich*, in: *Immenga/Mestmäcker*, Art 81 (1), para. 135. The approaches pointing to the necessity of taking into account mere ‘economic criteria’ fail to recognize the regulatory task of competition law, namely to foster general constitutional principles and guarantee the basic principles inherent to private law, essentially determined by national legislation. In detail, see *Säcker: Grundlagen der Wettbewerbstheorie*, 20 ff. Solely in the context of mergers, in effect leading to more efficient corporate structures and thus enabling the respective companies to participate in the process of competition more actively, these sustainable ‘efficiencies’ are to be taken into account positively. In case they are based on the structure of the market as a result of a remaining ‘residual competition’ it may be ascertained on the basis of distinct criteria (for instance the SIEC test) to what extent they are effectively passed on to consumers. In detail, see *Communication of the Commission on Horizontal Mergers* (Council Reg. Nr. 13/04) of 5.2.2004, OJ [2004] C 31, 5-19).

¹¹⁶⁶ For the explicitly named forms under which this may be done see in particular Art 101 (1) lit. a-e. Cf. *Emmerich*, in: *Immenga/Mestmäcker*, Art 81 (1), para. 146.

¹¹⁶⁷ Thus *Müller-Graff*, in: *Hailbronn/Klein/Maguiera/Müller-Graff*, Art 85, para. 73, as cited in this regard by *Buntscheck*, *Konzernprivileg*, 115.

¹¹⁶⁸ These evidently include corporate entities. See *Säcker*, *Grundlagen der Wettbewerbstheorie*, *supra* note 24.

¹¹⁶⁹ *Säcker*, *Grundlagen der Wettbewerbstheorie*, 29.

principles of a free market economy, the protection of competition constitutes an indispensable precondition for the effective guarantee of private autonomy.¹¹⁷⁰

Therefore, the implementation and preservation of a democratic constitution based on the rule of law binds acts of public authority to the egalitarian function of competition, namely of guaranteeing a balance of power between the subjects of private law. Based on this premise, legal constraints of private power thus require a consideration of the socio-political aims of antitrust policy for society on the whole.¹¹⁷¹ These general objectives necessarily include the possibility of a company to define and structure its distribution policy on its own terms. Accordingly, companies should not be 'punished' by the competition provisions for not making full use of their economic or legal opportunities to decisively influence the conduct of their affiliated companies.

In light of this reasoning it becomes apparent that the European Courts consider the restriction of an undertaking's economic freedom of action and decision as the decisive element of a 'distortion of competition' in the sense of Art 101 (1) TFEU.¹¹⁷²

All other aspects of consideration mentioned in European case-law determining the objective of Art 101 (1) TFEU, (such as consumer welfare or ensuring an efficient allocation of resources),¹¹⁷³ are nothing but the outcome or positive consequence of guaranteeing the socially necessary entrepreneurial autonomy. In this sense, the ECJ has correctly determined not every agreement between undertakings or decisions between associations of undertakings by which the economic autonomy of one of these undertakings is factually restricted to automatically fall under Art 101 (1) TFEU.¹¹⁷⁴ Rather, the general context of an agreement or decision, as well as their effect and intended purpose are to be considered for the appropriate application of the cartel ban.¹¹⁷⁵ A 'distortion of competition' can therefore not be made in isolation, but has to take into account the general preconditions on the respective market.¹¹⁷⁶ Thus, the European institutions seem to evaluate whether the positive aspects of guaranteeing economic freedom on the market¹¹⁷⁷ are in effect passed on to consumers, thereby generating the aspired increase of welfare. For the ascertainment of the 'general conditions on the market' it may also be of relevance whether comparable agreements exist with third parties, hereby giving a separate agreement a different role.¹¹⁷⁸

¹¹⁷⁰ Cf. e.g. *Mestmäcker*, Jus 1963, 420; *idem*, AcP 168 (1968), 235; *Fikentscher*, in: Festschrift für Hallstein, 1966, 131; *Großfeld*, Aktiengesellschaft, Unternehmenskonzentration und Kleinaktionär, (1968), 50 ff.

¹¹⁷¹ *Säcker*, *ibid*, 28.

¹¹⁷² Similarly, *Emmerich*, in: Immenga/Mestmäcker, Art 81 (1), para. 137.

¹¹⁷³ Communication from the Commission, Guidelines of 27.4.2004 on the application of Art 101 (3) of the Treaty [2004] OJ C 101/97, para. 13.

¹¹⁷⁴ See *Lübbig*, in: Wiedemann, Handbuch, § 7, para. 21.

¹¹⁷⁵ ECJ of 19.2.2002, C-309/99, *J.C.J. Wouters*, [2002] ECR I-1577 (1688), para. 97; likewise ECJ of 18.7.2006, C-519/04 P, *Mecca Medina and Majcen*, [2006], ECR I-6991 = WuW/E EU-R 1493, para. 42.

¹¹⁷⁶ See in effect, *Lübbig*, *ibid*.

¹¹⁷⁷ In respect to the 'concern-privilege,' this includes a company's freedom of structuring its distribution policy and exerting influence on affiliated undertakings by the means of general corporate law.

¹¹⁷⁸ ECJ of 12.12.1967, *Brasserie de Haecht/Wilkin and Janssen*, [1967] ECR-543 (555); ECJ of 18.2.1971, *Sirena/Eda a.o.*, [1971] 69 (80ff); and ECJ of 28.2.1991, *Delimitis vs. Henninger Bräu*, [1991] ECR I-935 (978f), as cited by *Lübbig*, in: Wiedemann, Handbuch, § 7, para. 21. In this regard it has already been noted, that in case an agreement between a (controlled) subsidiary and a controlling parent company includes a congruent agreement with third parties, the latter agreement would in any case not be covered by the application scope of the 'group-privilege', but - due to its external effect - subject all parties of this agreement to Art 101 (1) TFEU. Such a 'balancing of interest' with regard to third parties must therefore be made in deliberate consideration of the distinct application scope and objectives of Articles 101 and 102 TFEU.

§ 3. Critical Assessment of the ‘Single Economic Entity’-Doctrine by the Postulate of ‘Corporate Autonomy’

In literature¹¹⁷⁹ as well as in some decisions of the European institutions,¹¹⁸⁰ the fact of a ‘distortion of competition’ has therefore regularly been assessed as the appropriate base of reference for exempting group-internal agreements from the application range of Art 101 (1) TFEU, hereby justifying the so called ‘intra-enterprise, or group-privilege’.¹¹⁸¹ As outlined above, this is essentially due to the fact that no competition exists between companies that decide to affiliate on the basis of strategic considerations by means of the organizational form of a corporate group or concern.¹¹⁸² As long as no competition exists between otherwise legally separate undertakings, it cannot be intentionally distorted or restricted.¹¹⁸³

This last aspect has to be substantiated, nevertheless, by the fact that the parent company must - by the means this affiliation confers upon it - have the possibility to *decisively* influence the subsidiary’s behavior. Where this is not the case, as often assumed for minority shareholdings, Art 101 (1) TFEU remains principally applicable.¹¹⁸⁴

In this respect it is important to note that the assessment of an undertaking’s competitive autonomy neither depends on the *purpose* of the agreement nor on the fact that the undertakings concerned otherwise stand in a *competitive relationship* to each other.

In relation to the first assertion of the **purpose** of the agreement, it has already been mentioned that the ECJ, in its decision of the case of *Viho*,¹¹⁸⁵ negated the precondition of a group-internal ‘allocation of tasks and responsibilities’ in a final instance, abolishing the previously led discussion of this issue. This view is to be approved of as the ban of Art 101 (1) TFEU is already factually not applicable to existing ‘economic entities’ on the basis of the subsidiary’s lacking autonomy.¹¹⁸⁶ The original purpose of confining the exemption of agreements between affiliated undertakings from the cartel ban by the introduction of an

¹¹⁷⁹ *Emmerich*, in: Immenga/Mestmäcker, EG-Wettbewerbsrecht, Art 81 (1), para. 55; *Schroeder*, in: Wiedemann, Handbuch, § 8, para. 3; *Leo*, Konzerninterne Marktregelungen, 40; *Leo*, Kartell Rundschau 1966, Heft 8, 11 (15ff); *Schroeder*, WuW 1988, 274 (277); *Gleiss/Hirsch*, Art 85, para. 190; *Roth/Ackermann*, in: Frankfurter Kommentar, Grundfragen Art 81 (1) EG-Vertrag; *Huber*, AWD, 1969, 431; *Treeck*, AWD 1969, 358; dismissive however *Schröter*, in: GTE, Art 85 (1) para. 89 ff, 97; unclear regarding the respective reference to the facts of Art 101 (1) TFEU *Grill*, in: Lenz, EG-Vertrag, Vorbem. [preliminary remarks to] Art 81-86, para. 36.

¹¹⁸⁰ See the Commission in its original Decision IV/22548, *Christiani & Nielsen*, [1969] OJ Nr. 165/12, 14; See the Opinion of the AG in: *Béguelin Import Co.*, Case C-22/71, ECJ of 25.11.1971, [1971] ECR 949, 955; ECJ of 12.7.1984, *Hydrotherm Gerätebau GmbH*, [1984], ECR 2999, 3016, para. 11; cf. also *GA Dutheil de Lamothe* in the case *Béguelin Import Co. vs. S.A.G.L. Import Export*, (Case C-22/71, ECJ of 25.11.1971, [1971] ECR 949, 967); and *GA Lenz*, in the case of *Viho* [C-73/95, *Viho Europe BV vs. Commission of the European Community*, [1996] ECR I-5472).

¹¹⁸¹ See *Buntscheck*, Konzernprivileg, 117.

¹¹⁸² *Sander*, Das Konzernprivileg im Österreichischen und Europäischen Wettbewerbsrecht, OZK 2008, 20 (22).

¹¹⁸³ In case-law the prevention of such a ‘distortion’ is generally referred to as the ‘object’ in the sense of Art 101 (1) TFEU, while ‘restrictions of competition’ are referred to as the ‘effect’ in the sense of Art 101 (1) TFEU. See *Faull/Nikpay*, The EC Law of Competition, (2007) § 3.144 ff.

¹¹⁸⁴ In detail see however point § 3.2.2. below.

¹¹⁸⁵ ECJ of 24.10.1996, C-73/95, *Viho Europe BV vs. Commission of the European Community*, [1996] ECR I-5472, para. 13 ff.

¹¹⁸⁶ Cf. *Thomas*, Konzernprivileg und Gemeinschaftsunternehmen, ZWeR 3/2005, 236 (243).

‘internal element’ to the agreement oversees the fact that even on a free market the competitive freedom of the single market participant is not absolute. Rather, it is necessarily restricted by the freedom of the other actors on the market.¹¹⁸⁷ Every exchange agreement between two market participants necessarily restricts the possibility of others to conclude a respective contract with the partners of the agreement.¹¹⁸⁸ The application of Art 101 (1) TFEU therefore requires an evaluative assessment to delineate these agreements essentially ‘immanent’ to competition and therefore acceptable, from agreements that lead to an illicit restriction of a third party’s range of action.¹¹⁸⁹

Even though the wording of Art 101 (1) TFEU does not generally speak against such a consideration of third party interests when interpreting the norm it has been pointed out that almost any contract would be drawn into the scope of the provision, whereby the purpose of its creation would essentially be exceeded.¹¹⁹⁰ The difficulties of such an evaluation have therefore led to the negation of reflecting on the position of third parties for determining the existence of a ‘distortion’ to competition.

The majority of decisions issued by the Commission and the ECJ have likewise been based on the restriction of the freedom of action and disposition of at least one of the undertakings concerned, while possible negative effects on third parties have merely been mentioned in the holdings of the case.¹¹⁹¹ Recent tendencies of the Commission, increasingly considering the position of third parties, in fact allude to the attempt of a ‘more economic approach,’ which allegedly allows for a more flexible handling of the European competition provisions.¹¹⁹² Even if this is done in order to appropriately acknowledge the increasing importance of economic analysis for determining the regulatory tasks of the competition principles, practice has been advised to treat these developments with a certain degree of caution.¹¹⁹³

First, the system of the Treaty speaks for a more traditional interpretation of the cartel ban, as it includes an explicit legal basis for a consideration of possible ‘efficiency enhancing’ agreements, increasing consumer welfare by the means of a more efficient allocation of resources in Art 101

¹¹⁸⁷ See *Herdzina*, Wettbewerbspolitik, Stuttgart, 4th ed. (1993), as cited by *Buntscheck*, Konzernprivileg, 120.

¹¹⁸⁸ *Bunte*, in: Langen/Bunte, Art 85, general principles, para. 38; *Emmerich*, in: Immenga/Mestmäcker, Art 81 (1), para. 148.

¹¹⁸⁹ Whether the so-called theory of ‘immanence,’ generally accepted under German competition law, can be considered part of European law remains dubious. Even though the ECJ has (inexplicitly) referred to this principle in some decisions, these have been assessed to remain the exception. See e.g. *Thomas*, *ibid*; and *Mira Senke*, Elektrizitätslieferverträge nach der Liberalisierung des Elektrizitätsmarktes im lichte des europäischen und deutschen Kartellrechts, available at: http://www.jurawelt.com/sunrise/media/mediafiles/13739/tenea_juraweltbd23.pdf, supra note 383).

¹¹⁹⁰ See *Emmerich*, in: Immenga/Mestmäcker, Art 81 (1), para. 148; see furthermore *Faull/Nikpay*, The EC Law of Competition, (2007) § 3.134: “In this way the Commission’s approach to the concept of a ‘restriction of competition’ drew thousands of agreements, the vast majority of which were harmless or efficiency-enhancing, into the scope of Art 81 (1) TFEU”.

¹¹⁹¹ Cf. *Buntscheck*, Konzernprivileg, 120, and page 150 above, where it has been denoted that such a consideration of ‘general market conditions’ could, under the system of the European competition provisions, only be carried out appropriately on the basis of Art 102 TFEU. In detail see *Lübbig*, in: Wiedemann, Handbuch, § 8 para. 21.

¹¹⁹² Essentially derived from U.S. antitrust law, this approach nevertheless oversees that the U.S. antitrust laws have evolved on the basis of an essentially distinct historical development. In detail see *Hoppmann*, in: FS für Wessels (1967), 145 (168 ff), as cited by *Säcker*, Grundlagen des Wettbewerbsrechts, supra note 81.

¹¹⁹³ See *Faull/Nikpay*, The EC Law of Competition, (2007) § 3.138.

(3) TFEU. Secondly, the criteria applied under this ‘more economic’ approach have in fact not been endorsed by the ECJ. Only in a few minor cases the Court explicitly applied a consumer welfare test under Article 101 TFEU.¹¹⁹⁴ In consideration of recent case law on this matter,¹¹⁹⁵ it can therefore indeed be argued that the Court relied on an *ordo-liberal* approach to reach its conclusions.

Concerning the second assertion of a necessary **competitive relationship** between affiliated companies on the market, it has sometimes been asserted that one could at least speak of ‘spurious competition’ between the entities of a corporate group.¹¹⁹⁶ However, this statement is inconsistent¹¹⁹⁷ as it misperceives that ‘competition’, under the *ordo-liberal* understanding underlying the European competition provisions, does not require such a ‘competitive relation’ between the undertakings of an agreement. Rather, Art 101 (1) TFEU is also applicable to vertical restraints.¹¹⁹⁸ Competition is hence protected on any level of trade and in all its appearances. For the application scope of Art 101 (1) TFEU one need not differentiate between actual or potential competition, horizontal or vertical restrictions.¹¹⁹⁹

This is why it follows that a ‘distortion’ of competition in the sense of Art 101 (1) TFEU is identical with the *restriction of the economic freedom of action* of at least *one* of the undertakings concerned. Hereby it is sufficient that a rationally acting undertaking cannot make use of its respective scope of action under the artificially created circumstances by the agreement.¹²⁰⁰

More plausible for the assessment of affiliated undertakings therefore, is the reasoning that the freedom of disposition will regularly be lacking for one or several of these companies where the controlling company is able to impose its will on the other entities of the group. This is the case where the parent company may interfere as it wishes with the market conduct of its subsidiaries as well as in regard to the corporate relation between them.¹²⁰¹ This shows that a consideration of the position of third parties is of limited importance for the assessment of agreements between affiliated undertakings. A controlling parent company would well be able

¹¹⁹⁴ See ECJ of 20.6.1978, Case 28/77, *Tepea vs. Commission*, [1978], ECR 1391, para. 56; CFI of 7.6.2006, Joined cases T-213/01 and T-214/01, *Österreichische Sparkasse und Bank für Arbeit und Wirtschaft vs. Commission*, [2006]; and ECJ of 13.7.1966, joined cases of 56/64 and 58/64, *Consten and Grundig vs. Commission*, [1966] ECR 299, as cited in this regard by *Faull/Nikpay*, *ibid*.

¹¹⁹⁵ CFI of 18.9.2001, T-112/99, *Métropole Télévision vs. Commission*, [2001] ECR II-2459; see *P. Manzini*, *The European Rule of Reason: Crossing the Sea of Doubt*, (2002) ECLR, 392. On the basis of the Commission guidelines on the application of Art 101 (3), European practice rather considers the necessity of ‘efficiency gains’, a ‘fair share to consumers’, the ‘indispensability of the restriction’, and the preservation of competition under this provision. See the Commission Guidelines on the application of Art 101 (3) of the Treaty, [2004] OJ C101/97, paras. 24 and 31.

¹¹⁹⁶ *Leo*, *Konzerninterne Marktregelungen*, 40; *Treeck*, AWD 1969, 368.

¹¹⁹⁷ See also *Spormann*, *Die Entwicklung der Europäischen Wettbewerbspolitik*, in: AWD 1970, 156-163; *Markert*, *Anmerkungen zu Béguilin Import Co. vs. S.A.G.L. Import Export*, in: *Europarecht (EuR)* 1972, 159 (166), as cited in this regard by *Buntscheck*, *Konzernprivileg*, 117.

¹¹⁹⁸ See *Emmerich*, in: *Immenga/Mestmäcker*, Art 81 (1), para. 138.

¹¹⁹⁹ In regard to the protection of ‘spurious’ competition on extensively accessed markets, effectively subjecting illicit agreements on these markets to the cartel ban, see ECJ of 16.12.1965, C-40/73, *Suiker Unie*, [1975] ECR 1663, 1942; ECJ of 29.10.1980, C-209/78, *Van Landewyck/FEDET*, [1980] ECR 3125, 3261 ff, para. 126.

¹²⁰⁰ *Emmerich*, in: *Immenga/Mestmäcker*, Art 81 (1), para. 148.

¹²⁰¹ *Grill*, in: *Lenz*, EG-Vertrag, Art 81, para. 36; and page 150 above. For common parent corporations of joint ventures see *Wißmann*, *Die Anwendung von Art 85 des EWG-Vertrages auf Gemeinschaftsunternehmen*, Köln/Berlin/Bonn/München (1974), and below under 3.4.. In exceptional cases therefore, a recourse to the uniquely interpreted concept of ‘competition’ is still emphasized in order to justify the exemption of group-intern agreements from Art 101 (1) TFEU: see e.g. *Emmerich*, *ibid*, paras. 148 and 151 ff.

to attain the objective of the group-intern accord through other means.¹²⁰² By the existence of a group-intern agreement, a competitor's freedom of choice cannot therefore be restricted in an additional way.¹²⁰³

Under the liberal understanding of the competition principles, widely accepted for European practice,¹²⁰⁴ a company's freedom of disposition cannot be restricted where it does not have the potential to autonomously determine its own market conduct in the first place. Such agreements cannot be seen as a threat to the objective of competition, namely for individuals to coordinate their individual business plan on the basis of the market mechanism.¹²⁰⁵

§ 3.1. The Notion of '**Control**' in the Context of a 'Single Economic Entity'

This conceptual foundation of the so-called 'concern, or group-privilege,' should make clearer that an undifferentiated employment of the 'single economic entity' doctrine for the different legal issues concerning corporate groups is dogmatically inconsistent.¹²⁰⁶ On the one side, an exemption of certain group-intern agreements from the cartel ban is teleologically necessary because a company's freedom of disposition, essentially protected by Art 101 (1) TFEU, cannot be restricted further. On the other side, however, an attribution of liability is carried out in order to appropriately consider the actual economic strength of legally or factually affiliated undertakings when employing Art 101 (1) TFEU.

Both subjects of concern nevertheless hinge on the amount of 'control' exerted by one undertaking on the other. Therefore, it is essential to review the criteria of this term and assess whether it is appropriately employed in a differentiated manner by the European institutions for considering corporate group relations under Art 101 (1) TFEU.

The existence of corporate groups, comprising several independently incorporated companies mostly connected by a chain of participation, thus practically forming one commercial unit, has long been recognized as an economic reality in various areas of the law.¹²⁰⁷ It has been mentioned, nevertheless, that corporate affiliations pursue significantly different objectives, hereby forming distinct forms and concepts of a corporate group.¹²⁰⁸ It is therefore questionable,

¹²⁰² Cf. *Buntscheck*, Konzernprivileg, 121.

¹²⁰³ See *Roth/Ackermann*, in: *Frankfurter Kommentar*, Grundfragen Art 81(1) EG-Vertrag, para. 212.

¹²⁰⁴ Cf. *Gleiss/Hirsch*, EG-Kartellrecht, Art 85, para. 136; *Koch*, in: *Grabitz/Hilf*, Art 85, para. 45; *Emmerich*, in: *Immenga/Mestmäcker*, EG-Wettbewerbsrecht, Art 81 (1); para. 146; *Schroeder*, in: *Wiedemann*, Handbuch § 8, para. 3. Since a 'distortion' of competition is lacking in these cases it is even terminologically incorrect in a strict sense to speak of 'group-intern restrictions of competition,' as sometimes mentioned in practice when assessing this topic.

¹²⁰⁵ *Koch*, in: *Grabitz/Hilf*, Art 85, para. 45, as cited by *Buntscheck*, Konzernprivileg, 118.

¹²⁰⁶ See already 3.1.1.2. above.

¹²⁰⁷ See *Immenga*, Company Systems and Affiliations, 13 *International Encyclopedia of Comparative Law* (1985), p. 7-11 ff; and for Europe see: *Lutter*, Stand und Entwicklung des Konzernrechts in Europa, ZGR (1987), 324 (330).

¹²⁰⁸ See *Gleiss/Hirsch*, EG-Kartellrecht, Art 85, para. 196. It has been mentioned, that despite ambitious efforts for establishing codified rules for corporate groups in European law, no common concept of a 'concern' exists as, for instance, under German law. See *Forum Europaeum*, Corporate Group Law for Europe, *European Business Organization Law Review* (2000), 1:165-264. Similarly detailed regulations exist in some of the European member states, which, to a certain extent, rely on the German example. For Portugal, see for instance *J.E. Antunes*, The Law of Affiliated Companies in Portugal, in: *Balzarini, Carcano*

whether already the fact of an existing relation of dependence between undertakings is sufficient for denying the possibility of a 'distortion' of competition.¹²⁰⁹

In the national laws of the member states **two main approaches** exist for classifying corporate affiliations: the concept of 'control' and that of 'dominance or dependence.'¹²¹⁰

'Dominance' exists where a parent company, despite holding less than 50% of the voting rights, is practically in a position to control a majority of the votes of the dependent company.¹²¹¹ This is assumed to be the case where the parent company for instance holds 45% of voting rights, while the ownership of the remaining rights is widely dispersed and attendance of the corporation's general annual meeting is regularly below 80%.¹²¹²

The concept of 'dominance' therefore exceeds that of 'control,' upon which the existence of a corporate group is generally assumed where one company controls another either by a majority of voting rights or other mechanisms of company law.¹²¹³ The concept of 'control,' which is fundamental to many other areas of European law,¹²¹⁴ is nevertheless the most commonly used term in the EU.¹²¹⁵

Though it has been mentioned that due to distinct objectives of the European competition principles a legal comparison to other areas of law for ascertaining corporate group relations is not necessarily insightful, the Commission regularly refers to the commonly accepted notion of 'control' under general corporate law when justifying the existence of a 'single economic entity.'¹²¹⁶

In the context of Art 101 (1) TFEU, a preferential treatment of agreements between affiliated undertakings is only acceptable where the freedom of action or disposition of one of these undertakings cannot factually be restricted. In case that one of the undertakings participating in an agreement possesses 'control' over the other to such an extent, it is clear that a subsidiary's lack of discretionary power cannot further be restricted by the agreement.¹²¹⁷

It is moreover important to note that - distinct to agreements between economically independent undertakings - a controlling company and its controlled subsidiary will regularly be

and Mucciarelli (eds.), *I gruppi di società*, Giuffrè: Milano (2006), 355. See also *Lutter and Overath*, in: *Lutter, Konzernrecht im Ausland*, De Gruyter, Berlin (1994), 229.

¹²⁰⁹ Cf. *Buntscheck*, *Konzernprivileg*, 118.

¹²¹⁰ See *Forum Europaeum*, in: *European Business Organization Law Review* (2000), 1:165, 187.

¹²¹¹ *Forum Europaeum*, *ibid*, 188.

¹²¹² Cf. *VW/Niedersachsen*, BGHZ 135, 107 for an interesting case under German law in which 'dominance' was found to exist on the basis of merely 20% shareholding because the annual meeting was regularly attended by less than 40% of the shareholders.

¹²¹³ This concept of 'control' is, for instance, fundamental to the provisions of the Seventh Council Directive. See in particular Art 114, para. 1, Directive 83/349/EEC, of 13 June 1983: Consolidated Group Annual Accounts, [1983] OJ Nr. L 19.

¹²¹⁴ According to Art 1 of the 'Parent-Subsidiary-Directive', (Seventh Council Directive 83/349/EEC, of 13 June 1983: Consolidated Group Annual Accounts, [1983] OJ Nr. L 196) other controlling mechanisms may be of a contractual nature or concern the right to elect or remove the majority of the directors or the members of a company's supervisory Board. This corresponds to § 290 of the German Commercial Code [HGB], or § 244 of the Austrian Commercial Code [UGB] on the financial reporting of parent-subsidiary relationships.

¹²¹⁵ See *Forum Europaeum*, in: *European Business Organization Law Review* (2000), 1:165 (187).

¹²¹⁶ See for instance Commission Decision IV/32186 of 15.5.1991, *Gosme/Martell*, [1991], OJ Nr. L 185/23, para. 30 ff, as cited by *Thomas*, *Konzernprivileg und Gemeinschaftsunternehmen*, ZWeR 3/2005, 249.

¹²¹⁷ Cf. *Buntscheck*, *Konzernprivileg*, 119, who assesses the question whether the discretion of the parent company could hereby be restricted by the agreement itself. Since the subsidiary can hardly rely on the implementation of this agreement, and because the parent company could revoke the agreement any time, the author essentially comes to the conclusion that this is not the case. See similarly *Petra Pohlmann*, *Unternehmensverbund*, 415.

connected by the existence of ‘common interests’ already before entering into an agreement.¹²¹⁸ The economic success of a controlled subsidiary will hence directly benefit the parent company, so that, when entering into an agreement with its subsidiary, it merely acts on its own interest.¹²¹⁹

Even if it is therefore conceptually difficult to think of a parent company and its subsidiary ‘conspiring,’¹²²⁰ an appropriate assessment of ‘control’ shows that a certain degree of influence is required for exempting group-internal agreements from Art 101 (1) TFEU.¹²²¹ Where the required amount of influence cannot be found to exist, a parent and a subsidiary can well be held liable for antitrust damages. Therefore, the assessment of control-relationships between corporate groups in European competition law, and thus the determination of a ‘single economic entity’ does not hinge on the definition of a ‘corporate group,’ but rather on the *telos* of the respective norm.¹²²² This is also the reason why a positive legal definition of a corporate group is not essential to approaching the issue of corporate group liability in European antitrust law.

Nevertheless, the European institutions have regularly denied the application of Art 101 (1) TFEU to agreements in which one of the undertakings was ‘controlled’ by the other without explicitly referring to a lack of competition between them. Likewise, an attribution of conduct and liability was carried out with the succinct notion that the undertaking under assessment was not able to independently determine its conduct on the market due to its existent economic affiliation with another company. In this way, the Commission and the Courts have referred to the existence of a ‘single economic entity’ regardless of essentially different legal conditions.¹²²³ This was regularly done without determining the exact **degree of control** necessary to justify the negation of a ‘distortion’ to competition outlined above, or disregarding the principle of ‘legal separation’ under corporate law.

§ 3.2. The Restriction of Economic Autonomy by the Concept of ‘Decisive Influence’

In their decisions on the inapplicability of Art 101 (1) TFEU on agreements between companies of a corporate group, neither the Commission nor the ECJ have made consistent assertions on the degree or quality of ‘control’ hereby required.¹²²⁴ Rather, the Community institutions

¹²¹⁸ Hence, even the definition of a ‘parent company’ and a ‘subsidiary’ in most jurisdictions refers to this bond of interests. See for instance Black’s Law Dictionary, West 7th ed., (1999), 344: “A parent is a ‘corporation that has a controlling interest in another corporation,” usually “through ownership of more than one-half the voting stock,” as cited by R.P. Meyers, Partial Ownership of Subsidiaries, Unity of Purpose, and Antitrust Liability, 68 U. Chi.L.Rev. (2001), 1401.

¹²¹⁹ For U.S. antitrust law, see the assertions of the U.S. Supreme Court in regard to Section 1 of the Sherman Act in its Copperweld Decision (*Copperweld Corp vs. Independence Tube Co*, 467 US (1984) 752, 767), as cited in this regard by Buntscheck, Konzernprivileg, 119, and Meyers, *ibid*. For the determination of this ‘unity of interest’ see furthermore Hovenkamp, Federal Antitrust Policy, St. Paul: Minnesota (1994); and Heitzer, Konzerne, 237 ff.

¹²²⁰ Cf. Meyers, 68 U. Chi.L.Rev. (2001), 1401.

¹²²¹ As mentioned above, some views in literature therefore ascertain the exemption of group-internal agreements from Art 101 (1) TFEU as “the specific exception, requiring an explicit justification in the particular case”: see Emmerich, in: Immenga/Mestmäcker, Art 81 (1) EGV, para. 54.

¹²²² This is why a general definition of ‘corporate groups’ is arguably not essential for a consistent application of the competition provisions.

¹²²³ See already 3.1. of this thesis.

¹²²⁴ Cf. Buntscheck, Konzernprivileg, 124.

referred to the existence of particular aspects of ‘control’ on a case-by case basis. These comprise: the amount of share capital held by the parent company,¹²²⁵ the quantity and influence of existing voting rights obtained by the agreement, the parent company’s right to determine the constitution of the subsidiary’s board of directors or management,¹²²⁶ the factual practice of the subsidiary to independently negotiate the relevant terms of a contract,¹²²⁷ or common staff or management.¹²²⁸ The notion of ‘control’ in European competition law evidently requires influence of certain significance. As mentioned above, there will only be factual control between affiliated companies where it is possible for one undertaking to exert ‘**decisive influence**’ on the conduct of the other. This latter term is therefore essential for an understanding of the scope of the concept of ‘control’ in European antitrust law by which a single economic entity may legitimately be assumed.¹²²⁹

From this it follows on the one hand, that the company law protection of minority shareholders, as existent in the national company laws of the various member states, does not constitute a sufficient degree of influence.¹²³⁰ On the other hand, the requirement of ‘decisive influence’ does not necessitate the possession of ‘absolute control’ in any case. This would namely require the exertion of intrusive influence on the everyday management of the controlled company, which would essentially ignore other decisive modes of influencing a subsidiary’s management.

In context of the determination of a ‘single economic entity’, the possibility of exercising influence may be justified either legally or factually.¹²³¹ Even though the Commission has, in principle, accurately determined the existence of an ‘economic entity’ between affiliated companies on a case-by-case basis,¹²³² it has refrained from providing an accurate mode of assessing ‘decisive influence’ in this sense. Sometimes the Commission has even established the subsidiary’s lack of economic autonomy on the fact that the subsidiary was *obliged* to follow the instructions of its parent company.

For the assumption of ‘control’ in the sense of ‘decisive influence’ it is nevertheless a too narrow assessment to require the head of the company to be able to directly exert legally binding directions on a subsidiary.¹²³³ Under the company laws of some of the member states this would exclude situations where a parent company merely *factually* possesses the possibility

¹²²⁵ See Commission decision IV/22548, *Christiani & Nielsen*, [1969] OJ Nr. L 165/12; ECJ of 24.10.1996, C-73/95, *Viho*, [1996] ECR I-5457; CFI of 6.4.1995, T-145/89, *Baustahlgewerbe GmbH*, [1995] ECR II-987; and T-141/89, *Téfileurope Sales S.A.R.L.*, [1995] ECR II 791. For the assessment of the distinct topic of an attribution of liability see ECJ, Case 97/08 P, *Akzo Nobel NV vs. Commission*, [2009] ECR I-08237, para. 63 ff.

¹²²⁶ (The latter term refers to private limited companies. See Commission Decision IV/32186 of 15.5.1991, *Gosme/Martell*, [1991], OJ Nr. L 185/23; ECJ of 24.10.1996, C-73/95, *Viho*, [1996] ECR I-5457.

¹²²⁷ Commission Decision IV/32186 of 15.5.1991, *Gosme/Martell*, [1991], OJ Nr. L 185/23, para. 30.

¹²²⁸ See ECJ of 12.7.1984, C-170/83, *Hydrotherm Gerätebau GmbH*, [1984], ECR 2999.

¹²²⁹ *Broberg*, The Concept of Control in the Merger Control Regulation, ECLR (2004), Issue 12, 741 (742).

¹²³⁰ Cf. Commission Notice on the Concept of Concentration between Undertakings under Reg. 4064/89, [1998] OJ Nr. C66/5, para. 22. See also Commission Decision of 13.6.2001, COMP/M2393, *Skanska Sverige/Posten/HOOC*; Commission Decision of 26.6.2011 COMP/M.2300, *YLE/TDF/Digital/JV*; and Commission Decision of 11.12.1998 Case IV/JV.13, *Winterfall/ENBW/MVV/WV/DEO*, as cited by *Broberg*, *ibid*, who nevertheless points to the fact that it cannot entirely be ruled out that there may be situations in which the legal protection of minority shareholders might effectively lead to the existence of ‘decisive influence’. For an example of this, see *idem*, in *supra* note 361 (*VW/Niedersachsen*, BGZH135, 107).

¹²³¹ Cf. *Schroeder*, in: Wiedemann, Handbuch, § 8, para. 9; *Emmerich*, in: Immenga/Mestmäcker, Art 81 (1) EGV, para. 56.

¹²³² See page 158 above.

¹²³³ *Koppensteiner*, in FS Mailänder (2006), 125, 132.

of implementing its will on other companies of the group.¹²³⁴ Given the objective of protecting a company's market autonomy, this approach is too limited.

In literature it has been ascertained that the *functional* notion of 'control' under Art 3 (3) of the **European Merger Regulation**¹²³⁵ also constitutes an appropriate base of reference for the existence of 'decisive influence' in context of a 'single economic entity'.¹²³⁶

For the exemption of group-intern agreements, the reasoning is the following: corporate affiliations that would, in the hypothetical situation of their implementation between independent companies, constitute 'a merger' under the ECMR should lead to the inapplicability of Art 101 (1) TFEU to agreements adopted between these companies.¹²³⁷

For the application of the Merger Regulation it is essential to assess whether an undertaking, on the basis of rights, contracts, or other means, has the possibility to determine another company's economic policy. This must nevertheless be made in consideration of the legal and factual circumstances of the case.¹²³⁸ As the Merger Regulation provides for a standardized formulation of 'control' for the regulative revision of corporate restructurings leading to the permanent restriction of a company's economic autonomy, the formula mentioned above has been deemed a suitable reference for the exemption of group-intern agreements from Art 101 (1) TFEU.¹²³⁹

The application of a common term of 'control' in European competition law has particularly been deemed appropriate because the application of Art 3 (1) ECMR leads to the protection of an 'inner sphere' between the concerned undertakings.¹²⁴⁰ Hereby a company is granted the possibility of determining the business dealings of another undertaking on a long-term basis, or to decide on the employment of the latter's commercial profit.¹²⁴¹

Art 3 (2) of the Merger Regulation explicitly outlines the concept of 'control' to be constituted by "*rights, contracts or any other means which, either separately or in combination and having regard to the consideration of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by:*

- (a) *ownership or the right to use all or part of the assets of an undertaking;*
- (b) *rights or contracts, which confer decisive influence on the composition, voting or decisions of the organs of an undertaking*".

¹²³⁴ See *Schroeder*, in: Wiedemann, Handbuch, § 8, para. 9. The possibility of issuing legally binding instructions exists, for instance, in Germany only for private limited companies and is not possible for (controlled) corporations (see § 76 (1) of the German Stock Companies Act). Even though the executive board of a corporation is to conduct the company's affairs on the basis of his professional responsibility, a majority shareholder will nevertheless *factually* be able to exert 'decisive influence', for instance, by pressuring the supervisory board to replace the company's executive management.

¹²³⁵ Art 3 (2) and Art 5 (4) of the EC Merger Regulation (ECMR): Council Regulation (EC) No 139/2004 of 20.1.2004 on the control of concentrations between undertakings.

¹²³⁶ *Gleiss/Hirsch*, EG-Kartellrecht, Art 85, para. 197; *Emmerich*, in: Immenga/Mestmäcker, Art 81 (1) EGV, para. 56; *Schroeder*, in: Wiedemann, Handbuch, § 8, para. 9; *Thomas*, Konzernprivileg und Gemeinschaftsunternehmen, ZWeR 3/2005, 243. For Austrian antitrust law it has likewise been mentioned that although no explicit reference to the so-called 'group, or concern' privilege exists, a comparable exemption of group companies in the context of mergers is generally accepted under § 7 (4) of the Austrian antitrust code (KartG 2005); see *Sander*, OZK 2008, 20 (24).

¹²³⁷ *Schroeder*, in: Wiedemann, Handbuch, § 8, para. 6.

¹²³⁸ *Gleiss/Hirsch*, EG-Kartellrecht, Art 85 (1), para. 197.

¹²³⁹ *Gleiss/Hirsch*, *ibid*; *Schroeder*, in: Wiedemann, Handbuch, § 8, para. 6.

¹²⁴⁰ *Schroeder*, in: Wiedemann, Handbuch, § 8, para. 4.

¹²⁴¹ *Gleiss/Hirsch*, EG-Kartellrecht, Art 85, para. 197; *Emmerich*, in: Immenga/Mestmäcker, Art 81 (1) EGV, para. 56.

Upon these two facts, potential mergers that exceed the turnover thresholds of Art 1 (2) and (3) ECMR are reviewed for their potential effects on the area of the Common Market, in particular the protection of ‘effective competition’ on the basis of Art 2 ECMR.¹²⁴² A concentration under the ECMR can take two forms:¹²⁴³ it can either be a ‘true merger,’ where two undertakings merge to form a new undertaking,¹²⁴⁴ or it can be a takeover, where one or several undertakings take control of a separate company.¹²⁴⁵

While only the second fact concerns the direct or indirect ‘acquisition of control’ and thus the exertion of ‘decisive influence’ on a legally separate undertaking, the ‘concept of control’ has a central role in both cases. This is why its various aspects require to be analyzed for their appropriate determination of a ‘single economic entity’ in its distinct forms of application on a corporate group of companies.

In regard to the definition of ‘control’ under Art 3 ECMR it becomes clear that the Regulation refers to the existence of *actual* control. This means that ‘control’ may for instance be exercised by obtaining less than 50% of the shares or voting rights in a company,¹²⁴⁶ while conversely ownership of more than 50% of those shares does not necessarily provide control.¹²⁴⁷ Furthermore, there is no explicit requirement as to how this control must arise.¹²⁴⁸ The ‘acquisition of control’ can likewise be attained by a single undertaking (sole control), or by several undertakings (joint control), whereby in the latter situation the possible existence of a joint venture must be taken into consideration.¹²⁴⁹

Just as Articles 101 and 102 TFEU, the Merger Regulation ascertains the existence of a ‘distortion’ of competition on the basis of the *economic autonomy* of the concerned undertakings.¹²⁵⁰ Nevertheless, distinct to singular competitive restraints, a company’s freedom of action and decision is hereby assessed in a comprehensive manner. For distortive agreements under Art 101 (1) TFEU, a company’s autonomy will only be restricted in a certain manner or for specific areas.¹²⁵¹ It remains to be ascertained therefore, in how far the common aims of the

¹²⁴² In this way, the Commission assures that the aim of Articles 101 and 102 TFEU, namely to establish and preserve a functioning Common Market, is not circumvented by possibly detrimental concentrations; see *Miersch*, Kommentar zur EG-Verordnung Nr. 4064/89 über die Kontrolle von Unternehmenszusammenschlüssen, Frankfurt (1991), 8; *Kurz*, Das Verhältnis der EG-Fusionskontrollverordnung zu Artikel 85 und 86 des EWG-Vertrages, Frankfurt (1993), 228; *Blank*, Europäische Fusionskontrolle im Rahmen der Art 85 und 86 des EWG-Vertrages, Baden-Baden (1991), 272.

¹²⁴³ See Art 3 (1) of the ECMR.

¹²⁴⁴ In this case, the original undertaking ceases to exist.

¹²⁴⁵ Cf. *Broberg*, The Concept of Control, ECLR (2004), Issue 12, 741.

¹²⁴⁶ See e.g. Commission Decision of 26.6.2001 in Case COMP/M.2404, *Elkem/Sapa*; and Commission Decision of 24.2.1993, Case IV/MM.304, *Volkswagen AG/VAG (UK) Ltd.*, from which it can be deduced that, in principle, the Regulation’s definition of ‘actual control’ does not require explicit ownership at all, but that it is possible to acquire control on the basis of a mere agreement.

¹²⁴⁷ This could, for instance, be the case for a restriction on voting rights, where large shareholders would be prevented from exercising these rights to a significant extent: see *Broberg*, *ibid*, 742.

¹²⁴⁸ Control may, for instance, be attained by more than one transaction, see e.g. Commission Decision of 13.3.2002, Case COMP/M.2737, *Royal Bank Prive/Equity/CINVEN/Chelwood Group*; Decision of 20.12.2001, Case COMP/M.2679, *EDF/TXU Europe/24 Seven*; and COMP/M.2675, *EDF/TXU, Europe/West Burton Power Station*, as cited by *Broberg*, The Concept of Control, ECLR (2004), Issue 12, 741 (742).

¹²⁴⁹ See *Wiedemann*, in: *Wiedemann*, Handbuch § 15, para. 29. For the legal questions in regard to the determination of ‘control’ connected to this, see point § 3.4. below.

¹²⁵⁰ *Gleiss/Hirsch*, EG-Kartellrecht, Art 85, para. 194.

¹²⁵¹ *Mestmäcker*, Recht und ökonomisches Gesetz, Baden-Baden (1984) 513, as cited by *Buntscheck*, Konzernprivileg, 126. Before the enactment of the EC Merger Regulation, the relation between Arts 101 and 102 TFEU and the control of mergers had been contended in this regard. It had merely been widely

Merger Regulation and Article 101 (1) TFEU allow for a mutual reference to the concept of 'control' under Art 3 of the ECMR in order to assess the application of the cartel ban on companies of a corporate group.¹²⁵²

After outlining the modes of exerting 'decisive influence' under the Regulation, it will be analyzed whether they serve as consistent criteria for determining a 'single economic entity,' justifying an exemption of group-intern agreements from Art 101 (1) TFEU. Consequently, it will be ascertained whether this concept of 'control' also serves as an appropriate reference for attributing antitrust liability between affiliated undertakings, thus to effectively 'pierce the corporate veil'. In relation to both problem issues it will finally be determined whether the existence of 'joint control' likewise provides for a sufficient degree of control for assuming a 'single economic entity'. Hereby it will be reviewed whether the Commission's assertion of an allegedly consistent concept of a 'single economic entity' is actually reflected in its practice.

§ 3.2.1 The **Modes** of Exerting 'Decisive Influence' by the Notion of Control

For the application of the Merger Regulation in a specific case, the Commission is given a certain amount of discretion to assess the existence of 'decisive influence'. This intrusive degree of control is required for the Regulation's principle appliance.¹²⁵³ It is nevertheless expressly stated in the definition of 'control' set out in Art 3 (2) of the Regulation that the mere *possibility* of exercising control is sufficient. In other words, it is not necessary to give concrete evidence that a company's possibility to exert 'control' has or will be implemented, but merely that it does in fact exist.¹²⁵⁴ Regarding the central element of exerting 'decisive influence' on the market conduct of the target undertaking it is to be ascertained whether the obtained 'rights or other means to exert control' grant the acquirer the possibility to determine the business strategy of the target firm.¹²⁵⁵ Similar to the formula of a 'single economic entity' for group-intern agreements, an undertaking must be able to enforce its interests¹²⁵⁶ on the other undertaking in a way that deprives the latter of taking autonomous decisions.¹²⁵⁷

agreed upon the fact that the two provisions constituted an insufficient basis for determining the effect of mergers in their character of regulating the *market conduct* of companies, but not the general market *structure*. With the implementation of the Merger Regulation, this discussion has been abolished. The European institutions emphasized that the latter was not based on a different understanding of the competition provisions to protect the private autonomy of companies (see page 151 f above), but that it merely served a more comprehensive control of mergers. See Recitals 6 and 7 of Council Regulation (EC) No 139/2004 of 20.1.2004; as cited by *Immenga*, in: *Immenga/Mestmäcker*, FKVO Art 22, para. 2.

¹²⁵² Cf. *Buntscheck*, Konzernprivileg, 126.

¹²⁵³ Cf. *Broberg*, The Concept of Control, ECLR, (2004), Issue 12, 741 (742). See however the Commission Notice on the Control of Concentrations between Undertakings under Council Regulation (EEC) No. 4064/89 [1998] OJ Nr. C 66/01, in which the Commission substantiates certain issues of concern in regard to the ECMR's interpretation. See furthermore: Commission Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings (2004/C 31/03).

¹²⁵⁴ See paras. 9, 12, 19, 23 and 35 of the Commission Notice cited above and *Broberg*, *ibid*, 744. The term of 'control' under the ECMR is therefore seen to correspond to the notion of 'decisive influence' of § 17 of the German Stock Corporation Act (AktG).

¹²⁵⁵ Cf. Comm of 30.7.1991, Case IV/M.62, *Eridana/ISI*; Comm of 18.12.1991, Case IV/M.121, *Ingersoll-Rand/Dresser*; Comm of 30.5.1991, Case IV/M.10, *ConAgra/IDEA*.

¹²⁵⁶ See Comm notice (EEC) No 4064/89, paras. 14 and 18; as well as *Stockenhuber*, *ibid*, 84.

¹²⁵⁷ For the original determination of this term see already the High Authority of the European Coal and Steel Community (ECSC) in its decision Nr. 24/54 of 6.5.1954, [1954] 345, from which the term of 'control'

For the scope of Art 3 (1) lit b ECMR it is nevertheless generally recognized that already the attainment of the '*factual possibility of exerting operational control*' on another undertaking is sufficient to assume the acquisition of 'control' and accordingly a merger between the concerned undertakings.¹²⁵⁸ Thus, the criterion of an 'acquisition of control' is based on a qualitative criterion that is to be interpreted in an autonomous way¹²⁵⁹ and comprises a number of different transactions.¹²⁶⁰

It is therefore not required that control in the form of 'decisive influence' is attained on the basis of company law.¹²⁶¹ Rather, mere contractually realized forms of dependence are sufficient to justify the application of Art 3 (1) lit b ECMR in case they structurally alter existing market conditions in a permanent way.¹²⁶² 'Decisive influence' can therefore be established on a legal basis or arise from the factual circumstances of a case.¹²⁶³

For the attainment of control, the Regulation therefore requires an overall appraisal of the circumstances and the competitive conditions of the specific case.¹²⁶⁴ It is important to note in this regard, that also mere 'economic dependence' may factually lead to the attainment of 'control'. In practice this has been assumed the case where particular permanent contracts, *in connection with structural links*, permit the exertion of 'decisive influence.'¹²⁶⁵ This may, for instance, be assumed where the annulment of an affiliation is not possible without an impairment of one of the concerned undertaking's means of existence.¹²⁶⁶ Upon this - presumably cautious - approach of the Commission it becomes evident that neither contractual

for the revision of mergers derives. In detail see *Karl*, Zusammenschlussbegriff, 129 ff; *Kimphrove*, Fusionskontrolle, 240; *Dirksen/Barber* EWS 1992, 99; *Mestmäcker/Schweitzer*, § 24, para. 10; *Schröter* in: FKVO Art 3 FKVO, para. 21., as cited by *Immenga*: in *Immenga/Mestmäcker*, FKVO Art 3, para. 33.

¹²⁵⁸ *Immenga*, in: *Immenga/Mestmäcker*, FKVO, Art 3, para. 33. Commission notice (EEC) No 4064/89, para. 23; likewise *Krimphove*, Europäische Fusionskontrolle, 241.

¹²⁵⁹ This means it must be ascertained independent of not only the national laws of the various member states, but also of distinct areas of (European) law. See: Comm of 15.11.1993, IV/M.3342, *Fortis/CGER*, para. 12; Comm notice (EEC) No 4064/89, para. 17; *Stockenhuber*, Fusionskontrolle, 94; *Karl*, Zusammenschlussbegriff, 122 ff.

¹²⁶⁰ *Ehlermann*, WuW 1991, 539.

¹²⁶¹ *Stockenhuber*, Die Europäische Fusionskontrolle, Baden-Baden (1995), 88; *Immenga*, in: *Immenga/Mestmäcker*, FKVO Art 3, para. 29; differently *Miersch*, Kommentar zur FKVO, 69.

¹²⁶² Commission Decision of 7.12.1996, Case IV/M.660, *RTZ/CRA*, WUW 1996, 381, See *Wiedemann*, in: *Wiedemann*, Handbuch (1999), § 15, paras. 33 and 36, with further references.

¹²⁶³ In the first case, the Commission also speaks of 'de iure control', in the latter of 'de facto control'; see Comm of 7.3.1994 IV/M. 397, *Ford/Hertz*, para. 5 ff; and Commission Notice on the Concept of Concentration (EEC) No 4064/89, para. 13, as cited by *Immenga*, in: *Immenga/Mestmäcker*, FKVO Art 3, para. 33.

¹²⁶⁴ Cf. Commission notice, paras. 4, 9, and 14; *Ehlermann* WuW 1991, 539, as cited by *Immenga*, in: *Immenga/Mestmäcker*, FKVO Art 3, para. 32.

¹²⁶⁵ See Comm. of 24.2.1993, Case IV/M.304, para. 9, referring to Case IV/M. 258, *CCIE/GTE*, para. 12, nevertheless denying the contractual relation with the respective target undertaking. See also Comm. of 23.6.1991, Case IV/M.092, *RVI/VVBC/Heuliez Bus*, para. 4, where an attribution of profits is affirmed due to the existence of permanent 'exclusive procurement agreements' for a minority shareholding. See also *Wiedemann*, in: *Wiedemann*, Handbuch (1999), § 15, para. 36.

¹²⁶⁶ *Wiedemann*, *ibid*; *Ebenroth/Rösler*, RIW 1994, 533 (540); and in effect *Krimphove*, Fusionskontrolle, 258, the latter as cited by *Buntscheck*, Konzernprivileg, 127.

agreements alone, nor corporate linkages that exist for merely a brief period of time,¹²⁶⁷ are sufficient for the assumption of 'control' in the sense of 'decisive influence'.¹²⁶⁸

As mentioned above, the means of an undertaking to exert this intrusive amount of control on another comprise legal or factual elements.¹²⁶⁹ For conferring 'decisive influence' on the constitution, the consultations, or the decisions of a company's legal bodies, the Regulation not only relies on the legal structure of ownership, but also on the use of rights concerning the entirety or parts of another undertaking's assets.¹²⁷⁰

From the Commission's case law, a number of *strategic* elements may be inferred as relevant for determining 'decisive influence' in a specific case. These comprise, in particular, a company's influence on:¹²⁷¹

- the appointment (or dismissal) of the target undertaking's management;
- the adoption of the target undertaking's financial plans;
- the amount and employment of the target undertaking's dividends;
- the target undertaking's principle business plans, for instance the acquisition or sale of assets, the decision on considerable investments, licensing agreements, the competitive strategy or product arrangement;
- the change of the target undertaking's share or common stock capital;
- the target undertaking's choice of technology, as well as
- the target undertaking's product development.

In principle, 'control' over just one of these factors may amount to 'decisive influence'. This essentially depends on the business sector in which the target undertaking operates.¹²⁷² As the determination of this form of intrusive control in effect alludes to the factual possibilities available to a company's management, an overall consideration of the legal and actual facts of the case will again be decisive.¹²⁷³

For the question of exempting group-internal agreements from the application scope of Art 101 (1) TFEU (i.e. the 'intra-enterprise, or group-privilege'), it can likewise not be essential that 'control' be exerted on another undertaking by the means of company law.¹²⁷⁴ Also mere contractual relations or factually established 'control' may, in certain situations, deprive the controlled undertaking of its freedom of action and decision-making on the market.

¹²⁶⁷ This may for instance be the case where one undertaking acquires a target company and immediately sells parts of it to a third undertaking. See e.g. Comm of 21.11.2001 Case IV/M.2499, *Norske Skog/Parenco/Walsum*, and Comm. of 5.7.2001, Case IV/M.2461, *OM Group/DMCC2*, as cited by *Broberg*, ECLR [2004], Issue 12, 741 (745).

¹²⁶⁸ Similarly for § 17 of the German Company's Act see: BGHZ 90, 381, 395, as cited by *Wiedemann*, in: *Wiedemann, Handbuch*, § 15, para. 36a.

¹²⁶⁹ See *Wiedemann*, in: *Wiedemann, Handbuch*, § 15, para. 36 f. For the assessment of the correlate situation of the determination of 'control' under Art 101 (1), see *Lehner*, OZK 2011/5, 163 (164).

¹²⁷⁰ *Wiedemann*, in: *Wiedemann, Handbuch*, § 15, para. 36a.

¹²⁷¹ See Comm of 10.6.1991, Case IV/M. 72, *Sanofi/Sterling Drug*, para. 7; Comm of 14.7.1992, Case IV/M. 299, *Thomas Cook/LTU/West LB*, para. 8; Comm of 28.2.1994, Case IV/M.408, *RWE/Mannesmann*, para. 7; Comm of 4.7.1995, Case IV/M.618, *Dow/Buna*, para. 7; Comm of 25.7.1995, IV/M.551, *R/BaE*, para. 9; as cited by *Immenga*, in: *Immenga/Mestmäcker, FKVO Art 3*, para. 35.

¹²⁷² *Broberg*, The Concept of Control, ECLR (2004), Issue 12, 741 (743).

¹²⁷³ See Commission notice (EEC) No 4064/89, paras. 4, 9, 24 and 29, as cited by *Immenga* in: *Immenga/Mestmäcker, FKVO Art 3*, in paras. 33 and 34.

¹²⁷⁴ See *Buntscheck*, Konzernprivileg, 127.

It has to be reviewed therefore, whether the amount of control in the sense of Art 3 (1) lit b, leading to economic dependence may be assumed for situations of mere factual dependence. In its consolidated notice,¹²⁷⁵ the Commission has stated that, “*in exceptional circumstances, a situation of economic dependence may lead to control on a de facto basis, where, for example, very important long-term supply agreements or credits provided by suppliers or customer, coupled with structural links, confer decisive influence*”.¹²⁷⁶

In regard to the ‘group-privilege’ it must primarily be stated that the possibility¹²⁷⁷ of exerting ‘decisive influence’ and the correlating lack of a subsidiary’s autonomy may also be established either legally or factually. In cases of 100% shareholding participation this is regularly assumed to be the case.¹²⁷⁸ For the existence of an ‘economic entity’ in cases of a simple ‘factual group or concern’,¹²⁷⁹ it is nevertheless crucial to assess whether the managing board of a corporation has effectively lost its autonomy towards the majority shareholder. This essentially depends on whether the managing board acts in the latter’s interest, or whether it relies on its (official) independence.¹²⁸⁰ As a majority shareholder may nevertheless principally be capable of appointing a company’s supervisory board, hereby indirectly controlling its management, the former case may in effect be regarded possible.¹²⁸¹

Accordingly, the Commission has referred to a parent company’s possibility of appointing its subsidiary’s management or executive board¹²⁸² already in its initial decision in *Christiani & Nielsen*. This not only shows that a factual group or concern may also lead to the existence of a ‘single economic entity’, but that the functional concept of control under the Merger Regulation principally constitutes an appropriate base of reference for the assessment of intra-group control relationships on the basis of Art 101 (1) TFEU.¹²⁸³

Hence, it has been pointed out that a majority shareholding is sufficient to assume ‘control’ as long as it confers the possibility of exerting ‘decisive influence’ on a long-term basis.¹²⁸⁴ It has been drawn out that for wholly-owned subsidiaries this amount of influence,

¹²⁷⁵ Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the Control of Concentrations between Undertakings, [2008] OJ C95/1, as cited by *Wiedemann*, in: *Wiedemann, Handbuch* (2008), § 8 para. 36a.

¹²⁷⁶ See Commission Notice, para. 20, citing its Decision of 22.1.1997, Case IV/M.794, *Coca-Cola/Amalgamed Beverages GB*; Case IV/ECSC.1031, *US/Sollac/Bamesa* of 28.7.1993; Case IV/M.625, *Nordic Capital/Transpool* of 23.8.1995; for the criteria see also Case V/M.697, *Lockheed Martin Corporation/Loral Corporation*, of 27.3.1996.

¹²⁷⁷ See already 3.1.1.2, § 3.2. above.

¹²⁷⁸ See *Gleiss/Hirsch*, EG-Kartellrecht, Art 85 (1), para. 194.

¹²⁷⁹ This concerns corporate groups where there is a lack of a legal authority to issue binding instructions to another company.

¹²⁸⁰ In German law § 76 of the Stock Company Act, see *Thomas*, Konzernprivileg und Gemeinschaftsunternehmen, ZWeR 3/2005, 243.

¹²⁸¹ *Schroeder*, in *Wiedemann: Handbuch*, § 8, para. 9. For § 1 of the German antitrust code (GWB), see *Huber/Baums*, in: *Frankfurter Kommentar*, para. 154.

¹²⁸² See Comm. of 18.8.1969, IV/22.548, *Christiani and Nielsen*, [1969], OJ Nr. L 165/12, para. 2, as cited by *Thomas*, ZWeR 3/2005, 243 in this regard.

¹²⁸³ See likewise *Gleiss/Hirsch*, EG-Kartellrecht, Art 85 (1), para. 197, nevertheless with an undifferentiated assessment for the distinct areas for which the ‘single economic entity’-doctrine is applied. This implies on the other hand that where a controlling company does have the legal means of issuing binding instructions, for instance, in the case of a control or domination agreement or a limited liability company, the existence of an ‘economic entity’ may legitimately be assumed; see: *Schroeder* in: *Wiedemann, Handbuch*, § 8, para. 8; and *Emmerich*, in *Immenga/Mestmäcker*, Art 81 (1), para. 55; *Ritter/Braun*, *European Competition Law*, 3rd ed, (2005), 48.

¹²⁸⁴ See Comm. of 14.12.1972, IV/26.911, *Zoja*, [1972] OJ Nr. L 299/51, 54; ECJ of 16.12.1975, C-40/73, *Suiker Unie*, [1975] ECR 1663, as cited by *Gleiss/Hirsch*, *ibid*.

implying the company's lacking competitive autonomy, is even assumed. This means that the precondition of a 'durable and significant possibility of control,'¹²⁸⁵ as required for the assumption of an acquisition of control under the Merger Regulation, is also necessary for exempting group-intern agreements from the application scope of Art 101 (1) TFEU. Even if in this regard - and in distinction to the control of concentrations - the effects of an agreement on the economic freedom of a company are to be considered for the *contractual* domain, the criteria referred to by the European institutions¹²⁸⁶ suggest that also for the non-application of Art 101 (1) TFEU a *permanent* possibility of control is pertinent.¹²⁸⁷

From this assessment it may be deduced that apart from the permanent possibility of a certain degree of influence, the existence of assured 'structural relations' are necessary for the assumption of control in the form of 'decisive influence.'¹²⁸⁸ This rather cautious approach of the Commission, establishing 'decisive influence' upon the prerequisite of durable structural links has also been approved of in literature.¹²⁸⁹ This is precisely due to the fact that an 'assured amount of permanent control' will regularly be lacking in cases of mere factual dependence.¹²⁹⁰ For the determination of applying the 'group, or concern privilege' on affiliated companies therefore, recourse to the modes of exerting 'decisive influence' under Art 3 (2) of the ECMR is again suitable.

Similar approaches to the notion of intragroup 'control' exist under U.S. antitrust law, considering, on the one hand, the percentage of the parent company's ownership of its subsidiary's common stock, and on the other, the parent company's existing rights in relation to its subsidiary's voting stock.¹²⁹¹ Such a modified 'control'-approach only grants immunity from the cartel ban where a parent company possesses more than 50% of its subsidiary's common stock *and* a legally controlling interest in the latter's voting stock.¹²⁹² The necessity of the parent to be able to "*assert full control at any moment*" over the subsidiary is recognized likewise.¹²⁹³ In order to apply this 'intra-enterprise doctrine',¹²⁹⁴ this *ability* to control a subsidiary must

¹²⁸⁵ This implies the necessary element of a 'certain amount of time'; see also *Bunte*, in: Langen/Bunte, Art 85, General Principles, para. 113.

¹²⁸⁶ The European institutions have regularly cited elements such as the amount of share capital, voting rights, or the possibility to appoint a subsidiary company's executive board.

¹²⁸⁷ Cf. *Buntscheck*, Konzernprivileg, 127.

¹²⁸⁸ In this way, mere minority shareholdings have been asserted to confine the economic freedom of a subsidiary only in an insufficient manner, thus preventing their exemption from Art 101 (1) TFEU: see e.g. ECJ of 17.11.1987, cases 142 and 156/84, *B and Reynolds*, [1987] ECR 4487, paras. 7 and 31. In detail see Schroeder, EWIR 1987, 1207. In German antitrust legislation there have nevertheless been some rare decisions where even minority shareholdings were deemed sufficient for assuming 'decisive influence'. This has, for instance, been deemed the case where such a shareholder had the possibility to implement its instructions by a binding voting agreement. See BKartA, Tätigkeitsbericht 1973, p. 82, where the application of § 1 of the German antitrust code (cartel ban) was denied on the basis of a 30% shareholding.

¹²⁸⁹ See *Wiedemann*, in: Wiedemann, Handbuch (2008), § 8 para. 36a, pointing to the fact that the Commission insofar follows the German Supreme Court in its assessment of control under § 17 (1) of the (German) Stock Company's Act (AktG): see BGHZ 90, 381, 395, *Beton und Monierbau*.

¹²⁹⁰ For German Law: *Kleinmann/Bechtold*, Fusionskontrolle, § 23, para. 187, as cited by *Buntscheck*, Konzernprivileg, 127.

¹²⁹¹ See *Meyers*, Partial Ownership of Subsidiaries, Unity of Purpose and Antitrust Liability, 68 U. of Chi. L. Rev. (2001), 1401, and *Easterbrook*, The Limits of Antitrust, 63 Tex. L. Rev. 1, (1984), 12, noting in this regard that the vagueness found in doctrines such as the 'rule of reason' hinders business planning and increases litigation costs.

¹²⁹² See *Meyers*, *ibid*, 1414 ff.

¹²⁹³ *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), 771-72.

¹²⁹⁴ This term correlates to the 'group, or concern-privilege' in European law.

nevertheless concern ‘fundamental matters,’ for which a simple majority quorum is the default rule under most states’ corporation laws.¹²⁹⁵

All of these considerations point to the significance of additional structural connections for the necessary degree of control in order to exercise ‘decisive influence’ between affiliated companies of a corporate group.¹²⁹⁶ A participation of mere 25% has conversely been deemed insufficient for exempting agreements between companies of a corporate group from the application range of Art 101 (1) TFEU.¹²⁹⁷

§ 3.2.2. The Requisite **Degree** of Control

Apart from the modes of exerting control, it is furthermore necessary to substantiate the degree of control requisite for assuming ‘decisive influence’ and thus the existence of a ‘single economic entity’ in a particular case.

First of all, Article 3 (1) of the Merger Regulation expressly states that a concentration can arise in case either ‘direct’ or ‘indirect’ control is acquired. Indirect control exists where control is exercised by means of other companies, typically subsidiary companies.¹²⁹⁸ In this sense, a concentration may result from the combination of both direct and indirect control.¹²⁹⁹

In respect to the attribution of liability on the basis of ‘decisive influence’, the Commission has not hesitated to impute liability over various levels of ownership, regularly addressing its decision imposing the fine to the ultimate parent company of a corporate group.¹³⁰⁰ Indeed, it is clear from Commission decisions that the Commission also holds parent entities liable where they control subsidiaries indirectly (i.e. through other subsidiaries).¹³⁰¹ As outlined above, this is now invariably the case where the parent company, either directly or indirectly, holds 100% of the shares in a subsidiary in which an antitrust infringement has been committed.¹³⁰² Nevertheless, also majority shareholdings have regularly been deemed sufficient

¹²⁹⁵ See *Meyers*, 68 U. of Chi. L. Rev. (2001), 1401 (1415), on the antitrust law of the various U.S. states. He nevertheless points to the fact that a corporation’s articles of incorporation may specify a greater quorum, requiring for instance a ‘supermajority’ shareholding voting. For the comparable situation under the various national laws of the EU member states, see *Forum Europaeum Corporate Group Law*, EBOR (European Business Organization Law Review) 1: 165, 188f.

¹²⁹⁶ It has hereby been ascertained that the requirement of common stock ownership, or an ‘economic stake’ promotes antitrust policy by providing safeguards against a (mere) vote-controlling parent to strategically undermine the competitiveness of a subsidiary for its own benefit. See *Meyers*, *ibid*, 1418.

¹²⁹⁷ See Comm. Decision of 2.8.1989, 89/515/EEC, *Betonstahlmtten*, [1989] OJ Nr. L 260/1, para. 37, as cited by *Gleiss/Hirsch*, EG-Kartellrecht, Art 85 (1), para. 197.

¹²⁹⁸ *Broberg*, The Concept of Control, ECLR (2004), Issue 12, 746. In this case it can therefore be spoken of a ‘sub-subsidiary’. See also *Wiedemann*, in: *Wiedemann, Handbuch* (2008), § 15, para. 46.

¹²⁹⁹ See Comm Dec of 6.6.1994 IV/M.421, *Medeol/Elosua*, [1994] OJ Nr. C 169. In this case the company of ‘Medeol’ acquired 20% of the shares in ‘Elousa’, which did not by itself provide ‘control’. However, prior to this acquisition, ‘Medeol’ already controlled 37% of the shares through its subsidiary company ‘Koipe’, whereby the two shareholdings, taken together, allowed the assumption of ‘sole control’, i.e. a concentration. See *Broberg*, *ibid*, 747.

¹³⁰⁰ See e.g. ECJ of 27.10.2010, T-24/05, *Alliance One International vs. Commission*, para. 132 in regard to Case COMP/C.38.238/B.2, *Raw Tobacco Spain*, paras. 371 f.

¹³⁰¹ *Faull/Nikpay*, The EC Law of Competition, (2007) 8.561.

¹³⁰² See ECJ of 25.10.1983, Case 107/82, *AEG-Telefunken AG vs. Commission*, [1983] ECR 3151; ECJ of 16.11.2000 C-286/98 P, *Stora Kopparberg Bergslags vs. Commission*, [2000] ECR I-29925; CFI, Joined Case T-71/03, T-74/03, T-87/03 and T-91/03, *Tokai Carbon Co Limited a.o. vs. Commission*, [2004] ECR II-1181; ECJ of 10.9.2009, Case 97/08 P, *Akzo Nobel NV vs. Commission*, [2009] ECR I-08237. For the outline of the creation and substantiation of this ‘legal presumption’ see point 2.1.2. above.

for attributing responsibility on this basis.¹³⁰³ The appropriateness of this practice again hinges on the dogmatic assessment of the extensive application of a 'single economic entity doctrine' for this specific legal issue.¹³⁰⁴ In order to determine the scope of the so-called 'concern-privilege', the assessment of indirect control is again particularly relevant where 'decisive influence' is exercised via a joint venture subsidiary.¹³⁰⁵

In this regard, it has already been pointed out that Art 3 (1) lit b. of the ECMR differentiates between 'sole control' and 'joint control'. Sole control exists where an undertaking possesses either the majority of voting rights in another company, or, in cases of so-called 'qualified minority shareholdings',¹³⁰⁶ where the minority shareholding is supplemented by legal¹³⁰⁷ or factual¹³⁰⁸ elements allowing for the shareholder to determine the *economic strategy* of the target undertaking.¹³⁰⁹ Joint control, on the other hand, is presumed where two or more parent companies¹³¹⁰ must meet an accord on all principle decisions concerning a joint venture subsidiary.¹³¹¹ For the assumption of 'decisive influence' in this case, the possibility of *negatively* exerting control, i.e. being able to block the strategic economic conduct of the commonly controlled undertaking, is sufficient.¹³¹²

For the establishment of 'control' in the factual understanding of this term under the Merger Regulation it is therefore necessary to consider both positive, i.e. constructive, as well as *negative* means of exerting influence. In contrast to the exertion of 'decisive influence' under the notion of sole control,¹³¹³ situations of standoff may arise in cases of joint control, because two or more undertakings may have the possibility to block strategic decisions.¹³¹⁴ Because the attribution of conduct nevertheless requires either intentional or negligent conduct,¹³¹⁵ 'negative control,' denoting the mere possibility to block strategic decisions, is factually insufficient for assuming 'decisive influence'. Thus, a 'single economic entity' for this specific issue of concern

¹³⁰³ See ECJ of 21.2.1973, C-6/72, *Europemballage Corporation and Continental Can vs. EC Commission*, [1972] ECR 215; Comm of 20.10.2004, Case COMP/C.38.238/B.2, *Raw Tobacco Spain*, para. 371 f; For the exemption of group-intern agreements, see CFI of 6.4.1995, T-141/89, *Tréfileurope*, [1995] ECR II-791, para. 129; Comm of 15.10.1990, *CEKACAN*, [1990] OJ Nr. L299/64, paras. 1 and 34.

¹³⁰⁴ In detail see § 2. of this section.

¹³⁰⁵ For the determination of a concentration under Art 3 (3), control is regularly required *indirectly* where the joint venture is set up for the sole purpose of coordinating the owners' - usually two parent companies - joint control. Under the ECMR, this is important for determining whether 'control' is acquired and thus a concentration exists. For the Commission's questionably extensive determination of this acquisition of indirect control for several distinct companies controlling a joint venture see: *Broberg*, ECLR (2004), Issue 12, 746.

¹³⁰⁶ For the assessment of 'mere' minority shareholdings in regard to the concept of 'control', see page 194 below.

¹³⁰⁷ (This means pursuant to agreements with other shareholders, see Commission Communication No. C 43/2009, para. 59).

¹³⁰⁸ This requires the attainment of at least a factual majority of voting rights in the annual General Meeting. See Commission Communication No. 43/2009, para. 65.

¹³⁰⁹ See Commission notice (EEC) No 4064/89 on the concept of 'concentration', paras. 19 and 39.

¹³¹⁰ It has been mentioned that under principles of general corporate law, one speaks of a parent company, where a corporation has a controlling interest in another corporation, *usually* through ownership of more than one-half of the voting stock. See *Black's Law Dictionary*, West 7th ed., (1999), 344.

¹³¹¹ *Immenga*, in: *Immenga/Mestmäcker*, Art 3 FKVO, paras. 36 and 71.

¹³¹² See Commission notice (EEC) No 4064/89, para. 19.

¹³¹³ This form of 'control', in principle, requires the possibility of *positively* determining the general strategic decisions of another company.

¹³¹⁴ See Commission notice (EEC) No 4064/89, para. 18; *Köhler* EuZW 1992, 634 (637); and CFI of 23.2.2006, Case T-282/02, *Cementbouw*, see WuW EU-TR 1005, as cited by *Immenga*, *ibid*, para. 79.

¹³¹⁵ See Art 23 Reg. 1/2003, and in detail under 3.2. below.

may only be assumed for cases of 'positive influence', thereby nevertheless comprising the element of a negligent infringement of Art 101 (1) TFEU by an insofar 'controlling' parent company. In order to comprehensively point out that the concept of 'control' must again be ascertained differently for the assessment of exempting group-intern agreements from Art 101 (1) TFEU, it remains to be ascertained, whether the possibility of exerting *negative* control is conversely sufficient for the application of the so called 'group-privilege'.

In regard to the Merger Regulation, the Commission has held that it is sufficient for the establishment of 'sole' control that a single shareholder has the *possibility* to block these strategic decisions, thus effectively influencing the controlled company's market strategy.¹³¹⁶ In this way, even veto rights may, in exceptional circumstances, grant the ability of exerting not only common, but even sole control.¹³¹⁷ Concerning the modes of exerting 'decisive influence' in this regard, it is not required that veto rights exist in relation to all of the above-mentioned means.¹³¹⁸ Depending on the business sector in which the target undertaking operates, it is sufficient that decisive influence in relation to just one of these factors exists.¹³¹⁹ In the light of the common standard for assessing a company's economic autonomy under both Art 3 ECMR and Art 101 (1) TFEU, nothing else can hold true for determining the exemption of agreements between such a controlling undertaking and its dependent subsidiary company. However, this only applies where the possibility of exerting 'negative' control allows the parent company to effectively exert the corresponding strategic influence.¹³²⁰ Influence of this amount on the daily business conduct of a subsidiary is nevertheless sufficient.¹³²¹

Most cases, the Commission and the European Courts were to decide upon concerned constellations in which the concerned undertakings stood to each other in a relation of 'dependence,' or in which at least a common parent company existed.¹³²² It has been questioned

¹³¹⁶ Commission, notice (EEC) No 4064/89, para. 14, 30; *Immenga*, in: *Immenga/Mestmäcker*, Art 3 FKVO, para. 36 and 72; *Wiedemann*, in: *Wiedemann*, Handbuch § 15, para. 40b.

¹³¹⁷ See again Comm. Dec. of 6.6.1994 IV/M.421, *Medeol/Elosua*, [1994] OJ Nr. C 169. This is to be the case where an investor possesses a 50% shareholding in a company while the rest of the assets are widely dispersed among two or more minority shareholders, or where a certain number of votes are necessary for essential strategic decisions, conferring, in effect, a veto right onto a certain shareholder.

¹³¹⁸ See § 3.2.1 above.

¹³¹⁹ Cf. *Broberg*, *The Concept of Control*, ECLR (2004), Issue 12, 743, giving the example that where a target undertaking essentially depends on a number of major long term investments, a veto right in this respect could weigh heavily in balance. If in contrast long-term investments are of little significance for the target undertaking, the opposite will be the case.

¹³²⁰ For the example of an effective negative delimitation see *Immenga*, in: *Immenga/Mestmäcker*, Art 3 FKVO, para. 37, asserting that the possibility of simply *monitoring* the subsidiary's market conduct (i.e. its surveillance) is not sufficient for the assumption of 'decisive influence'. In this regard, see Commission notice (EEC) No 4064/89, para. 22.

¹³²¹ The question whether a sufficient degree of 'control' can be assumed for the existence of mere minority shareholdings has already been refuted for the application of the Merger Regulation. See: Greenbook on the revision of Council Regulation No. 4064/89, COM (2001) 745, 11.12.2001. While the Commission is therefore not able to review the acquisition of a non-controlling minority shareholding under the Merger Regulation, existing minority shareholdings may well be taken into account for the consideration whether a merger substantially impedes effective competition. See: *Kühnert/Xeniadis*, *Die wettbewerbsrechtliche Kontrolle von Minderheitsbeteiligungen*, ÖZK 2011/4, 123 (125). For an assessment of this degree of 'control' in regard to the determination of an exertion of 'decisive influence' required for an attribution of antitrust liability between a parent and a subsidiary undertaking, see § 3.3.2. c. below.

¹³²² For German corporate law outlined by § 17 AktG (German Stock Companies Act). Cf. *Buntscheck*, *Konzernprivileg*, 137. On the precise assessment of this topic issue following sometimes ambivalent

therefore, whether specifically the exemption from Art 101 (1) TFEU may also be applicable to situations in which there is no such relationship of dependence, but where two companies affiliate on an equal basis.¹³²³

Referring to the legal situation in some member states, allowing for the possibility of two or more undertakings to contractually establish a ‘common economic management’, while retaining their individual legal personalities,¹³²⁴ the Commission in practice reviews whether this may effectively result in the creation of a ‘single economic unit’.

Prerequisite for the assumption of a ‘single economic unit’ in this regard is whether the contractual agreement leads to a ‘*de facto* amalgamation’ of the concerned undertakings.¹³²⁵ Decisive for the assumption of a merger is the existence of a ‘permanent single economic management’ without depriving the companies of their separate legal personality.¹³²⁶

In consideration of the necessary degree of ‘control’ outlined above, it is nevertheless evident that the existence of ‘decisive influence’ may not only be fulfilled by a relation of subordination (i.e. legal dependence), but rather comprises situations where the autonomous freedom of action and decision on the market is already confined without the existence of an agreement.¹³²⁷ For these latter cases, which regularly result from a ‘common economic management’, it is crucial to ascertain whether the concerned undertakings possess a sufficient degree of economic autonomy towards each other which could possibly be restricted to a further extent by means of an ‘agreement’. At least in those situations in which the contractual creation of a mutual economic management is established by an agreement between companies on a permanent basis, there is, in principle, no objection to the inapplicability of Art 101 (1) TFEU.¹³²⁸ Finally, it should be noted that it had previously been assessed whether the contractual establishment of such a common management itself could infringe Art 101 (1) TFEU.¹³²⁹ With the adoption of the Merger Regulation, however, this latter question has essentially lost practical relevance.¹³³⁰

Regarding the *temporal* scope of a ‘single economic entity’, it is important to note that a ‘distortion’ to competition may legitimately only be ruled out as long as ‘decisive influence’ may actually be exerted.¹³³¹ In cases concerning an attribution of liability this factor is relevant for the assumption of an ‘economic entity’ in cases of ‘legal succession’.¹³³² In cases concerning the exemption of group-internal agreements on the other hand, this aspect has played a role for

assertions of the CFI: see ECJ of 2.10.2003, C-196/99 P, *Siderúrgica Aristrain Madrid SL vs. Commission*, [2003] ECR I-11049, para. 99, outlined in the discussion of case-law above.

¹³²³ Critically, *Emmerich*, in: Immenga/Mestmäcker, Art 81 (1), para. 58, as already cited in this regard by *Buntscheck*, *ibid*.

¹³²⁴ Under German law, for instance, this is the case for a so-called ‘Gleichordnungskonzern’ under § 18 (2) of the Stock Companies Act (*‘unter einheitlicher Leitung zusammengefasst’ [sind]*), and for the so-called ‘Groupement d’Intérêt Economique’ under French law (GIE).

¹³²⁵ See Commission notice (EEC) No 4064/89, para. 7.

¹³²⁶ See Commission, *ibid*, as cited by *Immenga*, in: Immenga/Mestmäcker, Art 3 FKVO, para. 19.

¹³²⁷ Cf. *Buntscheck*, *Konzernprivileg*, 138.

¹³²⁸ In effect, see *Schroeder*, in: Wiedemann, *Handbuch*, § 8, para. 12. This must be the case where the same individuals make up the management body of a company, or where instead of a legal contract, internal instructions could lead to the same result. See *Buntscheck*, *WuW* 2004, 374 with further references.

¹³²⁹ Comm. of 20.12.1974, IV/26.872, *Chevron*, [1975] OJ Nr. L 38/14, para. 15; Comm. of 15.12.1975, IV/27.073, *Bayer/Gist-Brocades*, [1976] OJ Nr. L 30/13, para. 18.

¹³³⁰ *Gleiss/Hirsch*, *EG-Kartellrecht*, Art 85 (1), para. 198.

¹³³¹ *Schroeder*, *Verbundene Unternehmen*, in *WuW* 4/1988, 280, see also *Faull/Nikpay*, *The EC Law of Competition*, (2007), 8.560.

¹³³² For a detailed assessment of this issue see however § 3.2.2.d below.

instances of imminent corporate restructurings. In a decision still concerning the file for a declaratory exemption of an agreement between two subsidiaries of the same parent company for instance,¹³³³ the Commission first declared its approval and exempted the intra-group accord from the cartel ban.¹³³⁴ As the common parent company nevertheless informed the Commission of its intention to resell parts of one of the subsidiaries to a third party, the authority revised its assessment of the case and considered the respective agreements to be subjected to Art 101 (1) TFEU. This was held to be the case, because the concerned undertakings were no longer seen to constitute part of the same ‘economic entity’ with their parent company. Irrespective of the fact that the latter still owned them, the Commission attributed the immanent restructuring of the group priority over the then existent structure of the group.¹³³⁵ Under a precise mode of assessing factual ‘control’ between corporate group companies, the pertinent moment should have been the actual termination of the corporate affiliation.¹³³⁶

§ 3.3. Potential versus Actual Control: A Uniform Application of the ‘Single Economic Entity Doctrine’?

The subordination of a company under the economic influence of another leads to the inapplicability of Art 101 (1) TFEU for agreements entered into between them.¹³³⁷ In this regard it is decisive whether a company’s freedom of action (i.e. its economic autonomy) is already confined by the powers of leadership or management of the controlling undertaking so that a contractual agreement between them could not lead to its further restriction.¹³³⁸ Where this is the case,¹³³⁹ the existence of a ‘single economic entity’ between legally separate undertakings is assumed. It has been outlined so far that this conclusion is principally congruent with the concept of ‘control’ under the European Merger Regulation.¹³⁴⁰

In respect to the alleged consistent application of the concept of a ‘single economic entity’, the question therefore arises whether an *active exertion* of ‘decisive influence’ in the respective area of the agreement or infringement is necessary, or whether already the mere possibility to do this is sufficient. As indicated above, it is essential to hereby distinguish between the two distinct legal issues upon which the Commission and the ECJ ascertain the

¹³³³ For the procedural changes in this regard introduced by Reg. 1/2003, replacing the centralized notification and authorization system under Art 101 (1) TFEU by a system of direct exemption see e.g.: Wils, *Principles of European Antitrust Enforcement* (2005), 3 f. In this regard it should be mentioned that a clear determination of the application scope of Art 101 (1) TFEU upon the notion of ‘control’ is even more crucial under existing procedural rules, as the respective undertakings are required to assess the risk of their agreement being subjected to Art 101 (1) TFEU on their own terms. In respect to the comparable problem for U.S. antitrust law, see *Easterbrook*, 63 *Tex.L.Rev.* (1984) 1, 12.

¹³³⁴ For a detailed assessment of an agreement between two subsidiary companies of the same parent in regard to Art 101 (1) TFEU, see 3.3. below.

¹³³⁵ See Comm. Decision of 12.12.1986, *Austin Rover Group*, OJ Nr. C 319, p. 3 = WuW 1987, 637.

¹³³⁶ Cf. *Schroeder*, WuW 4/1988, 275 (281).

¹³³⁷ Thus already *Harms*, *Konzerne im Recht der Wettbewerbsbeschränkungen*, 230; *Müller-Henneberg*, *Gemeinschaftskommentar* (1980), § 1 GWB, para. 15, literally: “*unter der Leitungspotenz eines anderen Unternehmens*”.

¹³³⁸ *Schroeder*, WuW 4/1988, 279.

¹³³⁹ (This means, where a further confinement of a company’s autonomy is factually impossible).

¹³⁴⁰ Thus already *Schroeder*, *Verbundene Unternehmen*, WuW 4/1988, 275 (279), referring to the most ‘recent developments’ in the regulation of mergers.

concept of a 'single economic entity' for a (possible) application of the cartel ban on corporate groups.¹³⁴¹

§ 3.3.1. Assessment in Regard to the Exemption of Group-Intern Agreements from Art 101 (1) TFEU

In its case-law, neither the Commission nor the ECJ have explicitly stated whether it is necessary for exempting group-intern agreements from Art 101 (1) TFEU that control in the sense of 'decisive influence' is in fact exerted.¹³⁴² In the frequently quoted case of *Christiani & Nielsen* the Commission had originally referred to the mere *possibility* of the parent company to exert instructions concerning the market conduct of its subsidiary. Factual circumstances were mentioned hereby to merely affirm the existent close cooperation.¹³⁴³ While in *Kodak*, the Commission and the ECJ unequivocally did point to the actual employment of a parent company's 'control', all further decisions contain no particular allusion to a de facto exertion of this amount of intrusive influence.¹³⁴⁴

Nevertheless, it has sometimes been argued that as long as the market conduct of a subsidiary is not determined by instructions of a controlling parent company, the former essentially acts on its own (entrepreneurial) responsibility. Such an amount of economic freedom of action was seen to lead to the existence of 'restrictable competition'.¹³⁴⁵ According to this view, the exemption of agreements between corporate group companies is only possible where the parent company has factually made use of its power to exert 'decisive influence'.¹³⁴⁶ As this form of 'reversible' competition was likewise ascertained to require protection,¹³⁴⁷ parent companies were reckoned to necessarily expect an application of the competition provisions, including possible sanctions, where they did not make use of their right to issue binding instructions.¹³⁴⁸

It has been pointed out, however, that in practice legally binding instructions and agreements constitute equal instruments to determine the conduct of a subsidiary company.¹³⁴⁹ The application of the 'intra-enterprise' or 'group-privilege' in these cases would only lead to the situation that vigilant parent companies replace a respective agreement by such a binding instruction.¹³⁵⁰ To make the existence of instructions a precondition for exempting group-intern agreements from the application scope of Art 101 (1) TFEU, can therefore hardly

¹³⁴¹ See already in 3.1.1.2, § 3.2. above.

¹³⁴² Cf. *Buntscheck*, Konzernprivileg, 135.

¹³⁴³ Comm. of 18.6.1969, Case IV/22548, *Christiani & Nielsen*, [1969] OJ Nr. 165/12, 14.

¹³⁴⁴ Comm. of 30.6.1970, IV/24055, *Kodak*, [1970] OJ Nr. L 147/24, 25, para. 12; CFI of 12.1.1995, T-102/92, *Viho*, [1995] ECR II-17, 35, para. 51; ECJ of 24.10.1996, C-73/95 P, *Viho*, [1996] ECR I-5457, 5495, para. 15 f, as cited by *Buntscheck*, *ibid*.

¹³⁴⁵ See *Emmerich*, in: Immenga/Mestmäcker, Art 81 (1) EGV, para. 56 f, in particular 59; *Idem*, in: Immenga/Mestmäcker, § 1 of the German antitrust code (GWB), para. 216; *Benisch*, Kooperationsfibel, 4th ed. (1973), *Mestmäcker/Schweitzer*, Europäisches Wettbewerbsrecht, 200 and 406; *Möschel*, Recht der Wettbewerbsbeschränkungen, para. 192; *Koch*, in: Grabitz/Hilf, Art 85, para. 44; *Schröter*, in GTE, Art 85 (1), para. 98.

¹³⁴⁶ *Koch*, in: Grabitz/Hilf, Art 85, para. 44; likewise *Müller-Graff*, in: Hailbronner/Klein/Maguiera/Müller-Graff, Art 85, para. 73.

¹³⁴⁷ *Mestmäcker/Schweitzer*, Europäisches Wettbewerbsrecht, § 8, para. 49 f, with further references.

¹³⁴⁸ *Emmerich*, in: Immenga/Mestmäcker, Art 81 (1) EGV, para. 59.

¹³⁴⁹ *Schroeder*, WuW 4/1988, 279, referring to *Schröter*, in GTE, Art 85 (1), para. 33.

¹³⁵⁰ *Schroeder*, WuW 4/1988, *ibid*.

lead to the enhancement of competition in the Common Market. In light of this objective, the reasons for parent companies to allow their subsidiary companies a certain amount of competitive freedom to determine their market conduct¹³⁵¹ are irrelevant in practice.

One can rather expect a disturbance of the parent company's market strategy from the approach of assessing the requisite amount of 'decisive influence' on the basis of binding instructions.¹³⁵² Furthermore, the ascertainment whether a specific area of business is directed by the head of the group on the basis of binding instructions has even been assumed to lead to 'insurmountable difficulties' in practice.¹³⁵³

In favor of the restrictive view, requiring a parent company's active employment of its means of exerting control, it has been argued that from the viewpoint of other market participants, only the active confinement of a subsidiary's conduct is similar to restricting competition between economically independent companies.¹³⁵⁴

An objection to this position is that the existence 'competition' cannot be determined upon a parent company's decision to what extent it intends to 'control' its subsidiaries by the legal or factual means it possesses.¹³⁵⁵ Accordingly, the ECJ has in no decision assumed the subsidiary to lack the respective legal autonomy only where a parent company had factually made use of its control rights, or actively interfered with the market conduct of one of its dependent companies.¹³⁵⁶ The effective employment of 'control' had rather only been explicitly mentioned as a supportive element where the parent company had in fact exerted influence on its subsidiary's conduct.¹³⁵⁷ Conditioning the application of Art 101 (1) TFEU on the existence of an actual utilization of 'control' by the parent company would thus not only sanction parent companies for conceding their subsidiaries a certain amount of competitive freedom in an inopportune way,¹³⁵⁸ but also contravene the purpose of Art 101 (1) TFEU.¹³⁵⁹ In line with this reasoning, a subsidiary's economic freedom is already missing where the controlling parent company has the mere *possibility* of exerting its rights of 'control'.¹³⁶⁰ In a strict sense, it is insofar even incorrect to speak of 'group-intern competition'.¹³⁶¹

¹³⁵¹ This essentially includes stepping back from issuing instructions despite their significant participation or the existence of a 'controlling agreement'.

¹³⁵² Thus already *Huber*, AWD 1969, 429 (430f) and in effect *Schroeder*, in: Wiedemann, Handbuch § 8, para. 7. This conclusion is irrespective of the fact whether one considers these forms of instructions to be exempted from Art 101 (1) TFEU because they essentially lack the character of an 'agreement' in the sense of the provision. In detail, see *Buntscheck*, Konzernprivileg, 80f.

¹³⁵³ *Schroeder*, WuW 4/1988, 279.

¹³⁵⁴ See e.g. Case ECJ of 24.10.1996, C-73/95, *Viho*, [1996] ECR I-5457, 5472 and ECJ of 14.10.1972, Case 48/69, *Imperial Chemical Industries* [1972], ECR 619, where the ECJ nevertheless also referred to the fact that the company of 'ICI' had *made use* of its power of direction over its subsidiaries in order to ensure the application of its decision (i.e. to raise prices) on the respective market.

¹³⁵⁵ In effect *Schroeder*, in: Wiedemann, Handbuch, § 8, para. 7.

¹³⁵⁶ *Gleiss/Hirsch*, EG-Kartellrecht, Art 85 (1), para. 196.

¹³⁵⁷ Cf. *Buntscheck*, Konzernprivileg, 135.

¹³⁵⁸ This would effectively misperceive the economic gains or objectives of an international corporate group.

¹³⁵⁹ In effect, *Gleiss/Hirsch*, EG-Kartellrecht, Art 85 (1), para. 196; *Bunte*, in: Langen/Bunte, Art 85, General Principles, para. 113; *Lübbig*, in: Wiedemann, Handbuch, § 7, para. 14; *Heitzer*, Konzerne im Europäischen Wettbewerbsrecht, 178. For the justification of the irrelevance of an existing instruction, see already *Schroeder*, WuW 4/1988, 279.

¹³⁶⁰ *Schroeder*, in: Wiedemann, Handbuch § 8, para. 7 and 3.1.1.2, § 3.2. above.

¹³⁶¹ In this way, see however *Schröter*, in: GTE, Art 85 (1), para. 98; likewise *Mestmäcker/Schweitzer*, Europäisches Wettbewerbsrecht, § 8, para. 49 f; *Immenga*, in: Immenga/Mestmäcker, Art 81 (1) EGV, para. 59.

The parent company's mere possibility to exert control is furthermore appropriate given that a subsidiary company will regularly act upon the consciousness of its dependence on the parent company. This is particularly the case as the controlling parent may, at any given time, revoke its decision of granting a certain amount of economic autonomy to it.¹³⁶² Restricting the exemption of group-intern agreements to the precondition of an 'actual exertion' of decisive influence would therefore seriously impact a corporate group's business strategy on the Common Market and effectively discriminate decentralized corporate groups.¹³⁶³ This would only lead to the effort of companies to issue binding instructions for existing corporate affiliations, which is essentially running counter the objective of Art 101 (1) TFEU. It would furthermore pose a substantial disadvantage to the business policy of foreign parent companies on the Common Market, which would in effect not enhance the Union's international position of an attractive area of commerce.

It has therefore already been mentioned that for presupposing a 'single economic entity' under this legal issue, requiring the existence of binding instructions on the part of the parent company is a too limited assessment.¹³⁶⁴ Instead, it must comprise all cases in which a parent company is de facto *able* to control its subsidiary's conduct.¹³⁶⁵

Finally, it must be assessed, whether agreements between **two subsidiary companies**, essentially controlled by the same parent company, may be exempted from the cartel ban likewise. Except for a single case, neither the Commission nor the ECJ have decided whether the so called 'group, or concern-privilege' comprises this situation as well.¹³⁶⁶ In literature, it has regularly been argued that, on the basis of the subsidiary's common subordination under the management of their common parent company, agreements between them cannot amount to a 'distortion' of competition.¹³⁶⁷ Sometimes this view has been restricted to the precondition that the subsidiary companies pursue the economic business strategy of the common parent company by means of the agreement.¹³⁶⁸

Such a confinement of exempting group-intern agreements at the 'horizontal corporate level'¹³⁶⁹ cannot reasonably be approved of. If one correctly refers to a company's 'economic autonomy' for determining the objective of Art 101 (1) TFEU, the purpose or aim of the agreement is irrelevant. In regard to the factual reality that economically dependent subsidiaries regularly act upon this consciousness, they will factually not contravene the business policy of

¹³⁶² Kleinmann/Bechtold, Fusionskontrolle, § 23, para. 170; Gleiss/Hirsch, EG-Kartellrecht, Art 85 (1), para. 196; Roth/Ackermann, in: Frankfurter Kommentar, Grundfragen Art 81 (1), para. 217; Schroeder, in: Wiedemann, Handbuch, § 8, para. 7; Ebel, Kartellrecht, Art 85, para. 30.

¹³⁶³ Similarly Schroeder, in: Wiedemann, Handbuch, § 8, para. 7 and Pohlmann, Unternehmensverbund, 408f; as cited by Buntscheck, Konzernprivileg, 136.

¹³⁶⁴ See 3.1.1.2, § 3.2. above. See also Buntscheck, *ibid*, 135.

¹³⁶⁵ In effect, Gleiss/Hirsch, EG-Kartellrecht Art 85 (1), para. 194. For the (comparable) situation under German law Langen/Niederleithinger/Rittner/Schmidt, § 1 GWB (1980), para. 134, 135; Müller-Henneberg, Gemeinschaftskommentar, 6th ed., § 1 GWB, para. 17; Loewenheim in: Loewenheim/Belke, § 1 GWB, para. 6.

¹³⁶⁶ Buntscheck, Konzernprivileg, 136.

¹³⁶⁷ See Gleiss/Hirsch, EG-Kartellrecht, Art 85, para. 196; von Bar, BB 1980, 1185, 1191; Schroeder in: Wiedemann, Handbuch, § 8, para. 12; Roth/Ackermann, in: Frankfurter Kommentar, Grundfragen Art 81 (1) EG-Vertrag, para. 21; Grill in Lenz, EG-Vertrag, Vorbem. Zu Art 81-86, para. 36; Pohlmann, Unternehmensverbund, 417; doubtful de Roux and Voillemot in: Gide/Loyrette/Nouel, Dictionnaire du Marché Commun, Concurrence, para. 15 a (a), p. 35 as cited by Schroeder, in WuW 4/1988, 280.

¹³⁶⁸ Schröter, in: GTE, Art 85 (1), para. 200; unclear in this regard Müller-Graff, in: Hailbronner/Klein/Magiera/Müller-Graff, Art 85, para. 74, as cited by Buntscheck, *ibid*, 137.

¹³⁶⁹ For this term see Schroeder, in WuW 4/1988, 280.

their common parent company by concluding agreements with other companies controlled by the same shareholder. Even in lack of a ‘de facto’ exertion of influence on their respective business policy, these subsidiaries do not possess a sufficient amount of freedom to “*independently determine their conduct on the market*”.¹³⁷⁰ Furthermore, the assertion that agreements between subsidiaries regularly imply a considerable ‘freedom of action’ on the market, intentionally conferred upon them by the common parent company cannot be accepted.¹³⁷¹ The existence of such an economic ‘freedom of action’ essentially depends on the respective parent company’s decision how ‘closely’ it is willing to integrate its various subsidiaries. In case the parent company is able to exert an intrusive amount of ‘control’ on the basis of legal or factual elements, any such decision of the parent company may again be reversed by the latter at any given moment.¹³⁷² Further deliberations on the competitive position of third parties in this regard, particularly that these should not be prevented from entering the market by an internal agreement,¹³⁷³ are therefore fallacious. Decisive for the (in)-applicability of Art 101 (1) TFEU is namely not the amount of influence the agreements between companies of a corporate group wield on the area of the Common Market, but the fact that no distortion of competition exists between them.¹³⁷⁴

§ 3.3.2. The Notion of ‘Control’ in the Context of an Attribution of Responsibility

The apprehended negative effects on third parties or on the market as a whole concern a distinct problem. In light of the factual power of international corporate groups in today’s economic reality, it is evidently important for a pertinent application of the competition provisions to not only consider the economic strength of a legally separate undertaking, but to consider its actual (financial) dominance by regarding existing corporate affiliations.¹³⁷⁵

In order to appropriately judge the market conduct of corporate groups, the Commission and the ECJ have, in a number of decisions, assumed that the anticompetitive conduct of one group undertaking may, under certain circumstances, be attributed to another company of the same corporate group or concern.¹³⁷⁶ It has been outlined that the European institutions hereby attempt to control the conduct of corporate groups by means of the ‘single economic entity’-doctrine.¹³⁷⁷ In this way, a company’s conduct, its market shares, as well as its profits are attributed to the parent company, or to the ultimate head of the group, where the latter is found to effectively be in a position to ‘control’ its affiliated companies by means of exerting ‘decisive influence’.¹³⁷⁸

¹³⁷⁰ See ECJ in ‘ICI’, Case of 14.7.1972, Case 48/69, [1972] ECR 619. See also *Buntscheck*, Konzernprivileg, referring to the same rationale just outlined for the insignificance of an ‘actual’ exertion of decisive influence.

¹³⁷¹ Thus *Schröter*, in GTE, Art 85 (1), para. 100.

¹³⁷² In effect, *Buntscheck*, Konzernprivileg, 137.

¹³⁷³ Comm. Opinion in the *Centrafarm* Case, ECJ of 31.10.1974, Case 15/74; *Centrafarm B.V. and Adriaan De Peijper vs. Sterling Drug Inc.* [1974] ECR 1147, 1160.

¹³⁷⁴ *Gleiss/Hirsch*, EG-Kartellrecht, Art 85 (1), para. 201.

¹³⁷⁵ See *Thomas*, Unternehmensverantwortlichkeit (2005), 140; and *Bürger*, Die Haftung der Konzernmutter für Kartellverstöße ihrer Tochter nach deutschem Recht, WuW 02/2011, 130 (140).

¹³⁷⁶ Cf. *Emmerich*, in: Immenga/Mestmäcker, Art 81 (1) EGV, para. 60.

¹³⁷⁷ Cf. *Gleiss/Hirsch*, EG-Kartellrecht, Art 85 (1), para. 201.

¹³⁷⁸ See ECJ of 22.1.1974, Cases 6 u 7/73, *ICI vs. Commercial Solvents*, [1974] ECR 223, 255; ECJ of 4.5.1988, C-30/87, *Corinne Bodson*, [1988] ECR 2479, para. 21; ECJ of 27.4.1994, C-383/92, *Almelo*, [1994] ECR I-1508= EuZW 1994, 408; Comm. of 14.12.1972, IV/26.911, *Zoja*, [1972] OJ Nr. L 299/51, 54; Comm. of

The control of the market conduct of such economic corporate groups is nevertheless not only a question of Art 102 TFEU (where the potential consequences of this conduct is assessed in relation to third parties or the market as a whole),¹³⁷⁹ but also concerns the question to what extent parent companies may be held responsible for the illicit conduct of legally separate undertakings belonging to the same corporate group.¹³⁸⁰

a. The Attribution of Conduct of Affiliated Undertakings: Revision of the Criterion of 'Control' Under Existing Case-Law

As discussed above, there is ambiguity in the standard of an 'economic entity'.¹³⁸¹ In its decisions in the *Dyestuffs* case the ECJ for the first time acknowledged that a parent company could be made responsible for the market conduct of its subsidiaries, because the latter were not capable to autonomously determine their own conduct on the market, but followed "*in all material respects*" the business policy of their parent companies.¹³⁸² This case is significant for the future practice of an attribution of conduct upon two considerations: First, it shows that in regard to larger groups of companies or concerns the degree of a company's independence is to be adequately reviewed.¹³⁸³ Secondly, the fact that this first case concerned a 'foreign' parent company already indicates the crucial importance that the question of attributing liability has for international competition cases.¹³⁸⁴

In the following case of *Zoja*,¹³⁸⁵ the Court acted on the presumption of an 'evident uniform conduct' between the companies of *Commercial Solvents* and *Istituto Chemioterapico Italiano*, holding both undertakings jointly and severally liable for the illicit conduct they had been accused of.¹³⁸⁶

In its judgment of *AEG* outlined above, the Commission, for instance, based the attribution of a subsidiary's illicit conduct on the fact that the parent company had been responsible for the implementation of the respective distribution policy, and had, at times, even actively interfered with its subsidiaries' management by issuing binding instructions.¹³⁸⁷ In his Opinion of the case, General Advocate *Reischl* nevertheless expressed doubts on holding the

17.12.1975, IV/26699, *Chiquita*, [1972] OJ Nr. L 95/1, 11; Comm. of 8.12.1977, IV/29.132, *Hugin*, [1978], OJ Nr. L 22/30, 30; *Emmerich* in: Immenga/Mestmäcker, Art 81 (1) EGV, para. 50.

¹³⁷⁹ See for instance the *Continental Can* Case, (ECJ of 21.2.1973, C- 6/72, [1973] ECR 215, 242= WuW/E EWG/MUV, 296).

¹³⁸⁰ 'E contrario', *Schroeder*, Verbundene Unternehmen, in WuW 4/1988, 281; differently *Gleiss/Hirsch*, EG-Kartellrecht, Art 85 (1), para. 202, consenting however that Art 101 (1) TFEU is not necessarily applicable for these cases.

¹³⁸¹ See also *Meyerling*, Uferlose Haftung im Bußgeldverfahren, WuW 02/2010, 157, ascertaining that a clear line of assessment for this concept is missing under (principles of) current case-law.

¹³⁸² See ECJ of 14.7.1972, Case 48/69, *Imperial Chemical Industries Ltd.* [1972] ECR 619, para. 133; where the parent company had actively interfered with its subsidiaries' pricing policy.

¹³⁸³ For a similar formulation see *Lehner*, Haftung für europarechtliche Kartell- und Wettbewerbsverstöße nach Umstrukturierungen oder Unternehmensübertragungen, ÖZK 2011/5, 163.

¹³⁸⁴ Likewise *Emmerich*, in: Immenga/Mestmäcker, Art 81 (1) EGV, para. 50. In detail, see under point 3 below.

¹³⁸⁵ ECJ of 22.1.1974, joined cases 6 & 7/73, *Istituto Chemioterapico Italiana S.p.A. and Commercial Solvents vs. Commission of the European Community*, [1974] ECR 223; based on Comm. Dec., IV/26.911, *Zoja/CSC-ICI*, OJ 1972, Nr. L 299/51, 54.

¹³⁸⁶ See page 2.1.2, § 1.1., and *Schroeder*, Verbundene Unternehmen, in WuW 4/1988, 280.

¹³⁸⁷ See case IV/28.748, *AEG* of 6.1.1982, [1982], OJ Nr. L 117; ECJ of 25.10.1983, Case 107/82, *Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunken AG vs. E.C. Commission*, [1983] ECR 3151.

parent company responsible for the subsidiaries' practice of denying the admission of certain dealers to its distribution network, as well as for the subsidiaries' particular pricing policy. He namely ascertained that the Commission had insofar not provided *concrete evidence* of parental influence.¹³⁸⁸

In its judgment of the case, the ECJ ascertained whether the parent company of *AEG* had actually made use of its possibility of influencing its subsidiaries' distribution and pricing policy, conferred upon it by means of its shareholding participation. As outlined above, this resulted in the formulation of a rebuttable presumption for the market conduct of wholly owned subsidiaries.¹³⁸⁹ Even if the actual exertion of decisive influence in the latter case could hereby (theoretically) be invalidated, the Court's formulation that a wholly owned subsidiary 'necessarily' follows the business policy of its parent company already seemed ambiguous. As mentioned above, the decision furthermore left open the exact criteria under which such a subsidiary's lack of economic autonomy could be assumed.¹³⁹⁰

The Commission, first following the 'belt and brace' approach mentioned above, consequently went on to base its decision of holding a parent company liable for its subsidiary's antitrust infringement upon shareholding criteria only.¹³⁹¹ According to this methodology, it was merely required to show that the parent company held all the shares in a company in order to assume that the latter had in fact exerted 'decisive influence' on the market conduct of its subsidiary.¹³⁹² Hereby it was upon the respective parent company to rebut the 'presumption' by providing sufficient evidence that it did not in fact control the subsidiary in which the infringement had occurred in this way. As outlined above, this approach of the Commission has now been approved of by the ECJ in its recent decision of the *Akzo Nobel* case.¹³⁹³

While the Commission initially held that the possibility of exerting 'decisive influence' was regularly also fulfilled for cases of near 100% shareholdings, at times even lower stakes were deemed sufficient for the determination of the pertinent amount of 'control'. Accordingly, the existence of a 'single economic entity' has been applied by the ECJ for majority shareholdings as well.¹³⁹⁴ Hereby the reference of a company's lacking 'economic autonomy' was used extensively to hold the 'controlling' parent companies liable for antitrust breaches of an affiliated corporate entity. As long as such an entity could not autonomously decide on its market conduct, but followed, in 'all material respects,' the instructions of its parent company¹³⁹⁵ it was not seen to possess economic independence.¹³⁹⁶ A parent company's liability was thus regularly determined upon the finding that the anticompetitive conduct was carried out on the basis of the parent companies 'conscience or leadership'.¹³⁹⁷ In *Johnson & Johnson*, for instance,¹³⁹⁸ the Commission held a parent company and its subsidiaries jointly and severally liable for the prevention of

¹³⁸⁸ See Opinion, C-107/82, *AEG*, [1983] ECR 3226, 3270, as cited by *Schroeder*, WuW 4/1988, 280.

¹³⁸⁹ See 2.2.2.2. above.

¹³⁹⁰ Cf. *Riesenkampff and Krauthausen*, ECLR [2010] Issue 1, 38 (41); *Hofstetter and Ludescher*, Der Konzern als Adressat von Bussen im EU-Kartellrecht, 4912, see already 2.2. above.

¹³⁹¹ See 2.2.2. above.

¹³⁹² Cf. *Lehner*, OZK 2011/5, 166.

¹³⁹³ ECJ of 10.9.2009, C-97/08P, *Akzo Nobel*, [2009] ECR I-08237, particularly para. 62.

¹³⁹⁴ See e.g. Case 6/72, *Continental Can vs. Commission* [1973] ECR 215.

¹³⁹⁵ ECJ of 25.10.1983, C-107/82, *AEG vs. Commission*, [1983] ECR 3151, para. 8.

¹³⁹⁶ Cf. *Lehner*, OZK 2011/5, 164 outlining the Commission's approach in this regard.

¹³⁹⁷ Comm. of 22.12.1987, IV/30.787, *Hilti*, [1988], OJ Nr. L 65/19 *Lehner*, *ibid*.

¹³⁹⁸ See Comm. of 31.12.1980, OJ [1980] Nr. L 377/16, 26 = WuW/E EWG/MUV, 296.

parallel imports of goods, as these measures had been implemented under the ‘conscience and control’ of their parent company.¹³⁹⁹

In other circumstances,¹⁴⁰⁰ the Commission nevertheless assigned the fine to the ultimate parent company of a corporate group without explicitly referring to the conditions of an attribution of liability. This practice was rather deemed a ‘procedural necessity’, in order to prevent companies from organizing their insolvency before the issuance of the final decision. Sometimes this was allegedly required to avoid the impairment of the decision’s enforcement by a transfer of assets between the parent company and the subsidiary.¹⁴⁰¹ The parent company’s responsibility was hereby based on the fact that it had exerted influence on decisions of distribution and marketing activities of the respective subsidiaries.¹⁴⁰² Even if a close personal interrelation of the organizational bodies of a parent and subsidiary undertaking provided a strong reinforcement of the assumption of ‘decisive influence’,¹⁴⁰³ it was ultimately deemed decisive whether the parent possessed a ‘general responsibility’ for the planning and coordination of its subsidiaries’ conduct.¹⁴⁰⁴ It was hereby not always clear whether the parent company had itself been actively involved. Rather, the Commission seemed to impose a fine on the parent company for its assignment of intragroup functions and responsibilities.¹⁴⁰⁵

This practice of extending the existence of a ‘single economic entity’ and thus liability beyond testimony of a parent company’s actual involvement in an antitrust infringement becomes even more striking when regarding the Commission’s procedural method of issuing fines. As mentioned above,¹⁴⁰⁶ the Commission hereby proceeds in a two-step approach when determining the responsible legal entity on which it imposes its final decision. While it determines the ‘economic entity’ responsible for an infringement under substantive law in a first step, it then distinguishes the respective legal entity to which it ultimately addresses its decision.¹⁴⁰⁷

I have outlined above¹⁴⁰⁸ that in this way the determination of ‘an undertaking’ in the sense of European competition law regularly differs from the traditional principles of company law.¹⁴⁰⁹ Hereby, the classical dichotomy between an undertaking as a (non-identified) legal object and the individual legal entity as a subject of substantive law under traditional principles of company law is altogether ignored.¹⁴¹⁰ As there is nevertheless an established set of principles for the disregard of this separation in the various company laws of the national member states, it has already been questioned above whether this undifferentiated methodology is legally justifiable.

¹³⁹⁹ See *Schroeder*, in WuW 4/1988, 281.

¹⁴⁰⁰ Cf. Comm of 9.6.1976, *Hoffmann La Roche*, [1976] OJ Nr. L 223/27 = WuW/E EV 673 (EC) of 13.2.1979 [1979] ECR 461); Comm of 27.11.1981, *Moët et Chandon*, [1982] OJ Nr. L 94/7; and Comm. of 14.12.1984, *John Deere*, [1985] OJ Nr. L 35/58 = WuW/E EV 1083.

¹⁴⁰¹ Cf. *Bürger*, WuW 02/2011, 140; Opinion of AG Kokott of 23.4.2009 in case C-97/08 P, *Azko Nobel vs. Commission*, p. 39 ff.

¹⁴⁰² See Comm. of 21.12.1988, IV/C.31.865, *PVC*, [1994] OJ Nr. L 239 para. 45.

¹⁴⁰³ Comm. of 21.12.1974, IV/31.866, *LDPE*, [1974] OJ Nr. L 343, para. 57, here the Vice-president of DOW Europe and member of the board of Thew DOW Chemical Com, as cited by *Lehner*, OZK 2011/5.

¹⁴⁰⁴ See Comm. of 16.12.1985, *Sperry New Holland*, [1985] OJ Nr. L 376/21.

¹⁴⁰⁵ Comm., *ibid*, para. 26, as cited by *Schroeder*, in WuW 4/1988, 281.

¹⁴⁰⁶ See 3.1.1.2. of this thesis.

¹⁴⁰⁷ See Comm. of 21.12.1988, IV/C.31.865, *PVC*, [1994] OJ Nr. L 239 para.

¹⁴⁰⁸ See 3.1.1.2. above.

¹⁴⁰⁹ *Gleiss/Lutz*, Deficiencies in European Community Competition Law, http://ec.europa.eu/competition/consultations/2008_regulion_1_2003/gleiss_lutz_en.pdf, [hereinafter cited as: *Gleiss/Lutz*, Deficiencies], 50.

¹⁴¹⁰ Cf. *Stockenhuber*, in: Grabitz/Hilf, Das Recht der Europäischen Union (2004), Vol I, Art 81, para. 52.

b. Liability of the Parent Company

For the appropriate assessment of ‘decisive influence’ it is relevant that the Commission regularly already addresses its statement of objections to the ultimate parent company of the group in order to avoid the complicated review of the existent group structure before entering an investigation. From the case-law drawn out above it may be deduced that the Commission has proceeded from a mere procedural approach of assuming an ‘economic entity’ under technical considerations to an inappropriate¹⁴¹¹ extension of this doctrine under aspects of substantive law.

Sparing the practical difficulties connected to the determination of ‘decisive influence’ in the specific case, the Commission has regularly held a parent company jointly and severally liable for any antitrust infringement occurring within the corporate group by a curt allusion to the notion of a ‘single economic entity’.¹⁴¹² Hereby the Commission and the CFI¹⁴¹³ have repeatedly employed generalized formulations, justifying this position based on existing corporate linkages between the concerned companies. In reference to the definition of ‘an undertaking’ under European competition law, the liability of a parent company for infringements of its subsidiary has regularly been justified on the basis of “*a uniform organizational structure of personal, material and immaterial means [between the companies of a corporate group], with which a specific commercial aim is pursued on a long term basis*”.¹⁴¹⁴ From this increasingly extended use of the concept of a ‘single economic entity,’ the European institutions obviously intend to generate additional ‘efficiencies’ for deterring undertakings from anticompetitive conduct.¹⁴¹⁵

The ambivalent standard comprised in this assessment has been drawn out under the discussion of recent case law and the difficulties connected to linking this concept to the term of ‘an undertaking’ under European competition law.¹⁴¹⁶ Admittedly, the European Court of Justice has ruled the notion of an ‘economic entity’ to constitute an appropriate criterion for determining the attribution of conduct with the consequence that an undertaking may be held responsible for the conduct of another legally separate entity.¹⁴¹⁷ Nevertheless, the all-embracing procedural approach of the Commission outlined above is not backed by existing case-law.¹⁴¹⁸ Apart from the dubious reinforcement of the legal presumption for wholly-owned

¹⁴¹¹ See *Bauer/Reisner*, *Erweiterte Zurechnung des Verhaltens Dritter bei der Festsetzung von Geldbussen im EG-Kartellrecht?*, [hereinafter cited as: *Erweiterte Zurechnung*], WuW 2007, 737 (738).

¹⁴¹² This has even been deemed necessary under the pretence of ‘alleviating the Commission from its “substantial workload in this respect”, see CFI of 14.12.2006, T-259/02-T-264/02 & T-271/02, ‘*Lombard-Club*’, [2006] ECR II-5169, para. 17, as cited by *Bauer/Reisner*, WuW 7 a. 8/2007, 743.

¹⁴¹³ See *Bauer/Reisner*, *Erweiterte Zurechnung*, WuW 7 a. 8/2007, supra note 4, 738.

¹⁴¹⁴ CFI of 10.3.1992, C-T 11/89, *Shell vs. Commission* [1992] ECR II-757, para. 311; CFI of 14.5.1998, Case T-352/94, *Mo och Domsjö vs. Commission*, [1998] ECR II- 1989, para. 87.

¹⁴¹⁵ In keeping with the general trend of increasingly higher fines in recent years, the Commission has been deemed “generally keen to hold parent companies liable for the conduct of their subsidiaries”, see *Siragus/Rizza*, *EU Competition Law*, (2007), Vol. III, para. 4.46, as cited by *Gleiss/Lutz*, *Deficiencies*, 46.

¹⁴¹⁶ See 3.1.1.2. above. For a similar assessment for cases imposing intragroup tort liability, see *Blumberg*, *The Law of Corporate Groups*’ (1987), § 6.02, 112 ff.

¹⁴¹⁷ See e.g. ECJ of 28.6.2005, C-189/02 P, *Dansk Rorindustri*, [2005] ECR I-11005, *Hofstetter/Ludescher*, *Der Konzern als Adressat*, 488.

¹⁴¹⁸ *Bauer/Reisner*, *Erweiterte Zurechnung*, WuW 7 a. 8/2007, 743.

subsidiaries,¹⁴¹⁹ the ECJ has namely principally ascribed strict criteria to the possibility of an attribution of conduct under the notion of an ‘economic entity’.¹⁴²⁰

Primarily it is correct that an accurate consideration of the detrimental effects of a cartel agreement requires the possibility of attributing conduct from one legal person to another, thus taking into account the true financial potential behind existing corporate affiliations.¹⁴²¹ In this way, it is a general standard in European competition law that responsibility for antitrust infringements does not halt at the borders of company law.¹⁴²² The attribution of fines and sanctions for illicit conduct breaching the antitrust provisions of the Treaty rather adheres to autonomous principles of European law and does not follow possibly deviant standards of national law.¹⁴²³

The consideration that in a corporate group several legally independent entities may constitute an ‘undertaking’ in regard to the pertinent relationships of ‘control’ between them, suggests that this term cannot be a useful concept for determining the pertinent legal entity actually responsible for the infringement.¹⁴²⁴ Rather, this must be substantiated separately for every legal entity. The application of generalized formulas for determining an ‘economic entity’, such as the curt assessment that the respective subsidiary cannot autonomously determine its own conduct on the market, does not appropriately illustrate the dogmatic foundation behind this concept. This principle of limited liability of juristic persons¹⁴²⁵ must namely be regarded for competition law as well.¹⁴²⁶

Therefore, the legal necessity of considering the true financial strength behind an antitrust infringement on the basis of existent control relationships between legally or factually affiliated companies must fulfill the principle standards of fault and perpetration in order to be considered lawful. In this sense, Art 23 of Regulation 1/2003 provides that a fine may be imposed on undertakings that have intentionally *or negligently* breached Art 101 TFEU. As for most cases imposing intra-group liability, the extent to which a parent company exerts ‘control’ is nevertheless central to this assessment.¹⁴²⁷

Under existing factual realities, however, a parent company regularly ‘controls’ its subsidiaries, e.g. by designating the controlled company’s board of directors and conducts the subsidiary’s affairs in accordance with the objectives, policies, and financial restraints

¹⁴¹⁹ For the assessment of its ambivalent approach for wholly owned subsidiaries, see 3.1.1.2. above and point c. below.

¹⁴²⁰ See the exposition right below.

¹⁴²¹ Cf. *Lehner*, OZK 2011/5, 165; Cf. Opinion of AG Kokott of 23.4.2009 in the Case, C-97/08 P, *Akzo Nobel vs. Commission*, [2009] ECR I-08237, para. 39 ff.

¹⁴²² Distinct to the general view: *Sura*, in: Langen/Bunte, Art 23 Vo 1/2003, para. 10; *Dannecker/Biermann*, in: Immenga/Mestmäcker, Vorbem. Zu Art 23 Vo 1/2003, para. 70. With a different formulation, assuming liability not to halt at the company ‘directly’ involved: *Zimmer/Paul*, Kartellbußgeldrechtliche Haftung und Haftungsbefreiung im Konzern, WuW 10/2007, 970 (971).

¹⁴²³ CFI of 11.3.1999, Case T-134/94, *NHM/Stahlwerke GmbH*, [1999] ECR II-239, para. 44.

¹⁴²⁴ See already § 1.2. above. Likewise, *Hofstetter/Ludescher*, Der Konzern als Adressat, 494, citing in this regard also the opinion of the Swiss competition authority in ‘*Swisscom ADSL*’, RPW 2004, 421, para. 56.

¹⁴²⁵ For the consideration of this concept on corporate groups under general civil law, see e.g. *Hofstetter*, Sachgerechte Haftungsregeln für multinationale Konzerne, (1995), 77 ff, as cited by *Hofstetter/Ludescher*, Der Konzern als Adressat, 494.

¹⁴²⁶ *Hofstetter/Ludescher*, *ibid.* In detail see 3.2. below.

¹⁴²⁷ For a similar assessment for cases imposing intragroup tort liability, see *Blumberg*, The Law of Corporate Groups, § 10.02, 187.

determined by the group.¹⁴²⁸ Under principles of corporate law, in all but the rarest cases¹⁴²⁹ a parent company not only has the potential to control its subsidiaries' conduct, but to exercise it to a substantial degree.¹⁴³⁰ The standard for determining the concept of an 'economic entity' in order to attribute liability between group companies should therefore not simply be the principal existence of 'control', but the fact that this is exercised to the point that the intervention in the subsidiary's management can be regarded as 'intrusive'.¹⁴³¹ This has, in principle, also been recognized by the ECJ in its mode of assessing the circumstances under which the comportment of one company may be attributed to another company of the same corporate group.¹⁴³²

Accordingly, the standard for attributing conduct has been drawn out by ECJ case-law in the following way.¹⁴³³ In order not to legally blur the differentiation between the concept of an 'undertaking' and that of a 'shareholder', an attribution of conduct and thus responsibility to a parent company is only possible in situations where:

- unambiguous evidence points to the direct involvement of the parent company or head of the group in the infringement,¹⁴³⁴ or
- in the absence of any direct involvement, where the parent company has exerted 'decisive influence' over the area of conduct in which the infringement occurred.¹⁴³⁵ This has, in certain cases, been recognized by the European Commission as well.¹⁴³⁶

Under the first criterion, an attribution of illicit behavior only comes into question where an undertaking with the possibility of substantially influencing the business policy of its subsidiary is informed of the participation in a cartel and approves or tolerates this conduct.¹⁴³⁷ The second criterion denotes that, in order to be held liable, a parent company must be able to exert 'decisive influence' on the market conduct of its subsidiaries and have *in fact* made use of this possibility.¹⁴³⁸ This essentially shows that a different standard of 'control' is necessary for this

¹⁴²⁸ It has even been ascertained that "any other view would be entirely unrealistic": see *Blumberg*, The Law of Corporate Groups, § 10.02, 187.

¹⁴²⁹ In the context of mergers assessed under U.S. antitrust law, see e.g. *Asarco, Inc. v. Idaho State Tax Comm'n*, 458 U.S. 307 (1982), as cited by *Blumberg*, *ibid*.

¹⁴³⁰ *Blumberg*, *ibid*.

¹⁴³¹ Cf. *Blumberg*, *ibid*.

¹⁴³² Cf. *Bauer/Reisner*, *Erweiterte Zurechnung*, WuW 7 u. 8/2007, 737 (739).

¹⁴³³ Cf. *Zimmer/Paul*, WuW 10/2007, 971. See however the assertions of the Commission e.g. in the cases '*Johnson & Johnson*' and '*Shell*', cited above.

¹⁴³⁴ This may, for instance, be assumed where representatives of the subsidiary company that participated in cartel meetings also belonged to the management of the parent company. Cf. ECJ of 16.11.2000, C-286/98, *Stora Kopparbergs Bergslags vs. Commission*, [2000] ECR I-9915, para. 24 ff; See *Gleiss/Lutz*, *Deficiencies in European competition law*, 51.

¹⁴³⁵ Cf. *Gleiss/Lutz*, *Deficiencies*, 51 and *Lehner*, OZK 2011/5, 166, the latter nevertheless appealing to the second criterion for instances where "more than one undertaking of the same corporate group has participated in the infringement".

¹⁴³⁶ Comm. decision of 13.7.1994, IV/C.33.833, *Cartonboard*, [1994] OJ Nr. L 243/1.

¹⁴³⁷ ECJ of 16.11.2000, C-248/98 P, *KNP BT vs. Commission*, [2000] ECR I-9641, para. 73; CFI of 20.3.2003, T-1/99, *ABB Asea Brown Boveri vs. Commission*, [2002] ECR II-1882.

¹⁴³⁸ See ECJ of 25.10.1983, C-107/82, *AEG vs. Commission*, [1983] ECR 3151, para. 50 = WuW/E EWG/MUV 600; Comm. of 26.5.2004, COMP/C-3/37.980, *Souris-Topps*, OJ Nr. L 162. Thus likewise, *Faull/Nikpay*, *The EC Law of Competition*, (2007), 8.560. Hereby these authors correctly criticize *Wils*, who has argued insofar that it would be at least equally justifiable to use the notion of *capacity* to exert 'decisive influence', as it would only use the criterion of *actual exercise* of decisive influence. See *WPJ Wils*, *The undertaking as subject of EC competition law and the Imputation of infringements to natural or legal persons*, (2000) EL Rev, 99, 116.

problem issue of assessing a 'single economic entity' in consideration of the standard of intentional or negligent conduct under Art 23 of Reg. No. 1/2003.

The principle possibility of a parent company to exert 'decisive influence' should nevertheless appropriately be determined upon the same standard upon which the inapplicability of Art 101 (1) TFEU between two companies of a corporate group is ascertained. This is necessary in order to grant a consistent application of the competition provisions in a precise case. Therefore, the existence of 'actual control' must also be possible for instances of a 'control agreement' in cases of a factual concern.¹⁴³⁹ In case that none of these facts are fulfilled, only the subsidiary that has directly committed the respective infringement can serve as an addressee of the Commission's decision imposing the fine.¹⁴⁴⁰ Principally, every company is therefore liable for its own illicit conduct. Accordingly, where more than one undertaking of a corporate group may have been involved in an antitrust infringement, its own breach of competition law must be substantiated in order to determine the possibility of anticompetitive behavior.¹⁴⁴¹

The question whether such a 'decisive' amount of influence in fact exists depends - at least partly - on applicable company law.¹⁴⁴² In this sense, provisions in a company's statutes or articles of incorporation may allow for a determination whether a particular level of shareholding translates into real 'control'.¹⁴⁴³

As mentioned in the discussion of case law above, this must be proven by the Commission under general principles of procedural law.¹⁴⁴⁴ Of crucial importance in this regard, is therefore the interpretation of 'default' on the part of the parent company.¹⁴⁴⁵ Even if this is to be considered under the circumstances of the particular case,¹⁴⁴⁶ it is essential that the respective line of assessment employed by the Commission follow a clear and unambiguous method adhering to the prerequisite of legal certainty and consistency.

For the existence of this sort of influence, the question whether the strategic planning was carried out by the individual undertaking itself, or whether this was upon the respective head of the group was assumed a significant factor to determine the existence of 'decisive influence'.¹⁴⁴⁷ In this regard, the Commission and the CFI have found it to be sufficient that the parent actively influences the subsidiary's *general strategy*. It was not presumed necessary, that the parent company "*ha[d] exerted influence in the business policy of its subsidiary in the respective area in which the infringement occurred*".¹⁴⁴⁸

¹⁴³⁹ Likewise *Zimmer/Paul*, Kartellbußgeldrechtliche Haftung und Haftungsbefreiung im Konzern, WuW 10/2007, 971, referring to this concept under § 291, 308 ff of the German Corporation Act.

¹⁴⁴⁰ See *Hofstetter/Ludescher*, Der Konzern als Adressat, 495.

¹⁴⁴¹ Thus, see already ECJ of 2.10.2003, C-196/99 P, *Siderúrgica Aristrain Madrid SL vs. Commission of the European Community*, [2003] ECR I-11049, para. 99.

¹⁴⁴² *Gleiss/Lutz*, Deficiencies in European competition law, 51; and *Faull/Nikpay*, The EC Law of Competition, (2007), 8.563.

¹⁴⁴³ Cf. *Faull/Nikpay*, *ibid.*

¹⁴⁴⁴ See Art 2 of Reg. No. 1/2003; and CFI of 27.9.2006, Case T-314/01, *Avebe BA vs. Commission of the European Community*, [2006] ECR II-319, para. 136, citing e.g. *Dansk Rørindustri and Others vs. Commission*, C -189, 202, 205-208 & 213/02 P, [2005] ECR I-5425, paras. 118 to 122.

¹⁴⁴⁵ Cf. *Lehner*, OZK 2011/5, 166.

¹⁴⁴⁶ *Lehner*, *ibid.*

¹⁴⁴⁷ Commission decision of 23.4.1986, COMP/C.31.149, *Polypropylen*, [1986] OJ Nr L 230/66. para. 102.

¹⁴⁴⁸ CFI of 12.12.2007, Case T-112/05, *Akzo Nobel vs. Commission*, [2007] ECR II-5049, para. 83, as cited by *Hofstetter/Ludescher*, Der Konzern als Adressat, 491. The Commission has gone so far as to ascertain that 'decisive influence' could be assumed, where not even the companies concerned had any doubts that the

While it can be derived from previous case-law that the ECJ had explicitly required an exertion of such an intrusive amount of influence only in the area of business in which the infringement took place, e.g. the subsidiary's pricing or distribution policy,¹⁴⁴⁹ recent case law seems to suggest that the Court now refers to the parent company's general influence of the subsidiary's 'business, or commercial policy'.¹⁴⁵⁰

A further strong indication of the required amount of influence has been seen in the interrelation of the parent and subsidiary companies' executive bodies.¹⁴⁵¹ In case that no distinct parent company or head of the group could be made out, the Commission has previously not hesitated to attribute liability to the respective 'commercial unit' within a corporate group or concern which was responsible for the 'coordination and strategic planning of the entire group'.¹⁴⁵²

Since the judgment of *Akzo Nobel*, it is furthermore clear that the *market conduct* of a subsidiary by no means constitutes the sole point of reference for attributing its conduct to its parent company, but merely denotes an indication for the existence of an 'economic entity'.¹⁴⁵³ It has been outlined above, that the ECJ has rather required a comprehensive review of "*all the relevant factors relating to the economic, organizational, and legal links, which tie the subsidiary to the parent company*".¹⁴⁵⁴ According to the view of Advocate General Kokott, the exertion of 'decisive influence' does not necessarily require the existence of concrete instructions, guidelines or even a controlling-, or voting right on decisions concerning product-pricing, production or distribution policy essential to the subsidiary's market conduct.¹⁴⁵⁵ As the lack of influence on one of these areas allegedly does *not* allow the conclusion of a subsidiary's autonomy, this may, a *minori*, not be assumed where a parent company refrains from actively interfering with its subsidiary's daily conduct, or issuing directions on the various elements of the latter's business policy.¹⁴⁵⁶

According to the General Advocate, it is ultimately 'decisive' whether the parent company may, on the basis of the intensity or degree of its influence, determine the subsidiary's conduct in such a way that both companies can be viewed as a 'single economic entity'.¹⁴⁵⁷

Considering the related question of determining 'decisive influence' in respect to the 'group- or concern privilege', existing case-law does not clearly answer whether the assumption of 'decisive influence' requires an *actual* exertion of control rights. It has been emphasized above, however, that Art 101 (1) TFEU is already inapplicable to group-internal agreements where the mere possibility to do this exists.

subsidiary was not autonomous. See Comm. of 15.5.1991, Case IV/32.186, *Gosme/Martell-DMP*, [1991] OJ Nr. L 185/23, para. 23.

¹⁴⁴⁹ Cf. ECJ of 14.7.1972, C-48/69, *ICI*, [1972] ECR 619, para. 136/141; ECJ of 25.10.1983, C- 107/82, *AEG*, [1983] ECR 3151, para. 50.

¹⁴⁵⁰ ECJ of 16.11.2000, C-286/98 P, *Stora Kopparbergs Bergslags AB*, [2000] ECR I-9925, para. 27, as cited by *Hofstetter/Ludescher*, *ibid*.

¹⁴⁵¹ Cf. Comm of 21.12.1974, IV/31.866, *LDPE*, [1974] OJ Nr. L 343, para. 57.

¹⁴⁵² Cf. Comm of 21.12.1988, COMP/C.31865, *PVC*, [1994] OJ Nr. L 239. para. 45, as cited by *Lehner*, *ÖZK* 2011/5, 166.

¹⁴⁵³ *Bauer/Anweiler*, Verneinung der Haftung einer Muttergesellschaft für Kartellrechtsverletzungen, *ÖZK* 2011/2, 76.

¹⁴⁵⁴ See ECJ, Case 97/08 P, *Akzo Nobel NV vs. Commission*, [2009] ECR I-08237, para. 74.

¹⁴⁵⁵ Cf. *Bauer/Anweiler*, *ÖZK* 2011/2, 76.

¹⁴⁵⁶ Cf. *Bauer/Anweiler*, *ibid*.

¹⁴⁵⁷ Opinion of the AG, 23.4.2009, C-97/08, *Akzo Nobel NV vs. Commission*, [2009] ECR I-08237, paras. 89-94.

Regarding the main point of reference, according to which every legal entity is primarily responsible for an infringement that has occurred under its management,¹⁴⁵⁸ as well as the strictly defined principles of European procedural law,¹⁴⁵⁹ it is clear that a different assessment is pertinent for the attribution of liability. ‘Decisive influence’ must hereby necessarily adhere to the fault-based standard of responsibility for any form of anticompetitive behavior. This means that for the ascertainment of a parent company’s involvement in its subsidiary’s infringement it is not sufficient that the respective parent is solely in a *position* to exert decisive influence on the market conduct of its subsidiary. Rather, the Commission has to verify whether such an amount of influence has *actually* been exerted by the parent company.¹⁴⁶⁰

The Commission appropriately determines in this regard that actual conscience of an infringement is in any case sufficient to assume liability.¹⁴⁶¹ The ECJ has, at times, even ruled on the parent company’s obligation to actively interfere with the subsidiary’s conduct, preventing the continuation of the respective illicit behavior.¹⁴⁶² Furthermore, it is unquestionable that the parent is to be held responsible for a breach of antitrust law where it has consciously issued a binding instruction, indirectly encouraging the subsidiary company to engage in unlawful behavior. In this case it is even flawed to speak of an ‘attribution’ of conduct or liability,¹⁴⁶³ because under the principles of corporate law a controlling company is directly responsible for the issuance of illegal instructions.¹⁴⁶⁴ In this case the parent is in fact *directly* involved in the infringement itself.

The view that a subsidiary can only be responsible for its own conduct where it has, despite the establishment of the group’s strategic business policy by a parent company, nonetheless autonomously determined its conduct on the market,¹⁴⁶⁵ or even actively *refused* to adhere to this policy, is to be strictly rejected. Such an assessment, requiring the subsidiary’s active violation of pertinent company law, cannot reasonably be endorsed upon the aim of an ‘effective enforcement’ of the competition provisions. Furthermore, the attribution of conduct to a legal person where this person has not been identified as the (final) individual responsible under the procedural conditions of Art 23 (2) of Regulation No. 1/2003 is questionable under a general legal principles point of view¹⁴⁶⁶ and should therefore be avoided as well. Insofar, the

¹⁴⁵⁸ See ECJ of 25.10.1983, C-107/82, *AEG vs. Commission*, [1983] ECR 3151, para. 50 = WuW/E EWG/MUV 600; Comm of 26.5.2004, COMP/C-3/37.980, *Souris-Topps*, OJ Nr. L 162.

¹⁴⁵⁹ I.e. Art 23 of Reg. 1/2003.

¹⁴⁶⁰ Cf. *Bauer/Anweiler*, ÖZK 2011/2, 71. Correctly, CFI of 27.9.2006, T-314/01, *Avebe*, [2006] ECR I-03085, para. 136, as cited by *Meyring*, *Uferlose Haftung im Bußgeldverfahren*, WuW 02/2010, 166.

¹⁴⁶¹ See Comm. of 31.12.1980, IV/29.702, *Johnson & Johnson*, [1980] OJ Nr. L 377/16, 26 = WuW/E EWG/MUV, 296.

¹⁴⁶² See ECJ of 16.11.2000, C-286/98 P, *Stora Kopparbergs Bergslags AB*, [2000] ECR I-9925, para. 10.

¹⁴⁶³ Differently, Opinion of AG Mischo of 16.11.2000, C-286/98 P, *Stora Kopparbergs Bergslags AB*, [2000] ECR I-9925, A 51.

¹⁴⁶⁴ See e.g. § 48 of the Austrian (stock) company’s act [AktG] and § 61 (2) of the law on limited liability companies [GmbHG].

¹⁴⁶⁵ Cf. Comm. Dec. of 17.3.2005, COMP/E-1/38.823, *Elevators and Escalators*, OJ Nr. L 162, para. 605; CFI in Case T-12/03, *Itochu vs. Commission* [2009] ECR II-883.

¹⁴⁶⁶ Cf. *Steinle*, *Kartellgeldbußen gegen Konzernunternehmen nach dem ‚Aristrain‘-Urteil des EuGH*, in: *Europäisches Wirtschafts- und Steuerrecht*, (2004) Vol 15/3, 6 (10); *Heinichen*, *Unternehmensbegriff und Haftungsnachfolge im europäischen Kartellrecht*, (2011), 146: assessing that from the absence of a comparable norm of Art 23 para. (4) of Reg. 1/2003 it could be concluded, that, according to a systemic interpretation, joint and several liability is not foreseen by para (1) of the said provision, which is why the imposition of such form of liability infringes the precondition of legality of decisions. Differently: *Mansdörfer/Timmerbeil*, *Das Modell der Verbandshaftung im europäischen Kartellbußgeldrecht*, *Europäische Zeitschrift für Wirtschaftsrecht* 6/2011, 214, as cited by *Kerstin Fischer*,

legal concept of ‘joint and several liability’ as employed by the Commission in its current practice, has correctly been criticized.¹⁴⁶⁷

It has been outlined, that European practice nevertheless regularly bases its assessment on the fact that the said provisions are addressed to ‘undertakings’, which, under the principles of European competition law, comprise ‘economic entities’ and could thus principally include parent companies as well.¹⁴⁶⁸ In this way, the ECJ has held, that for an undertaking to be held liable, it is not even requisite that the respective individual acting on behalf of the undertaking is distinguished and made responsible for a possible organizational misconduct, as this would “*impinge seriously on the effectiveness of Community competition law*”.¹⁴⁶⁹ The undertaking’s liability is, in the eyes of the Commission and the European Courts, (irrebuttably) implied by the fact that an infringement of competition law has been committed by one of the company’s employees.¹⁴⁷⁰ By means of the questionable extension of a ‘single economic entity’, without verifying in detail the parent company’s *actual involvement* in the infringement, this assessment is conferred upon the entire corporate group.¹⁴⁷¹ As outlined above, purportedly only in this way, the true financial power of the respective ‘undertaking’ could appropriately be considered.¹⁴⁷²

This practice essentially leads to the parent company’s liability being equated with that of its subsidiary.¹⁴⁷³ Responsibility hereby merely requires (any) employee of the respective subsidiary company to have been engaged in an anticompetitive conduct. This is neither a form of vicarious liability, nor does it necessitate the breach of any kind of duty (e.g. in the form of organizational deficiencies, or a neglect of supervisory obligations).¹⁴⁷⁴ Rather, the latter is irrebuttably presumed.¹⁴⁷⁵ The serious consequences that the inclusion of a parent company, or the even holding companies¹⁴⁷⁶ has on the policy of a corporate group have already been mentioned.¹⁴⁷⁷

Specifically problematic about this view is that under the pretense of an alleged ‘consistent concept’ of an ‘economic entity’ not only the acts of a subsidiary are attributed to the respective parent company, but also those of other affiliated ‘sister’ companies, which the former may

Gesamtschuldnerische Haftung von Unternehmen für die Zahlung von Geldbußen bei Kartellverstößen, ÖZK 3/2011, 99.

¹⁴⁶⁷ See *Schwarze/Bechtold/Bosch*, in: Gleiss/Lutz, Deficiencies in EC Competition Law, (2008), 49.

¹⁴⁶⁸ For criticism of this approach see 3.1.1.2. and e.g. *Schwarze/Bechtold/Bosch*, in: Gleiss/Lutz, Deficiencies in EC Competition Law, 48 ff; *Zimmer/Paul*, WuW 10/2007, 970 f; *Hofstetter/Ludescher*, Der Konzern als Adressat, 488 ff; *Bauer/Anweiler*, ÖZK, 2011/2, 75ff.

¹⁴⁶⁹ ECJ of 18.9.2003, C-338/00 P, *Volkswagen vs. Commission*, [2003] ECR I-9189, para. 98, as cited by; *Hofstetter/Ludescher*, Der Konzern als Adressat, 492.

¹⁴⁷⁰ See Comm. Dec. of 21.12.1988, COMP/C.31.865, *PVC*, 1994] OJ Nr. L 239. para. 42, as cited by *Lehner*, ÖZK 2011/5, 166; *Hofstetter/Ludescher*, Der Konzern als Adressat, 493.

¹⁴⁷¹ In detail, see 4.2. below. Cf. also *Schwarze/Bechtold/Bosch*, In: Gleiss/Lutz, Deficiencies in EC Competition Law, (2008), 49. Responsibility thus only requires (any) employee of the respective subsidiary to have engaged in an anticompetitive conduct. A vicarious neglect of the legally separate company (e.g. in the form of organizational deficiencies, or neglect of supervisory duties) is not required, but irrebuttably presumed.

¹⁴⁷² CFI of 12.12.2007, T-112/05, *Akzo Nobel vs. Commission*, [2007] ECR II-5049, para. 90.

¹⁴⁷³ *Hofstetter/Ludescher*, Der Konzern als Adressat, 494.

¹⁴⁷⁴ In detail, see 3.2. below.

¹⁴⁷⁵ *Hofstetter/Ludescher*, *ibid.*

¹⁴⁷⁶ Comm. Dec. of 24.1.2007, COMP/F/38.899, *Gas Insulated Switchgear*, para. 44.

¹⁴⁷⁷ Cf. *Bauer/Anweiler*, ÖZK 2/2011, 75; See also 2.2.2.2. above

neither know of, nor have had the means to prevent.¹⁴⁷⁸ Apart from the fact that this is hardly compatible with the principle of personal liability,¹⁴⁷⁹ it further denotes that the topos of an 'economic entity' is instituted with evaluations that cannot appropriately reveal the conditions under which an attribution of conduct is justified.¹⁴⁸⁰

Apart from holding parent companies liable, the ECJ has, under this pretense, extended direct entity liability to other affiliated companies without aptly reviewing the latter's possibility of influencing the conduct of the company in which the infringement originally occurred.¹⁴⁸¹ In *Aristrain*, for instance,¹⁴⁸² the Court held that a company's common shareholding in two separate legal entities did not lead to a mutual attribution of conduct and liability between them. It nevertheless approved of such a 'horizontal' imputation of responsibility in a subsequent decision.¹⁴⁸³ In this decision, the shares of the affiliated companies concerned were held by a natural person, which maintained key functions in all of the companies' executive bodies and furthermore acted as a common 'agent' for the negotiation of a uniform quota of the cartel for the two undertakings.¹⁴⁸⁴ Even if the circumstances of this case were particular due to personal identity of the respective undertakings' executive body, it shows that the standard of '*personal liability*' is pertinent for these 'horizontal' constellations as well. There is no convincing argument pointing to the necessity of an essentially different treatment of these cases from the mode of assessing a 'vertical' attribution of liability.¹⁴⁸⁵ Where a company possesses no means to actively determine the respective deficient decision possibly leading to the adoption of illicit behavior, there is no dogmatic requirement for holding a separate legal entity responsible.

This last point again denotes the essentially different assessment of 'control,' which is necessary for the issue of exempting group-intern conduct from Art 101 (1) TFEU. While in the latter case the mere *possibility* of exerting decisive must be sufficient, additional principles essentially adhering to the conditions of 'personal liability' under the specific fault-based approach of competition law come into play for attributing responsibility.¹⁴⁸⁶ As will be analyzed,¹⁴⁸⁷ these must necessarily respect the standard inherent to the practice of 'piercing the corporate veil'. It will furthermore be shown that the Commission hereby possesses the required means in order to effectively enforce Art 101 (1) TFEU.¹⁴⁸⁸ At this point it must merely be stated that the Union, as well as the member states themselves,¹⁴⁸⁹ are to establish a system of sanctions that is not only sufficiently deterrent, but which is furthermore appropriate under general principles of law.

¹⁴⁷⁸ Cf. *Zimmer/Paul*, Bußgeldzurechnung im Konzern, WUW 10/2007, 970 (971).

¹⁴⁷⁹ For this see *Dannecker/Biermann*, in: Immenga/Mestmäcker, preliminary remarks to Art 23 Reg. 1/2003, paras. 70 ff; *Steinle*, in: FS Bechtold (2006), 541, 545.

¹⁴⁸⁰ Thus, *Zimmer/Paul*, Bußgeldzurechnung im Konzern, WuW 10/2007, 972.

¹⁴⁸¹ *Zimmer/Paul*, *ibid.*

¹⁴⁸² ECJ of 2.10.2003, C-196/99 P, *Aristrain*, [2003] ECR I 11005, para. 99; See 2.2. above; furthermore, *Steinle*, EWS 2004, 118f.

¹⁴⁸³ ECJ of 28.6.2005, Joined Cases C-189/02 P a.o., *Dansk Rørindustri A/S a.o. vs. Commission*, [2005], ECR I-5425, para. 119, as cited by *Zimmer/Paul*, *ibid.*

¹⁴⁸⁴ *Zimmer/Paul*, *ibid.*

¹⁴⁸⁵ This means, an attribution of responsibility from a subsidiary company to its controlling parent company.

¹⁴⁸⁶ Art 23 (2) Reg. 1/2003.

¹⁴⁸⁷ See 3.2.

¹⁴⁸⁸ See 4.1. below.

¹⁴⁸⁹ See Commission Notice on the cooperation within the European competition network (2004/C 101/03, 27.4.2004, OJ C 101, p. 43–53, para. 2), as cited by *Bürger*, Die Haftung der Konzernmutter für Kartellverstöße ihrer Tochter nach deutschem Recht, WuW 02/2011, 136.

Under the standards established for the doctrine of ‘piercing the corporate veil’, the premise of ‘entity law’ therefore serves the fundamental principle of **‘limited liability’** underlying the system of corporate law.¹⁴⁹⁰ The imposition of liability on a parent or other component of a corporate group for the illicit conduct or contracts of a subsidiary therefore rest on a disregard of the separate corporate entities of the two corporations.¹⁴⁹¹ According to these principles, however, such a disrespect of the corporate entity has been deemed appropriate only in ‘exceptional cases’.¹⁴⁹² National courts have therefore often proceeded to adopt this approach only when the subsidiary in question has been dominated or ‘controlled’ by the parent company to such an extent that the subsidiary company may be described to have “*no separate mind, will or existence of its own*”.¹⁴⁹³

Apart from the fact that such a use of metaphors as a substitute for a comprehensive legal analysis has rightly been criticized,¹⁴⁹⁴ such an excessive amount of ‘control’ cannot reasonably be employed for the assessment of an attribution of liability in European competition law. In order to duly regard the respective financial or economic power behind an infringement of Art 101 (1) TFEU, it is rather appropriate to allude to the factual concept of ‘control’ under Art 3 of the European Merger Regulation outlined above. The assessment inherent to this standard must hereby necessarily be complemented by the existence of an ‘*actual*’ exertion of control postulated by principles of procedural law. Hereby it must nevertheless be refrained from using generalized standards such as influence on the subsidiary’s ‘general business conduct or market strategy’.

According to this approach, the ECJ would be required to desist from an attribution where a company abstains from influence despite a principal legal possibility to do so. Furthermore it would have to distinguish in a meticulous way those ‘**core**’ areas of a company’s business policy that are, despite being usually determined by the separate legal entity itself, controlled intrusively by the respective parent or head of the group.

c. The Assessment of Wholly Owned Subsidiaries Upon the Notion of ‘Control’

Under the current standard of assessing ‘economic entities’ in recent ECJ case-law, a controlling shareholding nevertheless not only implies the possibility of an exertion of influence, but furthermore represents a significant indication that the parent company has in fact made use of this possibility.¹⁴⁹⁵ For wholly-owned subsidiaries this is even ‘rebuttably’ presumed.¹⁴⁹⁶

¹⁴⁹⁰ For the anglosaxon legal system, for instance, limited liability of shareholders arises from the corporate common law reflecting the evolution of a doctrine, (discussed in detail by *idem*, The Law of Corporate Groups, § 1.04), rather than from statutory or constitutional provisions. For a detailed assessment of the general evolvement of this term, cf. *Antunes*, The Liability of Polycorporate Enterprises, 13 Connecticut Journal of International Law [hereinafter Conn. J. Int’l L. 197] (1998-1999), 197f.

¹⁴⁹¹ Cf. *Blumberg*, The Law of Corporate Groups, § 6.01, ‘Piercing the Veil: General Doctrine’, 106.

¹⁴⁹² See e.g. *Baker v. Raymond Int’l, Inc.*, 656 F 2d 173, 179 (5th Cir. 1981), cert. denied, 456 U.S. 983 (1982).

¹⁴⁹³ For an example under U.S. (tort) law (on the basis of which responsibility in antitrust law is generally ascertained), see *Lowendahl v. Baltimore & O.R.R.*, 247 A.D. 144, 157, 287 N.Y.S. 62, 76 (1st Dep), aff’d, 272 N.Y.360, 6 N.E.2d 56 (1936), as cited by *Blumberg*, *ibid*, 107.

¹⁴⁹⁴ See e.g. *Hamilton*, The Corporate Entity, 49 Tex L. Rev. 979, 979 (1971); *Landers*, A Unified Approach to Parent Subsidiary, and Affiliate Questions in Bankruptcy, 43 U. Chi. L. Rev. 589, 619-20 (1915), as cited by *Blumberg*, *ibid*.

¹⁴⁹⁵ Cf. *Hofstetter/Ludescher*, Der Konzern als Adressat, 490.

¹⁴⁹⁶ *Zimmer/Paul*, Bußgeldzurechnung im Konzern, WuW 10/2007, 970 (1971).

According to this latter standard of proof, the Commission may assume that the respective company “*essentially follows the instructions given to it by its parent company*” without being required to “*further review whether the parent company has in fact exercised that power*”.¹⁴⁹⁷ It hereinafter suffices for the Commission to prove that the entire share capital in a subsidiary was held by the (final) parent company of the group in order to conclude that the latter in fact exercised an ‘intrusive’ amount of control over its subsidiary’s commercial policy. The opposite case, namely that ‘decisive influence’ has not been exerted, must hereby be proven by the concerned parent company.¹⁴⁹⁸

Even if one cannot assume the Court to have established a presumption ‘to hoax’ the defendants, the evidence submitted by the respective parties attempting to rebut the said presumption has regularly¹⁴⁹⁹ not been regarded sufficient to prove the requisite lack of influence.¹⁵⁰⁰ In the case of *Raw Tobacco Spain* for instance,¹⁵⁰¹ the Commission ascertained that even though the direct parent company of *Agroexpansión* (a company named *Intabex*) held a 100% of its subsidiary’s shares, the latter had, in its response to the Commission’s statement of objectives, provided sufficient evidence that it had not exerted ‘decisive influence’ on its subsidiary’s conduct due to its mere financial interest in the latter.¹⁵⁰² On this basis, the Commission, almost surprisingly, negated the attribution of liability to the respective parent company. Where the evidence presented by the undertakings asserting the autonomous conduct on the market is found inadequate for rebutting the presumption, the Commission is capable of drawing on the respective parent company for the enforcement of its decision.¹⁵⁰³

It has been mentioned, that ‘corporate control’ nevertheless exists in every parent-subsidiary relationship.¹⁵⁰⁴ As observed in the assessment of this term under the standard of the European Merger Regulation, it is established on the basis of an appropriate relation of both legal, as well as factual elements.¹⁵⁰⁵ Questions of attribution in company law regularly become pertinent where it is to be decided whether circumstances or acts of one legal entity are to be judged as

¹⁴⁹⁷ CFI of 10.6.2005, Joined Cases T-71, T-74, T-87, and T-91/03, *Tokai Carbon vs. Commission*, [2005] ECR II-10, para. 60, as cited by *Gleiss/Lutz*, *ibid.* ECJ of 10.9.2009, C-97/08, *Akzo Nobel vs. Commission*, [2009] ECR I-08237, para. 62.

¹⁴⁹⁸ On the respective difficulties for an assessment of the legal problem inherent in this standard, see 2.2.2.2. above.

¹⁴⁹⁹ For some rare exceptions, see e.g. CFI of 4.7.2006, T-304/02, *Hoek Loos*, [2006] ECR II-01887, para. 117 ff, where the Court argued in complete contrast to its general assessment that a subsidiary’s anticompetitive conduct could automatically be attributed to its parent company where they constituted a ‘single economic entity’; see also CFI of 27.10.2010, Case T-24/05, *Alliance One International vs. EC Commission*, [2010] ECR II-05329.

¹⁵⁰⁰ See already, 2.2.2.1., § 4.2. above.

¹⁵⁰¹ Comm. Dec. of 20.10.2004, COMP/C.38.238/B.2, *Raw Tobacco Spain*, [2004] OJ Nr. L 161, para. 383.

¹⁵⁰² Comm. Dec. of 20.10.2004, COMP/C.38.238/B.2, *Raw Tobacco Spain*, [2004] OJ Nr. L 161, para. 383, as cited by *Bauer/Anweiler*, ÖZK 2/2011, 77.

¹⁵⁰³ As mentioned above, this presumption, inferred from the (mere) existence of substantial capital links between the companies is employed equally for indirect shareholding, namely where one or more subsidiary company-(ies) are situated between the particular subsidiary in which the infringement occurred and the final parent company, or head of the group to which this illicit conduct is consequentially attributed; see CFI, *ibid.*, para. 132, as cited by *Lehner*, ÖZK 5/2011, 166.

¹⁵⁰⁴ *Blumberg*, *The Law of Corporate Groups*, § 6.02, 114.

¹⁵⁰⁵ See already the decision of the Community’s ‘High Authority’ in its decision Nr. 24/54 of 6.5.1954, 345; *Mestmäcker/Schweitzer*, § 24 para. 10; *Schröter*, in FK Art 3 FKVO, para. 21

those of another.¹⁵⁰⁶ This necessarily depends on the particular objectives and policies of the area for which the assessment of 'control' is carried out.¹⁵⁰⁷

Such issues arise in various constellations, among which the determination of the scope of restraints on competition is merely one of many.¹⁵⁰⁸ In all cases, however, 'control' is ascertained on the basis of shareholding rights coupled with other forms of factual influence.¹⁵⁰⁹ National courts ruling on situations of attribution – i.e. 'piercing the corporate veil' – insofar as agree that 100% stock ownership,¹⁵¹⁰ and, in some jurisdictions,¹⁵¹¹ even the existence of common officers and directors are principally insufficient for imputing liability.¹⁵¹²

In most situations, ownership of the majority of the shares suggests the existence of 'control', since the majority shareholder will have the power to influence decisions on the latter's general business policy, or because it will have the power to nominate (the majority of) the directors on the board.¹⁵¹³ However, even a minority shareholding may result in the actual exercise of decisive influence over another company, for example, because its shares confer upon it specific voting rights or a veto right in regard to strategic decisions that relate to the day-to-day business operations and thus require the minority shareholders' approval.¹⁵¹⁴

Although these aspects may indicate the *power* of a parent company to exert decisive influence,¹⁵¹⁵ other evidence may nevertheless be necessary to demonstrate that such 'decisive influence' was actually exercised. Even if European antitrust procedures are principally administrative in nature, it has been outlined above, that they are of a 'criminal law nature'. The standard of an actual exertion of 'decisive influence' must therefore essentially be linked to the parent company's own involvement to render the latter a *culpable breach* of competition law.¹⁵¹⁶

¹⁵⁰⁶ Cf. *Koppensteiner*, in: FS Schmidt (2006), Über Zurechnungskriterien im Gesellschaftsrecht, 927.

¹⁵⁰⁷ In detail, see further below in this point of the assessment. For the principle necessity of distinguishing between the various areas of law, on the most broadest level, between tort and contract law, see *Hamilton*, The Corporate Entity, 49 Tex. L. Rev. 979, 985 (1971); furthermore *Blumberg*, The Increasing Recognition of Enterprise Principles in Determining Parent and Subsidiary Corporation Liabilities, 28 Conn. L. Rev. 295 (1995-1996), 303 ff.

¹⁵⁰⁸ See *Koppensteiner*, *ibid.* For the problem of determining the attribution of shares of a subsidiary company for related company law questions, see also *idem*, wbl 2005, 293 ff.

¹⁵⁰⁹ *Koppensteiner*, wbl 2005, 293, 296 ff; *Wallace*, The Multinational Enterprise, 644; Cf. *Emmerich*, in: Immenga/Mestmäcker, Art 3 FKVO, paras. 33 ff. For the assessment of the term of 'control' under the Merger Regulation, see Commission notice (EEC) No 4064/89, para. 23, appropriately referring to the basic, or essential strategic decisions relevant for the determination of 'decisive influence'.

¹⁵¹⁰ See e.g. *Wallace*, Legal Control of the Multinational Enterprise, 640 ff and *Blumberg*, The Law of Corporate Groups, Vol III, (Substantive Law), § 6.02, particularly 114 f.

¹⁵¹¹ For positions in U.S. company law, see e.g. *Nelson v. International Paint Co.*, 734 F.2d 1084 (5th Cir. 1984); *Miles v. American Tel. & Tel. Co.*, 703 F.2d 193 (5th Cir. 1983); *Edgar v. Fred Jones Lincoln-Mercury of Oklahoma City, Inc.*, 524 F.2d 162 (10th Cir. 1975); *Steven v. Roscoe Turner Aeronautical Corp.*, 324 F.2d 157, 161 (7th Cir. 1963), as cited by *Blumberg*, The Law of Corporate Groups, § 6.02, *supra* note 10.

¹⁵¹² See *Blumberg*, *infra* §10.02, note 8.

¹⁵¹³ Similarly, *Faull/Nikpay*, The EC Law of Competition, (2007), 8.563.

¹⁵¹⁴ See point 19 of the Commission Notice on the concept of concentration under Council Regulation (EEC) No. 4064/89 on the control of concentration between undertakings (98/C66/02), and CFI of 17.9.2006, Case T-330/01, *Akzo Nobel NV vs. Commission*, [2006] ECR II-03389, and CFI of 27.9.2006, T-314/01, *Avebe vs. Commission*, [2006] ECR II-03085, as cited in this regard by *Faull/Nikpay*, The EC Law of Competition, (2007), *ibid.* In favor of this approach also for the EC Merger Regulation see also: *Kühnert/Xeniadis*, Die wettbewerbsrechtliche Kontrolle von Minderheitsbeteiligungen, ÖZK 2011/4, 123 (125) (and page 169 above).

¹⁵¹⁵ Cf. *Faull/Nikpay*, The EC Law of Competition, (2007), 8.563.

¹⁵¹⁶ Thus also: CFI of 4.7.2006, T-304/02, *Hoek Loos*, [2006] ECR II-01887, para. 117. For a detailed assessment of this standard, see 4.1.1. below. In favor of this approach, see e.g.: *Scordamaglia*, Cartel Proof, Imputation and Sanctioning in European Competition Law, 5 (particularly 13 ff); *Evelyne Ameye*, The

In this sense, the CFI, in the case of *Hoek Loos*¹⁵¹⁷ argued that:

"[118] The applicant's argument would render pointless any analysis of the relations within a group of companies to determine whether the group constitutes a single undertaking for the purposes of applying the competition rules, since recognition of the responsibility of one member of the group would lead automatically to the parent company, if there is one, representing the group, or to the other undertakings constituting the group being held jointly and severally responsible.

*It therefore runs completely counter to the principle that penalties must fit the offence, so that an undertaking may be penalized only for acts imputed to it individually, a principle applying in any administrative procedure that may lead to the imposition of sanctions under Community competition law."*¹⁵¹⁸

The extension of liability to separate legal entities that can essentially not be blamed for a culpable behavior, therefore essentially breaches the principle of 'personal liability',¹⁵¹⁹ as well as the principle of 'fault' under general principles of European law.¹⁵²⁰ Under the specific objectives of European competition law not only to prosecute companies for their wrongdoing, but also to deter them from future violations of competition law,¹⁵²¹ this standard has furthermore been deemed pertinent to competition law according to applicable case-law of the European Court of Human Rights.¹⁵²²

As has already been stated,¹⁵²³ the existence of a legal presumption is primarily nothing alien to European competition law but serves to alleviate the Commission's (substantial) burden of proving the existence of an anticompetitive conduct.¹⁵²⁴ Nevertheless, also the implementation of legal presumptions cannot free the Commission from its procedural obligations to *prove* the illicit conduct of a party to which it addresses its decision.

The Court's interpretation of the burden of proof in *Stora*, and the consequent substantiation of this presumption in its formulation in the decision of the case of *Akzo Nobel* have been criticized,¹⁵²⁵ as the ECJ indisputably views the Commission to be legitimized to assume a parent company's actual exertion of 'decisive influence' on the basis of mere ownership criteria. This approach not only breaches the concept of 'control' under general

Interplay between Human Rights and Competition Law in the EU, [2004] ECLR, Issue 6, 332; and *Schwarze/Bechtold/Bosch*, in: Gleiss/Lutz, Deficiencies, 14 and 53.

¹⁵¹⁷ This case constitutes one of its rare exceptions of the Court's extensive application of a 'single economic entity'.

¹⁵¹⁸ CFI of 4.7.2006, T-304/02, *Hoek Loos*, [2006] ECR II-01887.

¹⁵¹⁹ Recognized for European Union law e.g. by CFI of 4.7.2006, T-304/02, *Hoek Loos*, [2006] ECR II-01887, para. 129; ECJ of 8.7.1999, C-49/92, *Anic Partizipazioni*, [1999], ECR I-04125, para. 78 and 145 WuW/E EU-R 320; ECJ of 11.12.2007, C-280/06, *ETI a.o.*, [2006] ECR I-11753, para. 39= WUW/E EU-R 1353; most recently GA Kokott of 23.4.2009 in case C- 97/98, *Akzo Nobel vs. Commission*, [2009] ECR I-08237, para. 39, as cited by *Meyring*, Uferlose Haftung im Bußgeldverfahren, WuW 02/2010, 157 (166).

¹⁵²⁰ Art 6 (2) ECHR, as well as Art 49 (3) of the Charta of the European Convention of Human Rights. Furthermore, under the often cited standard of Art 23 (2) Reg. 1/2003 according to which only 'intentional or negligent' conduct is prosecuted.

¹⁵²¹ Sometimes it has even been ascertained that the Commission, in recent times, only pursues the latter issue, see *Meyring*, *ibid*, 157.

¹⁵²² *Schwarze/Bechtold/Bosch*, in: Gleiss/Lutz, Deficiencies, 53.

¹⁵²³ See under 2.2.2.2, § 2.2 above.

¹⁵²⁴ See e.g. the assertions of AG Kokott in case C- 97/98, *Akzo Nobel vs. Commission*, [2009] ECR I-08237, paras. 30 f.

¹⁵²⁵ See 2.2.2.2. above.

considerations of ‘entity law’,¹⁵²⁶ but also constitutes a distorted application of the ‘single economic entity doctrine’.¹⁵²⁷

In the sole case in which the parent company’s responsibility was negated, the Commission regarded the lack of factual points of reference in the documents available to it as adequate to effectively negate the presumption of ‘decisive influence’.¹⁵²⁸ In its subsequent decision of the case, the CFI appropriately held that this was to be pertinent for the assessment of majority- and indirect shareholdings as well. The Court deduced that the Commission had thus incorrectly held the respective parent company liable.¹⁵²⁹ From this judgment it nevertheless follows that for an efficient application of the legal presumption, the *lack* of sufficient criteria must be regarded as significant indicia that the respective parent company has not exerted decisive influence over its subsidiary’s conduct.¹⁵³⁰

The principle of equal treatment (non-discrimination) prescribes that this approach of a ‘dual foundation’ must be applied to all parent companies in a consistent manner. For the appropriate distribution of proof in procedural law, one has to distinguish between a ‘formal’,¹⁵³¹ or procedural, and a ‘substantive’¹⁵³² standard of proof.¹⁵³³

The ‘formal’ burden of proof demands of the concerned parties to prove the facts substantiating their claim, or opposite assertion. The ‘substantive’ burden of proof represents the legal disadvantage that the respective party incurs in case it cannot prove the facts declared.¹⁵³⁴ While formal and substantive burden of proof coincide for procedures under civil law,¹⁵³⁵ Regulation 1/2003 determines that “*it is on the party or the authority alleging an infringement [...] to prove the existence thereof to the required legal standard*”.¹⁵³⁶ In competition law procedures, the detection of the relevant facts of a case is upon the authority in case the latter has initiated the proceedings.¹⁵³⁷

If a legal presumption under European competition law therefore denotes a company’s possibility to refute it by showing that a certain fact of the presumption is lacking in the precise case, this can only appeal to the *substantive* burden of proof. Would it conversely concern the procedural burden of proof, this would mean that the authority is only required to prove the facts on which the presumption is based. However, this would render the possibility of a company to rebut the said presumption ineffective.¹⁵³⁸ The authority would hereby entirely be

¹⁵²⁶ For an explanation of this approach under corporate law, see already 2.1.2 above.

¹⁵²⁷ Cf. Hofstetter/Ludescher, Der Konzern als Adressat, 488; Bauer/Reisner, Erweiterte Zurechnung des Verhaltens Dritter bei der Festsetzung von Geldbussen im EG-Kartellrecht?, WuW 2007, 737 (738).

¹⁵²⁸ See Comm. Dec. of 20.10.2004, COMP/C.38.238/B.2, *Raw Tobacco Spain*, para. 73; See already 2.1.2. § 2.2. above.

¹⁵²⁹ CFI of 27.10.2010, Case T-24/05, *Alliance One International vs. EC Commission*, [2010], ECR II-05329.

¹⁵³⁰ Bauer/Anweiler, ÖZK 2011/2, 78. For an original criticism of the approach of the European institutions under the principles of the *Stora* case and the inconclusive conclusions therein, see already Riesenkampff, in WuW 4/2001, 357 (358).

¹⁵³¹ This is also referred to as ‘subjective,’ or individual burden of proof.

¹⁵³² This is also referred to as the ‘objective’ burden of proof.

¹⁵³³ For an example of this necessity under German procedural law see e.g. Greger, in Zöller, ZPO, 22nd ed., preliminary remarks to § 284, para. 18, as cited by Thomas, Die verfahrensrechtliche Bedeutung der Marktbeherrschungsvermutung des § 19 (3) GWB [the presumption of dominance under § 19 (3) of the German antitrust code], WuW 5/2002, 470 (472).

¹⁵³⁴ Greger, *ibid*, as cited by *idem*.

¹⁵³⁵ This is due to the principle that the subject matter of the case is delineated by the application and general principles of the adversarial system.

¹⁵³⁶ See Council Regulation (EC) No 1/2003, OJ of 4.1.2003, Nr. L 1/1, in point (5).

¹⁵³⁷ Engelhardt in: Obermayer, VwVfG, 3rd ed., § 24, para. 296; Stelkens/Kallerhoff, in: Stelkens/Bonk/Sachs, VwVfG, 5th ed., § 24, para. 54, as cited by Thomas, WuW 5/2002, 472.

¹⁵³⁸ For the assumption of market dominance under German antitrust law, see Thomas, *ibid*.

dispensed from its procedural duty to prove whether the facts postulated by the assumption were existent in the case under assessment. The principle of 'official investigation' would hereby be circumvented,¹⁵³⁹ since other facts than those upon which the presumption is based would not be considered anymore.

This is nevertheless precisely the case for the current legal presumption of 'decisive influence' in light of wholly owned subsidiaries, drawing from the existence of a 100% shareholding the conclusion that the parent company in fact exerted 'decisive influence' on the subsidiary's conduct. For this reason, this approach essentially constitutes a reversal of the 'presumption of innocence' under European competition law.¹⁵⁴⁰

In case that precise indicia point to the lack of 'decisive influence' on the part of the parent company, it cannot be held jointly and severally liable with its subsidiary. This is the case, because the Commission, in the above mentioned case of '*Raw Tobacco*',¹⁵⁴¹ could not have deduced the same conclusions from the *lack* of indicia as it could have from the *existence* of such indicia pointing to the existence of decisive influence.¹⁵⁴² European competition law must insofar respect the principles developed under the national (corporate) laws of the member states regarding liability of parent companies for actions, or obligations of their subsidiaries, i.e. the developed practice of 'piercing the corporate veil'.¹⁵⁴³

Thus it has regularly been asserted that from the ambivalent approach of current case-law it could be concluded that a parent company's liability should be regulated by European legislation itself.¹⁵⁴⁴

This position cannot be approved of. Under principles of European Union law it is rather appropriate to confer this task upon '*case-law*' under the condition that general (judicial) standards of the law's formation are respected. This is due to the fact that positive law and case law, in the European legal order, necessarily constitute an equal standard if one is to take seriously the ECJ's task of not only interpreting, but also *forming* the law in the light of furthering the integration process.¹⁵⁴⁵ Case-law must accordingly regard those legal principles that are well established in the tradition of the (company) laws of all member states.¹⁵⁴⁶

Apart from the questionability of the presumption for wholly-owned subsidiaries under procedural principles, the specific policies and objectives of European competition law must be taken into account as well. This is due to the fact that the concept of 'piercing the corporate veil,' requires as an overriding rule of 'entity law' a consideration of the assertive aims of the specific legal area for which it is applied. Note that the mode of the presumption's application can hardly be regarded consistent with the principle aim pursued by European competition law, i.e. to *deter* companies from future misconduct.

¹⁵³⁹ For the criticism of the said presumption of 'market dominance' under German antitrust law, see e.g. *Leo*, in: *Gemeinschaftskommentar*, 5th ed., § 19, para. 1395. Möschel, has insofar even asserted the 'complete elimination' of the principle of official investigation: see *Möschel*, in: *Immenga/Mestmäcker*, 3rd ed., *GWB*, § 19, para. 92, as cited by *Thomas*, *WuW* 5/2002, 472.

¹⁵⁴⁰ Cf. *Van Vormizeele*, *Die EG-kartellrechtliche Haftungszurechnung im Konzern im Widerstreit zu den nationalen Gesellschaftsrechtsordnungen*, *WuW* 10/2010, 1008 (1014).

¹⁵⁴¹ Comm. Dec. of 20.10.2004, COMP/C.38.238/B.2, *Raw Tobacco Spain*. [2004], OJ Nr. L 206.

¹⁵⁴² Cf. *Bauer/Anweiler*, *ÖZK* 2011/2, 78.

¹⁵⁴³ Cf. *Schwarze/Bechtold/Bosch*, in: *Gleiss/Lutz*, *Deficiencies in EC Competition Law*, 52.

¹⁵⁴⁴ *Schwarze/Bechtold/Bosch*, *ibid*; see furthermore *Bauer/Anweiler*, *ÖZK* 2011, 78; *Meyering*, *Uferlose Haftung im Bußgeldverfahren?*, in: *WuW* 2010, 157.

¹⁵⁴⁵ For a more detailed assessment of the ECJ's task in this regard, see 3. §1 above.

¹⁵⁴⁶ In detail, see 3.2. below.

The upper limit of fines in European competition law under Art 23 (2) Reg. 1/2003 is based on the political decision of the legislator to grant that fines imposed on companies relate¹⁵⁴⁷ to the size of the concerned undertaking.¹⁵⁴⁸ Because the legal justification of this limitation of the fine is also justified upon economic criteria in order to avert the danger of fines crossing the border of the (politically) necessary, the said delimitation well comprises 'functional' aspects'.¹⁵⁴⁹ This reasoning is pertinent likewise on the level of the corporate group.¹⁵⁵⁰ An extension of liability to the respective parent company of the group and a connected increase of the maximum fine is therefore only effective where an increased level of deterrence is achieved.¹⁵⁵¹ This is nevertheless only the case where the respective parent company determines the conduct of its subsidiaries and hereby either inappropriately or ineffectively controls its controlled subsidiary's behavior.¹⁵⁵²

Under this principle of 'organizational negligence',¹⁵⁵³ this may therefore be assumed the case where

- the parent *knew* of this conduct¹⁵⁵⁴ and has
- explicitly or 'passively' *accepted* it,¹⁵⁵⁵ or
- where the parent failed to actively supervise its subsidiaries' activities, *even though* this would have been part of its duty in order to exert 'effective control'.

All these elements would meet the requirement of some form of *participation* by the parent in the infringement as required under the general principles of fining legal persons for intentional misconduct, as well as the specific standard of Art 23 (2) of Reg. 1/2003 for breaching European competition law.¹⁵⁵⁶ Where one of these criteria is not fulfilled however, the parent company's inclusion into the responsibility of its subsidiary could generate no additional deterrent effect.¹⁵⁵⁷

¹⁵⁴⁷ Meaning that they should not come off balance.

¹⁵⁴⁸ Cf. *Dannecker/Biermann*, in: Immenga/Mestmäcker, Wettbewerbsrecht, Vol I EG/Part I, Art 23 Reg. 1/2003, para. 100.

¹⁵⁴⁹ Cf. *Shavel*, Foundations of Economic Analysis of Law, (2004), [hereinafter: *Shavel*, Economic Analysis], 479 ff; *Wils*, Efficiency and Justice in European Antitrust Enforcement, Oxford (2008), [hereinafter: *Wils*, Efficiency], 51, para. 169, as cited by *Hofstetter/Ludescher*, Der Konzern als Adressat, 504.

¹⁵⁵⁰ *Hofstetter/Ludescher*, *ibid.*

¹⁵⁵¹ This has, in principle, been accepted by the Commission as well. It has nevertheless been outlined in the previous analysis that the Commission does not appeal to a clear line of assessment; Cf. also *Bechtold/Bosch/Hirsbrunner*, Kommentar zum EG-Kartellrecht, Munich (2005), Art 23 Reg. 1/2003, para. 63, with further references.

¹⁵⁵² See *Hofstetter/Ludescher*, Der Konzern als Adressat, point C.IV. in FS von Bühren (2009).

¹⁵⁵³ On a detailed assessment of the organizational concept behind the creation of a corporate group, see 3.2. and for the necessary standard of 'organizational negligence' this concept implies under 4. below.

¹⁵⁵⁴ A direct instruction (or even an indirect recommendation) to contravene the competition principles would not even pose the question of attribution, but expose the parent company to a direct breach of antitrust law by 'instrumentalizing' its subsidiary. Whether the subsidiary itself could be held liable for following the illicit instruction of its parent will subsequently depend on whether the subsidiary could be held liable of its own erroneous conduct.

¹⁵⁵⁵ This implies that the parent company did not react in a contravening way, immediately signaling that it does not approve of the conduct and undertakes effective steps to bring the infringement to an end.

¹⁵⁵⁶ Cf. e.g. *Koppensteiner*, Kartellrecht im Unternehmensverbund, in: Festschrift für Peter Mailänder (2006), 138 and *Faull/Nikpay*, The EC Law of Competition (2007), 8.560, explicitly suggesting that the Commission must hereby establish that the subsidiary did not act autonomously by demonstrating that the parent company actually exercised decisive influence on the subsidiary at the time of the infringement.

¹⁵⁵⁷ *Hofstetter/Ludescher*, Der Konzern als Adressat, 504.

In this regard it has sometimes been asserted, that a ‘mere cognition’ of the infringement on the part of the parent company cannot suffice for an attribution of illicit conduct. According to this view, a parent company’s conscience cannot not be understood as an implied approval of the behavior in question. This was seen to imply a lack of *contribution* by the parent, indispensable for criminal-akin responsibility.¹⁵⁵⁸ Despite the fact that this opinion makes an important point in requiring a certain form of participation - be it active or passive - by the parent company for which the latter can be held responsible, it must be regarded as disproportionate. On the one hand, it does not require the parent to actively intervene in the face of evident illicit behavior even though it would have the possibility to do this as a controlling company. On the other hand, it disregards previously existing case-law of the Court, explicitly requiring such a form of action on the part of the parent company.¹⁵⁵⁹

In the absence of a clear set of rules as existent in the jurisdiction of the various member states for the standard of ‘piercing the corporate veil’, the imposition of a fine on parent companies can only be legally justified where the parent company can itself be held responsible for misconduct.¹⁵⁶⁰ The practice of the Commission to impose on a shareholder a fine without proving that its management has acted irresponsibly is not only precarious under a general principles point of view,¹⁵⁶¹ but furthermore does not belong to the sanctioning mechanism of Art 101 and 102 TFEU in a way of rendering them more effective.¹⁵⁶²

In a final note it should nevertheless be mentioned that in its more recent decision practice, the Commission and the CFI have sometimes chosen not to rely on the presumption rule alone, but to base their findings on concrete evidence establishing that a parent company *in fact* exercised ‘decisive influence’ on its subsidiary.¹⁵⁶³ The Commission hereby increased the respective standard of proof in establishing its decision on the double basis of the ‘legal presumption’ in connection to circumstantial evidence pointing to the existence of a ‘single economic entity’ in the specific case.¹⁵⁶⁴ In its consequent assessment of the case, the CFI found that “ *the Commission provided an adequate statement of reasons as to why it had decided to attribute liability for ‘WWTE’s’ infringement to the applicants and therefore fully adhered to the term of an ‘economic entity’*”.¹⁵⁶⁵ In contrast to its previous findings, the Commission nevertheless held a ‘mere financial’ interest in another company to constitute insufficient evidence of ‘decisive influence’ despite the existence of a 100% shareholding.

¹⁵⁵⁸ For this opinion *Koppensteiner*, Kartellrecht im Unternehmensverbund, in: Festschrift für Peter Mailänder (2006), 138.

¹⁵⁵⁹ See CFI in cases T-71/03, T-74/03, T-87/03 and T-91/03, *Tokai Carbon a.o. vs. EC Commission*, [2005] 5 C.M.L.R. 13, paras. 65 ff. It has nevertheless been ascertained, that the legal presumption for wholly-owned subsidiaries, as reinforced by the Court itself in its decision of *Akzo Nobel*, renders this explicit precondition of an active form of participation by the parent company highly questionable.

¹⁵⁶⁰ *Schwarze/Bechtold/Bosch*, in: Gleiss/Lutz, Deficiencies in EC Competition Law, 52. Hereby only the categories of ‘action’ and ‘participation’ as generally employed by the German law of (administrative) offences (‘Ordnungswidrigkeitenrecht’), which is seen to essentially comprise the same standard as Art 23 of Reg. 1/2003 [Art 15 (2) of Reg. Nr. 17] can be pertinent. See *Schroeder*, Verbundene Unternehmen, in WuW 4/1988, 282.

¹⁵⁶¹ Thus also *Schwarze/Bechtold/Bosch*, in: Gleiss/Lutz, Deficiencies, 51.

¹⁵⁶² *Bürger*, Die Haftung der Konzernmutter, WuW 02/2011, 130 (136).

¹⁵⁶³ CFI of 27.10.2010, T-24/05, *Alliance One International vs. Commission*, [2010], ECR II- 05329, para. 141; see, inter alia, paras. 372, 375, 376 and 378 of the contested decision.

¹⁵⁶⁴ Comm. Dec. of 20.10.2004, COMP/C.38.238/B.2, *Raw Tobacco Spain*, para. 383 f, and, with an even more extensive approval of the Commission’s formulation, *Lehner*, ibid.

¹⁵⁶⁵ CFI, ibid, para. 155, as cited by *Lehner*, ÖZK 2011/5, 167.

Even though this evaluation has not been applied consistently in practice,¹⁵⁶⁶ the Commission's second ascertainment, namely that an attribution of liability requires the existence of 'decisive influence' at a specific point of time seems to reflect the current position of the Court.¹⁵⁶⁷ This assertion, indicating that the exertion of 'control' may change in the light of corporate restructurings, can only be approved of and should therefore be reviewed in more detail.

d. The Assessment of Cases of 'Legal Succession'

Closely interrelated to the question of whether the anticompetitive conduct of a subsidiary may be attributed to its parent company is the evaluation of the possible effects an intra-group restructuring may have on the determination of liability between affiliated companies.¹⁵⁶⁸ In today's rapidly changing 'corporate culture', the conclusion of mergers, or the outsourcing of certain parts of a company's business may be a commercial necessity. Considering these indispensable corporate reorganizations, the timely perspective of corporate group liability becomes pertinent.¹⁵⁶⁹ Particularly the long life span of cartels, together with the length of the Commission's investigation, has been found to generate difficulties in ascertaining liability where undertakings, either during the infringement or subsequently, assume new corporate identities or sell the relevant businesses.¹⁵⁷⁰

It is important to note that succession of liability for infringements of EU competition law is determined on self-standing criteria of European law and not by the rules of national (corporate) law.¹⁵⁷¹ In European Union law, the concept of a 'single economic entity' is also applied for instances in which the undertakings involved in a cartel subsequently change their legal structure.¹⁵⁷²

Principally, every legal entity remains responsible for an infringement that has been committed under its management, as long as it maintains its own legal personality.¹⁵⁷³ This principle of 'personal responsibility' is also pertinent in cases in which the decision holding the respective undertaking liable is issued at a point of time in which a different legal person has assumed responsibility over it.¹⁵⁷⁴ This shows that succession in terms of liability for

¹⁵⁶⁶ See 3.2.2. below.

¹⁵⁶⁷ See CFI of 27.10.2010, T-24/05, *Alliance One International vs. Commission*, [2010], ECR II- 05329, para. 151.

¹⁵⁶⁸ Cf. *Lehner*, ÖZK 2011/5, 167, and *Faull/Nikpay*, *The EC Law of Competition*, (2007), 8.570.

¹⁵⁶⁹ Cf. *Lehner*, *ibid.*

¹⁵⁷⁰ Cf. *Faull/Nikpay*, *ibid.*

¹⁵⁷¹ See Case T-134/94, *NHM Stahlwerke vs. Commission*, [1996] ECR II-537, as cited by *Faull/Nikpay*, *ibid.*

¹⁵⁷² *Bauer/Reisner*, *Erweiterte Zurechnung des Verhaltens Dritter*, WuW 7 u. 8/2007, 737 (739). As regularly apparent in European competition law, a clear dogmatic foundation of this ascertainment has found to be missing. See *Hamann*, *Das Unternehmen als Täter im europäischen Wettbewerbsrecht*, 1992, 211; *Papakiriakou*, *Das Europäische Unternehmensstrafrecht in Kartellsachen*, 2002, 162 ff; *Thomas*, *Unternehmensverantwortlichkeit und -umstrukturierung nach EG-Kartellrecht*, 2005, 7ff; as cited by *Steinle*, in: FS Bechtold (2006), 543.

¹⁵⁷³ *Bauer/Reisner*, *ibid.*

¹⁵⁷⁴ ECJ of 16.11.2000, C-279/98 P, *Cascades vs. Commission*, [2000] ECR I-9693, para. 78; ECJ of 16.11.2000, C-286/98 P, *Stora Kopparbergs Bergslags vs. Commission*, [2000] ECR I-9925, para. 37.

competition law infringements covers the situation where liability is attributed to an entity for the *past* participation of another entity or of assets it acquired.¹⁵⁷⁵

This aspect of antitrust liability was first considered by the ECJ in the cases of '*Suiker Unie*' and '*Rheinznk*' where the Court was called to decide on the appropriate legal entity responsible for an antitrust infringement in cases of 'legal succession'.¹⁵⁷⁶ In the former case, four Dutch cooperative companies had founded a separate undertaking under the name of '*Suiker Unie*', which launched its commercial activity in the year 1971. Soon afterwards, the company was dissolved by the cooperatives upon the creation of a new firm with the same name, which they consequently joined as direct members.

In its decision, the Commission did not hesitate to hold the new company of '*Suiker Unie*' responsible for the anticompetitive conduct carried out by the previous entity. Upon the complaint of the founding companies, the ECJ primarily rejected the objection that the new undertaking had not even existed at the time of the infringement. Instead, it held that all rights and responsibilities had passed on to the new company of '*Suiker Unie*', which was considered the direct legal successor of the former company. This was deemed necessary, because the cooperatives had attributed to it this position under a strictly 'economic point of view'.¹⁵⁷⁷ Hereby, the Court came to the conclusion that the conduct of '*Suiker Unie*' and the one of its legal predecessor was characterized by an 'obvious unity of conduct'. For this reason, the acts of the latter could legitimately be attributed to the former.¹⁵⁷⁸ This criterion of '**economic continuity**' was also relied on by the Court in its judgment of '*Rheinznk*' and characterized the Community institution's case-law throughout the subsequent decades.

Even if the Court came to an appropriate conclusion in the case of '*Suiker Unie*', the principle of 'economic continuity' was subsequently not always applied in a consistent manner. Rather, it seemed to result in the assumption that responsibility for antitrust infringements 'followed' the respective commercial conduct, irrespective of a change in legal personality.¹⁵⁷⁹ Thus, a fine was regularly imposed upon the legal entity in charge of a company's management at the time of the *issuance* of the Commission's decision. The actual involvement of the company held liable seemed to play no specific role. This practice had nevertheless strongly been criticized in literature.¹⁵⁸⁰

Primarily it is clear that a legal or organizational transformation of an entity that has breached the competition rules does not mean that a new undertaking free from liability of its predecessor

¹⁵⁷⁵ Cf. *Faull/Nikpay*, The EC Law of Competition, (2007), 8.570. In case the acquirer continues the infringement after the acquisition, the rules of an attribution of liability as previously discussed apply, meaning that the latter may be held liable for its own direct involvement in the infringement.

¹⁵⁷⁶ See ECJ of 16.12.1975, joined cases 40/73, *Suiker Unie a.o. vs. EC Commission*, [1975] ECR 1663; and ECJ of 28.3.1984, joined cases 29/83 and 30/83, *CRAM and Rheinznk vs. EC Commission*, [1984] ECR 1679, para. 9 on the basis of Comm. Dec. of 16.7.1969, *International Chinincartell*, [1969] OJ Nr. L 192/5, 21, as cited by *Steinle*, in: FS Bechtold (2006), 544.

¹⁵⁷⁷ ECJ of 16.12.1975, joined cases 40/73, *Suiker Unie a.o. vs. EC Commission*, [1975] ECR 1663, paras. 84/87. This was furthermore judged appropriate as the firm had been continued under the same name and had been managed by the same legal persons.

¹⁵⁷⁸ ECJ, *ibid*.

¹⁵⁷⁹ See Comm Dec of 28.11.1979, *FLORAL*, [1980] OJ Nr. L 39/51, para. 59; as well as Comm Dec of 23.11.1984, *Peroxyd-Products*, [1985] OJ Nr. L 35/1, para. 49; and Opinion of AG Vesterdorf of 10.7.1991, T-1/89, *Rhone-Poulenc vs. Commission*, [1991] ECR II-869, 919, as cited by *Steinle*, *ibid*, 545.

¹⁵⁸⁰ *Steinle*, in FS Bechtold (2006), 541, 549f, as cited by *Kling*, WRP 4/2010, 516; *Papakiriakou*, Das Europäische Unternehmensstrafrecht, 166 f.

is created.¹⁵⁸¹ Rather, it is to be assessed to whom the ‘collective responsibility’ for this new establishment may be attributed using the above-mentioned ‘economic point of view’. If the outcome is that ‘economic identity’ between the previous and the new entity may be assumed, the latter may legitimately be held accountable for the illicit conduct of its predecessor.¹⁵⁸² The above-mentioned practice of imposing the fine on the (parent) company (of a group of undertakings) existing at the time of the issuance of the decision essentially infringes the principle of ‘personal liability’. As mentioned above, this principle¹⁵⁸³ postulates that a legal person cannot be made responsible for an infringement that it has not committed.¹⁵⁸⁴ Responsibility for previous infringements can thus not be established upon the mere fact that a parent company takes over the management of a new undertaking.¹⁵⁸⁵ This assessment is furthermore appropriate because ‘decisive influence’ cannot be exerted before the creation of a relation of dependence.¹⁵⁸⁶ As argued above, the attribution of liability to a different legal entity requires a presentation of evidence that a company’s economic autonomy is *in fact* restricted. However, this is not possible before an acquisition of ‘corporate control’.¹⁵⁸⁷ An exception to this rule can only be assumed where the anticompetitive conduct is continued after the time of the respective takeover.¹⁵⁸⁸ Where a participation in the infringement is impossible from a timely perspective, the existence of an ‘economic entity’ must strictly be rejected.¹⁵⁸⁹

On the basis of this criticism, the Commission introduced a new approach for the assessment of antitrust responsibility in the light of corporate restructurings in its ‘*Polypropylen*’ decision. In this decision the authority formulated a specific principle, which was subsequently referred to as the so-called ‘*Anic-rule*’.¹⁵⁹⁰ According to this rule, an undertaking should not have the chance to rid itself of responsibility by selling the business segment or unit involved in a cartel to a

¹⁵⁸¹ Case T-29/83 & 30/83, *CRAM und Rheinzinke vs. Commission*, [1984] ECR 1679, para. 9.

¹⁵⁸² See *Christina Hummer*, Kartellrechtliche Haftung von Muttergesellschaften, *ecolex* 2010, 64 (65).

¹⁵⁸³ It has been reasoned in this thesis that this principle is pertinent likewise for the determination of responsibility within a corporate group of companies.

¹⁵⁸⁴ See *GA Ruiz-Jarabo Colomer* in his Opinion of 11.2.2003 in Case C-204/00 P, *Aalborg Portland vs. Commission*, [2004] ECR I-133, para. 65.

¹⁵⁸⁵ Likewise, CFI of 20.3.2002, T-9/99, *HFB a.o. vs. Commission*, [2002] ECR II-1487, paras. 101 ff = WuW/Eu-R 545, outlined under 2.2.2.1., § 3.2. above. See also *Thomas*, Unternehmensverantwortlichkeit und –umstrukturierungen nach EG-Kartellrecht, (2005), 158f; *Zimmer/Paul*, WUW 2007, 970 (976); critically *Katja Høegh*, Succession of Liability for Competition Law Infringements with Special Reference to Due Diligence and Warranty Claims, *ECLR* (2004), 534 f, as cited in this regard by *Kling*, WRP 4/2010, 516.

¹⁵⁸⁶ Cf. *Thomas*, Unternehmensverantwortlichkeit, 159.

¹⁵⁸⁷ *Kling*, WRP 4/2010, 516; likewise *Faull/Nikpay*, The EC Law of Competition (2007), 8.570.

¹⁵⁸⁸ See *Thomas*, Unternehmensverantwortlichkeit, 161; *Faull/Nikpay*, The EC Law of Competition (2007), 8.570 and *Kling*, *ibid*, the latter denoting that a parallel assessment is pertinent likewise in the context of an illicit payment of state aid. On this aspect see e.g. ECJ of 20.9.2000, *Banks/Coak Authority*, [2001] ECR I-6117, para. 78.

¹⁵⁸⁹ Cf. *Thomas*, *ibid*, 158 f, denoting that exceptions nevertheless exist for recidivism. See (not entirely consistent however) also CFI of 30.9.2003, T-203/01, *Michelin*, [2003] ECR II-4071, para. 290. Precondition for the assumption of liability in this case was the possibility of a parent company to exercise ‘decisive influence’ on the conduct of its subsidiary and that both the ‘original culprit’, as well as the ‘recidivist’ were addressees of the previous procedure. This view appropriately alludes to the ‘presumption of innocence’ as well as the ‘right to be heard’, according to which an appellant, who was not addressed by the previous decision, cannot take action against the latter. See furthermore ECJ of 14.7.2005, joined cases C-65/02 and C-73/02, *TKS*, [2005] ECR I-6773; as well as CFI of 12.10.2007, T-474/04, *Pergan*, [2007] ECR II-4225, para. 76/77, as cited by *Kling*, *ibid*, in *supra* note 151.

¹⁵⁹⁰ For the determination of this term, see particularly *Dyckjaer-Hansen/Høegh*, *ECLR* 2003, 203, as cited by *Steinle*, in *FS Bechtold* (2006), 545.

separate party *as long as it continues to exist itself*.¹⁵⁹¹ A legal entity should not be freed from liability because the company that it conducted at the time of the infringement does not exist anymore. Conversely, the principle of ‘personal liability’ was seen to find its limit where the legal entity responsible for the business at the time of the infringement ceases to legally subsist. In this case, the new legal person to whom the material and personal elements of the previous entity have been bestowed becomes liable under the principle of ‘economic continuity’ outlined above.¹⁵⁹² According to established ECJ case-law, the acquirer is not responsible for breaches of competition law *before* the time of the purchase even if it knew, or should have known, of the previously committed infringement.¹⁵⁹³ Under the concept of factual ‘control’ outlined above, such an assessment is appropriate. A parent company, which was not involved in the conduct of a subsidiary itself, can namely only be held accountable for commercial activity that it was actually able to monitor on the basis of factual or legal means.¹⁵⁹⁴

While the exact consequences of the so-called ‘*Anic-rule*’ on different types of corporate restructurings are not essential to the current analysis and will therefore not be treated,¹⁵⁹⁵ it should nevertheless be noted that its standard has susceptibly been confined again by recent case-law.¹⁵⁹⁶ A different conclusion was, for instance, deemed appropriate “*under the special circumstances of the case*”, where the preceding parent company was found to be insolvent, or had ceased to exist, abandoning all previous commercial conduct.¹⁵⁹⁷ According to the Community Courts, such an assessment did not infringe the principle of *nulla poena sine lege*.¹⁵⁹⁸

In consideration of the pertinent principles of procedural law, it must be noted that this position can only be upheld in case that the protection of insolvency claims must be attributed a higher legal standing than the protection of companies not to be made responsible for infringements which they have not committed.¹⁵⁹⁹ Such a restriction of the ‘*Anic-rule*’ would

¹⁵⁹¹ Comm. Dec. of 23.4.1986, *Polypropylen*, [1986] OJ Nr. L 230/1, para. 96, as cited by *Steinle*, *ibid*.

¹⁵⁹² *Bauer/Reisner*, *Erweiterte Zurechnung des Verhaltens Dritter*, WuW 7 u.8/2007, 740. According to the view of the Commission, an undertaking therefore remains responsible for infringements committed by it, irrespective of whether it has dismantled itself of its previous legal personality, if it can be distinguished as such upon economic or functional considerations. Cf. *Dannecker/Biermann*, in: Immenga/Mestmäcker, *EG-Wettbewerbsrecht* (2007), preliminary remarks to Art 23 of Reg. 1/2003, para. 103.

¹⁵⁹³ ECJ of 16.11.2000, C-286/98 P, *Stora Kopparbergs Bergslags vs. Commission*, [2000] ECR I-9925, para. 39; see also *Zimmer/Paul*, WuW 2007, 979 (977).

¹⁵⁹⁴ Even in cases where a parent company could possibly have monitored its subsidiary’s conduct it is questionable to what an explicit extent an obligation of the latter to supervise its subsidiary’s conduct may be assumed. For a detailed assessment of this issue see however 4. below. Approving of the so-called ‘*Anic-rule*’ see furthermore *Thomas*, *Unternehmensverantwortlichkeit*, 71; *Steinle*, in: FS Bechtold (2006), 541, 546.

¹⁵⁹⁵ In detail, see *Steinle*, *ibid*, 547 ff; *Lehner*, *ÖZK* 2011/5, 163 (167 ff); *Katja Høegh*, *Succession of Liability for Competition Law Infringements: the Cement Judgment*, ECLR (2004), Issue 9, 534; WuW 01/2010, *Folgen einer Unternehmensübertragung auf kartellrechtliche Haftung und Kronzeugenregelungen*, 109 ff and *Faull/Nikpay*, *The EC Law of Competition* (2007), 8.571 ff.

¹⁵⁹⁶ See e.g. ECJ of 11.12.2007, C-280/06, *Autorità Garante della Concorrenza e del Merco vs. Ente tabacchi italiani* (ETI SpA a.o.), [2007] ECR I-10893 = EuZW 2008, 94, para. 40 ff, as cited by *Kling*, WRP 4/2010, 517; see also *Roth/Ackermann*, *Fachkommentar zum EG-Kartellrecht*, Art 81 (1), para. 110.

¹⁵⁹⁷ Thus unconvincingly, CFI of 11.3.1999, T-143/94, *NHM Stahlwerke*, [1999] ECR II-239, para. 136 ff. For further critical remarks, see *Steinle*, in FS Bechtold (2006), 546, 551. See also the decision in the ‘*Lombard*’-case discussed below (CFI of 14.12.2006, T-259- 264 and 271/02 = WuW/E EU-R 1262 = WuW 2007, 824).

¹⁵⁹⁸ CFI of 11.3.1999, T-143/94, *NHM Stahlwerke*, [1999] ECR II-239, para. 134, as cited by *Kling*, WRP 4/2010, 517.

¹⁵⁹⁹ For a parallel assessment for the area of attributing antitrust liability in civil damages procedures, see: *Bürger*, *Die Haftung der Konzernmutter*, WuW 02/2011, 130 (140), asserting that cases of insolvency

nevertheless attribute the principle of ‘an effective enforcement’¹⁶⁰⁰ a higher legal standard than the principle of ‘personal liability’, essentially inherent to European antitrust law.¹⁶⁰¹ However, the Commission cannot be freed from its procedural obligation to prove the personal involvement of a particular legal entity under the pretense of an ‘increased efficiency’ of competition law enforcement.¹⁶⁰² Accordingly, the above mentioned restriction to the ‘*Anic*-rule’ under the broad assertion of the necessity to consider the ‘specific circumstances of the case’ should strictly be avoided, where this would disregard the standard of ‘personal liability’.

A further restriction of the ‘*Anic*’-standard was sometimes seen in the case that the acquirer explicitly took over antitrust responsibility for an undertaking that it consequently acquired during the administrative procedure before the Commission.¹⁶⁰³ It was criticized that responsibility for antitrust infringements was conferred to the respective parent company’s ‘freedom of disposition’ and therefore essentially infringed the principle of ‘personal liability’. This last position cannot be legitimately approved of. Appropriately ascertained, the principle of ‘personal liability’ must also comprise the respective undertaking’s freedom to consciously assume responsibility for the payment of an antitrust fine. This is only appropriate in respect to the extensive position of parental responsibility the Commission and the ECJ have endorsed in recent times, creating a certain risk for parent companies to be held responsible for the anticompetitive conduct of their wholly owned subsidiaries, including for the latter’s *past* illicit behavior.¹⁶⁰⁴ The practical danger of leaving the enforcement of the competition principles to a company’s disposition in these cases is factually prevented by the temporal aspect of corporate ‘control’.¹⁶⁰⁵ Because European competition law is essentially established upon the principle of a company’s private autonomy,¹⁶⁰⁶ the reasons for such a ‘take-over’ of responsibility must essentially be left to the acquiring undertaking.¹⁶⁰⁷

A specifically dubious view of ‘personal responsibility’ in the case of a subsidiary’s acquisition subsequent to an antitrust infringement was expressed by the Commission and the CFI in their

must rather be reviewed upon the pertinent rules of procedural law (for instance §§ 129 ff of the German Bankruptcy Code [InsO], and §§ 1 ff of the German Law concerning the Contest of a Debtor’s Transaction [AnfG]).

¹⁶⁰⁰ This standard is also referred to as the ‘effet utile’ of European Union law.

¹⁶⁰¹ Cf. *Katja Høegh*, ECLR (2004), 534, 536; approvingly however *Menz*, Die Wirtschaftliche Einheit im EG-Kartellrecht, (2004), 397. See also *Steinle*, *ibid*, 547, 552.

¹⁶⁰² See likewise the Opinion of the Advocate General of 11.2.2003, C-204/00 P, *Aalborg Portland vs. Commission*, [2004] ECR I- 133, para. 65, as cited in this regard by *Kling*, *ibid*, 517.

¹⁶⁰³ See CFI of 13.12.2001, joined cases T-45/98 a.o., *TKS and AST vs. Commission*, [2001] ECR II-3757, para 53 ff; approved by the ECJ on 14.7.2005, joined cases C-65/02 and -73/02 P, *TKS*, [2005] ECR I-6773, para. 81, as cited by *Kling*, WRP 4/2010, *supra* note 169.

¹⁶⁰⁴ See right below, as well as the assessment of *Christina Hummer*, Kartellrechtliche Haftung von Muttergesellschaften, *ecolex* 2010, 65 in this regard.

¹⁶⁰⁵ It has furthermore not been proven by sufficient practical evidence that companies are in fact able to circumvent an effective enforcement of competition law on this basis. See *Steinle*, in: FS Bechtold (2006), 541, 546.

¹⁶⁰⁶ See 3.1.1.3 above.

¹⁶⁰⁷ This may be done for instance in order to ‘settle’ on all previous law suits the subsidiary may in the future encounter, preventing the danger of possible (unexpected) future civil damages claims. In favor of a rather strict interpretation of this fact, see however *Faull/Nikpay*, The EC Law of Competition, (2007) 8.577. In favor of the above view for the related issue of civil damage claims under national law see e.g. *Bürger*, Die Haftung der Konzernmutter für Kartellverstöße ihrer Tochter nach deutschem Recht, WuW 02/2011, 130-140.

'Lombard' decision.¹⁶⁰⁸ In this case, the company of 'Erste Bank' was held accountable for the illicit conduct of the 'GiroCredit' even before it had acquired the majority of this company's shares from its legal predecessor, the 'Bank Austria AG'.¹⁶⁰⁹ That meant that the 'new' parent company assuming control over the subsidiary was made responsible for the payment of the latter's antitrust fine despite the fact that the previous parent company, managing the subsidiary at the time of the infringement, still existed.

The CFI was consequently called on to critically scrutinize whether the infringement by the company of 'Girocredit' had correctly been attributed to the 'Erste Bank' for the period before the acquisition.¹⁶¹⁰ Despite repeating once more the ECJ's line of reasoning in the 'Anic-case', the CFI attributed the Commission a 'discretionary power' of holding either the parent or the subsidiary liable for the occurred infringement.¹⁶¹¹ Particularly ambivalent about this judgment was the fact that the Commission was ascribed this right even in cases of an 'economic succession,' which are distinguished by the fact that the previously 'controlling' undertaking is legally still existent.¹⁶¹² This finding was deemed correct despite the Court's acknowledgement that the new parent undertaking essentially "*had nothing to do with the infringement*".¹⁶¹³ The CFI went so far as to assert that the Commission was hereby not required to distinguish whether the subsidiary 'autonomously' determined its market conduct, or whether it was subjected to the 'control' of a separate legal entity.¹⁶¹⁴

It has been outlined above, however, that such a form of 'discretionary authority' - even openly declared necessary to "*reduce the Commission's work load*" - not only lacks of an explicit approval by the ECJ but also infringes the precondition of a parent company's possibility to *actively* exert influence on the conduct of its subsidiary.¹⁶¹⁵ The assessment of holding a 'third' legal entity responsible has strongly been criticized given the fact that a company was held liable for conduct that it had no means to revise or control.¹⁶¹⁶

In a last remark, it should be noted that this legal hazard of parent companies to 'purchase liability' will regularly be difficult to avoid, even by means of a classical 'due diligence' revision. This is due to the fact that the acquiring company will regularly lack the means to detect whether the target company has factually been involved in an antitrust infringement.¹⁶¹⁷

¹⁶⁰⁸ Comm. Dec. of 11.6.2002, COMP/36.571/D-1, *Österreichische Banken* (Lombard Club'), [2004] OJ Nr. L 56/1 = WuW/E EU-V 949 = WuW 2004, 823 ff, *Lombard Club*; CFI of 14.12.2006, *Lombard Club*, [2006] ECR II-516.

¹⁶⁰⁹ CFI of 14.12.2006, *Lombard Club*, [2006] ECR II-5169, para. 319.

¹⁶¹⁰ CFI of 14.12.2006, *Lombard Club*, [2006] ECR II-5169, para. 329, as cited by *Bauer/Reisner*, WuW 7 u. 8/2007, 741.

¹⁶¹¹ Cf. *Bauer/Reisner*, *ibid.* For a recent assessment of the Commission's discretionary power in administrative decisions, see also CFI of 24.11.2011, T-296/09, *EFIM vs. Commission*, WuW 01/2012, 101-116.

¹⁶¹² *Bauer/Reisner*, *supra* note 24.

¹⁶¹³ *Bauer/Reisner*, *supra* note 25.

¹⁶¹⁴ CFI of 14.12.2006, *Lombard Club*, [2006] ECR II-5169, paras. 331, 335, with particular reference to its own decision in the case of *Tokai Carbon*, which nevertheless did not concern a case of 'legal succession' (CFI of 29.4.2004, T-236/01 a.o., *Tokai Carbon a.o. vs. EC Commission*, paras. 279-281 = WuW/E EU-R 847 = WuW 2004, 1335- *Graphit*). In this regard it should be noted that the ECJ's case law has ascertained to be unsettled for this legal area: see *Bauer/Reisner*, *ibid.*, 742.

¹⁶¹⁵ Thus explicitly, ECJ of 25.10.1983, Case 107/82, *AEG-Telefunken AG vs. Commission*, [1983] ECR 3151, para. 50.

¹⁶¹⁶ Cf. *Bauer/Reisner*, WuW 7 u. 8/2007, 744 ff, with further critical remarks.

¹⁶¹⁷ See *Christina Hummer*, Mütter in kartellrechtlicher Ziehung, *Die Presse* 2009/41/07. This has been deemed true for the reason that a manager of the subsidiary company evidently has no interest in disclosing such circumstances, or may even be unaware of them him- or herself.

Regarding the ECJ's recent line of argumentation,¹⁶¹⁸ multinational corporations will find themselves confronted with the risk of incurring fines of up to 10%, and, in the case of alleged 'recidivism', of up to 100 % of their combined international turnover.

As I have argued, it is nevertheless highly questionable whether this policy of 'burdening' parent companies or heads of international corporate groups is justifiable under the objective of 'detering' companies from illicit conduct. I will therefore analyze in a subsequent section whether this (appropriate) objective cannot be achieved by means of a different strategy or mode of assessment under current standards of European antitrust law.¹⁶¹⁹

§ 3.4. The Ambiguous Determination of 'Common Control' under the Concept of an 'Economic Entity' (Joint Venture Companies)

According to Art 3 (2) of the European Merger Regulation, 'decisive influence' can be exerted by one undertaking alone or by several undertakings together,¹⁶²⁰ in the latter case by commonly controlling a joint venture subsidiary.¹⁶²¹ The distinction between 'sole' or 'joint' control is not only significant for the calculation of the turnover thresholds of the Merger Regulation.¹⁶²² The distinction of these instances of 'corporate control' also becomes pertinent for the assessment of the conduct of a **joint venture subsidiary**. Hereby it is necessary to ascertain whether the shareholding parent companies and the joint venture may be considered an 'economic entity,' allowing for an attribution of conduct and liability between them.¹⁶²³

Primarily it must be noted, that in case the possible cooperative aspects between the shareholding parent companies of a joint venture have already been ascertained on the basis of the Merger Regulation,¹⁶²⁴ a subsequent review of their relation cannot be carried out upon Art 101 (1) TFEU.¹⁶²⁵ This is due to the fact that the approval of a merger or cooperation agreement as compatible with the common market under Art 2 (2) ECMR is of a *permanent* character. Art 101 TFEU could therefore only be applicable to a subsequent coordination of the parent companies' conduct where already the *establishment* of a joint venture had at its 'object or effect' the distortion or restriction of competition.¹⁶²⁶ This is nevertheless a question of 'causality', which is why the agreement founding a joint venture cannot be assessed upon the cartel ban.¹⁶²⁷

¹⁶¹⁸ See ECJ of 10.9.2009, C-97/08, *Akzo Nobel vs. EC Commission*, [2009] ECR I-8237, paras. 62 ff.

¹⁶¹⁹ See 4.1.2. below.

¹⁶²⁰ Cf. *Emmerich*, in: Immenga/Mestmäcker, Art 3 FKVO, para. 68; *Wiedemann*, in: *Wiedemann, Handbuch*, § 15, para. 34.

¹⁶²¹ As outlined above, neither the precise amount of shareholding, nor the total sum of voting rights are decisive per se to confer 'control' over a subsidiary. See Commission notice (EEC) No 4064/89, para. 12. Insofar it has appropriately been noted that also mere minority shareholdings may, in certain circumstances, grant the possibility of exerting such an intrusive amount of influence. This may, for instance, be assumed for particular exclusive control rights or general control agreements. In detail see: *Kühnert/Xeniadis*, Die wettbewerbliche Kontrolle von Minderheitsbeteiligungen, ÖZK 2011/4, 123 ff.

¹⁶²² For this aspect see *Emmerich*, *ibid*, para. 69 ff. A merger is hereby only assumed where 'control' is conferred upon a distinct legal or natural person. An internal reorganization of a corporate group of companies does not amount to a merger: see *Wiedemann*, *Handbuch*, § 15, para. 34.

¹⁶²³ Cf. Comm. Dec. of 18.10.1991, *Eirpage*, [1991] OJ Nr. L 306/22, para. 9; and Comm. Dec. of 16.1.1991, *Ijsselcentrale*, [1991] Nr. L 28/32, para. 24, as cited by *Schroeder*, in *Wiedemann: Handbuch*, § 8, para. 13.

¹⁶²⁴ In particular Art 2 (4) and (5) ECMR.

¹⁶²⁵ Cf. *Schroeder*, *ibid*.

¹⁶²⁶ The review of an 'agreement' upon Art 101 (1) TFEU is hereby confined to the relation of the parent companies towards each other. (Rare decisions such as Comm. Dec. of 19.8.2005 CIMP/M.3798,

The danger of parent companies to coordinate their conduct on the market by means of a joint venture is ascertained on the basis of the Merger Regulation under the so-called ‘group effect’.¹⁶²⁸ The legality of the contractual agreement between two parent companies to establish a joint venture must therefore strictly be distinguished from the analysis of a parent company’s liability under the concept of a ‘single economic entity’. From Art 2 (4) ECMR it can nevertheless be derived that the joint venture on the one side and the parent companies on the other side do not remain economically independent undertakings.¹⁶²⁹

The reason for necessarily including joint ventures in the assessment of attributing liability is that, in recent times, European antitrust practice seems to follow an **ambivalent approach** for the determination of these situations of ‘joint, or common control’. While neither the Commission nor the European Courts have so far applied the ‘group, or concern-privilege’ for cases in which parent companies possessed ‘joint control’ over a subsidiary,¹⁶³⁰ this has well been deemed sufficient for holding one or even *both* of the parent companies liable for the latter’s illicit conduct.¹⁶³¹

For the issue of exempting group-internal agreements, the European institutions have so far not explicitly been called on to rule on the question whether ‘mere’ majority shareholdings generate a sufficient degree of ‘control’.¹⁶³² For the attribution of responsibility, however, the Commission and the ECJ have regularly regarded the assumption of an ‘economic entity’ justified for shareholdings well below 100%. Insofar, even a participation of 50% was deemed sufficient to attribute liability where “*the overall circumstances of the case*” granted the parent company the possibility to exert control on a subsidiary’s conduct, while other shareholding companies were excluded from this possibility.¹⁶³³

In regard to the existence of ‘joint control’ over a joint venture, the European institutions have nevertheless made it clear that ‘common control’ in the sense of Art 3 (1) lit. b ECMR is *not* sufficient for the inapplicability of Art 101 (1) TFEU on agreements between affiliated companies.¹⁶³⁴ A mere ‘passive’ exertion of control was ascertained inadequate, because it did not grant a parent company the possibility to issue ‘binding’ directions over the said subsidiary.

NKY/Lauritzen Cool/Laucool JV have been assessed not to imply a renunciation of from this principle, see *Schroeder*, *ibid*).

¹⁶²⁷ *Schroeder*, In Wiedemann: Handbuch, § 8, para. 13.

¹⁶²⁸ For cases in which the foundation of a ‘full-functioning’ joint venture has at its ‘object or effect’ the coordination of the respective parent companies’ market conduct, the legitimacy of such a memorandum of foundation is not only assessed upon Art 2 (4) ECMR, but also on the basis of Art 101 (3) TFEU.

¹⁶²⁹ Cf. *Schroeder*, in: Wiedemann, Handbuch, § 8, para. 14.

¹⁶³⁰ See *Buntscheck*, Konzernprivileg, 128.

¹⁶³¹ Cf. *Meyring*, Uferlose Haftung im Bußgeldverfahren?, WuW 02/2010, 157 (165 f).

¹⁶³² Cf. *Buntscheck*, *ibid*.

¹⁶³³ See ECJ of 16.12.1975, joined cases 40/73 a.o., *Suiker Unie a.o. vs. EC Commission*, [1975] ECR 1663, paras. 376 ff; Cf. also ECJ of 14.7.1972, C-48/69, *ICI*, [1972] ECR 619, para. 136, for a mere capital majority, as cited by *Buntscheck*, Konzernprivileg, 129.

¹⁶³⁴ See Comm. Dec. of 18.10.1991, *Eirpage*, [1991] OJ Nr. L 306/22, para. 9; and Comm. Dec. of 16.1.1991, *Ijsselcentrale*, [1991] Nr. L 28/32, para. 24, as well as CFI of 6.4.1995, T- 145/89, *Baustahlgewerbe*, [1995] ECR II-987; and T-141/89, *Tréfileurope Sales SARL vs. Commission*, [1995] ECR II-791; Comm. Dec. IV/32.186, *Gosme/Martell Piper*, [1991] OJ Nr. L 185/23. A minority shareholding of 25% was furthermore deemed insufficient where substantial shareholding participations of other undertakings existed (see case T-145/89). In this regard it should nevertheless be mentioned that the Commission has recently contemplated to extend its assessment of an ‘acquisition’ of control under the Merger Regulation to cases of ‘mere’ minority shareholdings. In detail, see *Kühnert/Xeniadis*, ÖZK 2011/4, 123.

For the application of the 'group, or concern-privilege', the Commission and the ECJ have therefore demanded a degree of control that exists only in cases of 'sole' control.¹⁶³⁵

Despite the fact that in all other instances the Commission and the ECJ have argued for an allegedly consistent application of the 'single economic entity'-doctrine,¹⁶³⁶ the European institutions seem to deviate from this standard for attributing liability to the parent companies of a joint venture subsidiary.¹⁶³⁷

In regard to the degree of 'control' necessary for the attribution of liability between companies of a corporate group, the Commission had, still in the year 2005, ruled on the independence of an equally owned joint venture towards its respective parent companies.¹⁶³⁸ Antitrust liability of the parent companies was negated in these cases.¹⁶³⁹ This approach seemed furthermore consistent with the Commission's position that Art 101 TFEU was principally not only applicable to the relation of the parent companies of a joint venture, but also between a parent and its commonly controlled subsidiary.¹⁶⁴⁰

This line of reasoning is nevertheless no longer pursued by the Commission for determining the liability of parent companies of a joint venture. The Commission increasingly applies the definition of a 'unitary' undertaking to these cases of 'joint control', systematically taking 'co-controlling' parent companies into the decision of attributing liability.

As mentioned above, the common point of reference for the determination of 'control' under Art 101 TFEU and Art 3 of the Merger Regulation is the restriction of an undertaking's autonomy or freedom of decision. In respect to the estranged mode of determining corporate liability by an excessive application of the notion of an 'economic entity', two questions require to be assessed in more detail. First, it must be analyzed whether the restriction of Art 101 (1) TFEU's application scope is justified only for cases of 'sole' control.¹⁶⁴¹ Secondly, it should be reviewed whether the existence of 'joint control', including passive veto rights, constitutes a sufficient basis for attributing liability between companies of a corporate group.¹⁶⁴²

In regard to the first issue, it must be noted that despite the common grounds of assessing 'corporate control' under Art 101 (1) TFEU and the European Merger Regulation, it must be emphasized that for the creation of a full-function joint venture, 'control' in the sense of Art 3 (1) lit. b ECMR refers to the possibility of exerting influence over the *essential entrepreneurial or*

¹⁶³⁵ Cf. *Buntscheck*, *ibid.*

¹⁶³⁶ Cf. e.g. Comm. Dec. of 11.6.2002, Case COMP/36.571/D-1, *Austrian banks - 'Lombard Club'*, [2004] OJ Nr. L 56/1, para. 477. Critically *Bauer/Reisner*, WuW 2007, 737, 738.

¹⁶³⁷ Cf. also *Buntscheck*, *Konzernprivileg*, 129.

¹⁶³⁸ See Comm. Dec. of 21.12.2005, COMP/F/38.443, *Rubber Chemicals*, para. 263: "*In the case of a joint venture, jointly owned by its parents (and over which none of the parents has de facto or de jure sole control) the joint venture can be presumed to be autonomous from its parent companies (i.e. can be presumed to constitute a separate undertaking with respect to its parents).*" See *Meyering*, WuW 02/2010, 157 (167), who also refers to the Commission's decisions in *Ijsselcentrale* and *Gosme* (cited just above).

¹⁶³⁹ This has ascertained to be comprehensible at least for the existence of 'full-functioning' joint ventures in the sense of the Merger Regulation, as these per definition perform all the functions of an autonomous 'economic entity' on a permanent basis; Cf. Art 3 (4) of Reg. 2004/139, (ECMR) OJ Nr. L 2004/24, 1, as cited by *Mayer*, *ecolex* 2011, 835.

¹⁶⁴⁰ Cf. *Meyering*, *ibid.*, 167.

¹⁶⁴¹ This legal issue has already been assessed in detail by *Buntscheck*, in: *Das Konzernprivileg im Rahmen von Art 81 Abs. 1 EGV*, 129 ff. Nevertheless, it is instructive for the purpose of analyzing the current practice of the European institutions of attributing liability between companies of a corporate group to give a succinct review of the basis of this assessment in order to demonstrate the ambivalent mode of ascertaining so-called 'economic entities' in the presence of 'joint control'.

¹⁶⁴² *Meyering*, WuW 02/2010, 167.

strategic business decisions of another company.¹⁶⁴³ Hereby it is essential that the parent company has the possibility to influence *principal* decisions of a joint venture's general business policy.¹⁶⁴⁴ The potential to determine the subsidiary's daily administration of business is regularly deemed insufficient for 'joint control'.¹⁶⁴⁵

In light of these considerations, the essential difference between the assessment of 'control' for monitoring the market structure under the ECMR and the review of companies' behavior under Art 101 (1) TFEU becomes evident. While the former is designed to regard possible *future* aspects of a company's exertion of 'control', the assessment of this form of influence under Art 101 (1) TFEU requires the evaluation of whether an agreement is capable of restricting a subsidiary company's freedom of action and decision in the *concrete* case.¹⁶⁴⁶ The reason for including common or joint control for the latter provision again lies in the effects that such an exertion of control may have on a subsidiary's freedom of decision.¹⁶⁴⁷ For the determination of 'control' justifying the application of the so-called 'group, or concern-privilege', control over single areas of a subsidiary's daily business policy must therefore be sufficient if one appropriately ascertains this concept on the basis of an undertaking's restriction of 'corporate autonomy'.

At least in those cases in which one of the parent companies possesses 'sole' control over specific areas of this company's daily business conduct, agreements concerning these specific areas between the parent and the joint venture subsidiary must accordingly be exempted from Art 101 (1) TFEU.¹⁶⁴⁸ Due to the parent company's exertion of control in this case, the joint venture subsidiary possesses no freedom to individually determine its conduct on the market. In order to grant a consistent mode of applying the so-called 'concern-privilege', control in the sense of 'decisive influence' should include cases of 'joint control' where one, or even both parent companies have the *possibility* to separately influence the respective subsidiary's conduct.¹⁶⁴⁹

In practice, this assessment of a subsidiary's corporate autonomy has regularly led to problems where the dependent undertaking was such a 'commonly controlled' joint venture.¹⁶⁵⁰ In this sense, the Commission occasionally asserted 'competition' to exist between the two parent companies and the joint venture subsidiary leading to the application of Art 101 (1) TFEU for certain agreements between them.¹⁶⁵¹ Principally it is correct that in these cases neither parent

¹⁶⁴³ Cf. *Immenga*, in: *Immenga/Mestmäcker*, EG-Wettbewerbsrecht, FKVO Art 3, para. 29, as cited in this regard by *Buntscheck*, *ibid*, 130.

¹⁶⁴⁴ Cf. *Krimphove*, *Fusionskontrolle*, 241.

¹⁶⁴⁵ *Karl*, *Zusammenschlussbegriff*, as cited by *Buntscheck*, *ibid*.

¹⁶⁴⁶ Cf. *Buntscheck*, *Das Konzernprivileg*, 129.

¹⁶⁴⁷ *Buntscheck*, *Das Konzernprivileg*, 129.

¹⁶⁴⁸ For the detailed assessment of instances in which the parent companies of a joint venture possess 'control' over different areas of the subsidiary's business conduct that are accordingly determined autonomous of the other parent company, see e.g. Case IV/M.4, *Renault/Volvo*, [1990] OJ Nr. C 281/2; IV/M.72, *Sanofi/Sterling Drug*, [1991] Nr. C 156/10, and for a cooperative joint venture see IV/33.814, *Ford/Volkswagen*, [1993] Nr. L 20/14), as cited by *Buntscheck*, *Das Konzernprivileg*, 133 f.

¹⁶⁴⁹ The danger of the two parent companies to 'collude' by the means of the joint venture has already been assessed to rather be a problem of the 'founding agreement' creating the respective joint venture and should appropriately be assessed under the pertinent rules governing this legal issue, namely the ECMR. See also *Schroeder*, in: *Wiedemann: Handbuch*, § 8, para. 13.

¹⁶⁵⁰ In detail, see the assessment of *Thomas*, *ZWeR* 3/2005, 248 ff.

¹⁶⁵¹ Commission Decision of 27.7.1994, IV/94/579, *BT-MCI*, [1994] OJ Nr. L 223/36, para. 34 ff; Comm. of 21.12.1992, V/33.031, *Fi/Hitachi*, [1993] OJ Nr. C 20/10; furthermore CFI of 6.4.1995, T-145/89, *Welded Steel Mesh*, [1995] ECR II-987, para. 9, 107f. For a respective analysis of this, see *Schroeder*, in: *Wiedemann, Handbuch*, § 8, para. 160; and *Ritter/Braun*, *European Competition Law*, 3rd. Ed, 617 f.

company possess a sufficient amount of ‘control’ to determine the jointly owned company’s conduct in a sovereign manner. From this fact it cannot be derived, however, that the subsidiary is able to determine its commercial conduct ‘independently’.¹⁶⁵² ‘Joint control’ in the sense of Art 3 (1) lit b may also exist where only one of the parent companies is able to determine the daily business decisions of the common subsidiary. In its previous case-law, the Commission has at least acknowledged it to be sufficient that one of the parent companies has the possibility to influence the ‘general strategic decisions’ within the joint venture.¹⁶⁵³

Under a consistent standard of determining the exemption of group-internal agreements from the application scope of Art 101 (1) TFEU, the existence of a ‘single economic entity’ should also be assumed for these instances of ‘joint control’ where it can be determined that one of the parent companies has at least the *possibility* to exert ‘decisive influence’ on the respective business area that it effectively controls. Going one step further, one could even say that this has to be the case for instances in which both parent companies cannot decide on the subsidiary’s conduct independently, but only on a ‘common’ basis. In these circumstances, not only the subsidiary lacks a sufficient degree of ‘corporate autonomy’, but also the parent companies are not capable to independently decide on the business conduct they effectively carry out by the (allocation of duties within) a joint venture.

The Commission, however, has applied a much stricter mode of assessment. The authority already negates the application of the ‘group, or concern-privilege’ for situations in which single aspects of a subsidiary’s business conduct are determined on the basis of ‘joint control’. In these cases, a single parent company is allegedly incapable to exert control in the sense of ‘decisive influence’.¹⁶⁵⁴ This approach, factually leading to the application of the ‘concern-privilege’ only for situations in which a parent company has ‘sole’ control over *all* areas of a subsidiary’s commercial conduct, stands in sharp contrast to the extensive approach it applies when assuming ‘single economic entity’ for the attribution of conduct and liability.

In regard to the second issue of assessment, the Commission’s practice of holding both parent undertakings liable for an infringement of their common subsidiary originally concerned cases in which the respective parent companies had factually participated in the infringement themselves.¹⁶⁵⁵ Hereby the Commission drew on the existence of a(n alleged) ‘unitary undertaking’ between the parent companies and the joint venture on the basis that the former had consciously used their subsidiary as a vehicle for coordinating their participation in the cartel.¹⁶⁵⁶ Under a systematic mode of assessing the application of Art 101 (1) TFEU to these cases, the Commission should nevertheless have verified the parent company’s own illicit

¹⁶⁵² Cf. *Thomas*, *ibid*, 250.

¹⁶⁵³ Cf. IV/M.086, *Thomson/Pilkington*, [1991] OJ Nr. C 279/19, para. 12; IV/M.157, *Air France*, [1992] OJ Nr. C 272/5, para. 8; and case IV/M.363, *Continental/Kaliko/DG Bank/Benecke*, [1993] OJ Nr. C 336/11, para. 10.

¹⁶⁵⁴ See Comm. Dec. of 18.10.1991, *Eirpage*, [1991] OJ Nr. L 306/22, para. 9; and Comm. Dec. of 16.1.1991, *Ijsselcentrale*, [1991] Nr. L 28/32, para. 24, as well as CFI of 6.4.1995, T- 145/89, *Baustahlgewerbe*, [1995] ECR II-987; and T-141/89, *Tréfileurope Sales SARL vs. Commission*, [1995] ECR II-791; Comm. Dec. IV/32.186, *Gosme/Martell Piper*, [1991] OJ Nr. L 185/23.

¹⁶⁵⁵ Cf. *Meyering*, *ibid*.

¹⁶⁵⁶ Comm. Dec. of 24.1.2007, COMP/F/38.899, *Gas Insuled Switchgear*, para. 383. In this case, the representatives of the parent company had actively attended the cartel meetings. See also the similar cases: Comm. of 23.11.1984, IV/30.907, *Peroxygen Products*, paras. 2, 26, and 49; Comm. of 27.10.1992, IV/33.384 and 33.378, *Distribution of package tours during the 1990 world cup*, paras. 54, 56 ff; and Comm. of 22.7.2009, COMP/39.396, *Calciumcarbid*, para. 224, as cited by *Meyering*, *ibid*.

conduct.¹⁶⁵⁷ In some of its decisions, the Commission has even claimed to have an extensive ‘discretionary power’ for the ascertainment of an attribution of liability in this regard.¹⁶⁵⁸

Again, it is not comprehensible on which considerations the Commission established this discretionary power.¹⁶⁵⁹ Similar to the instances of a single parent company, the Commission merely relied on possible indicia leading to the assumption of ‘decisive influence’ in the particular case. Conversely, the lack of precisely these indicia was not presumed to denote the subsidiary’s autonomy in regard to the inapplicability of Art 101 (1) TFEU.¹⁶⁶⁰

In its recent case-law,¹⁶⁶¹ the CFI has approved of the Commission’s practice of holding the parent companies of a joint venture subsidiary jointly and severally liable for the latter’s conduct.¹⁶⁶² In the cases of *Fuji* and *Otis*, for instance, the Court of First Instance ruled on the liability of two parent companies, ascertaining them to constitute an ‘economic entity’ with their subsidiary. Accordingly, the fine was calculated on the basis of their combined turnover.¹⁶⁶³ Such an assessment, referring to an alleged consistent term of an ‘economic entity’ must nevertheless be rejected. Despite the fact that the so-called ‘group, or concern-privilege’ must appropriately include cases of ‘joint control’, the criteria establishing the existence of a ‘single economic entity’ must be substantiated for each legal issue separately. In the case of an attribution of liability, however, the Commission has refrained from providing a sufficiently precise and retraceable mode of assessment in respect to the principle of ‘personal liability’.

Upon this principle, a ‘discretionary power’ of the Commission, to hold either the subsidiary, one parent-, or even both parent companies of a joint venture liable for an infringement committed within the latter is unacceptable. In this way, the assessment of an attribution of liability is obscured with principles of judging the inapplicability of Art 101 (1) TFEU for group-intern agreements.¹⁶⁶⁴

The Commission has therefore been ascertained to become ‘ever more creative’ in proving the parent company’s actual exertion of ‘control’.¹⁶⁶⁵ For the attribution of liability, the Commission has assessed a parent company’s mere *right* to issue binding instructions on the subsidiary’s business plan or strategy in connection with a parity shareholding as sufficient evidence of ‘decisive influence’.¹⁶⁶⁶ This ambivalent approach has furthermore been supported by the CFI, which has concretely based the existence of an ‘economic entity’ on the facts that:

¹⁶⁵⁷ Cf. *Meyering*, WuW 02/2010, 168; for a reasoning of this necessity, see already 3.1.1.3, § 3.3.2. b above.

¹⁶⁵⁸ Comm. Dec. of 19.1.2005, COMP/E-1/C.37.773, *MCAA*, para. 260.

¹⁶⁵⁹ *Meyering*, WuW 02/2010, 168; See also *Mayer*, Kartellrecht: Haftung von Gesellschaftern eines Gemeinschaftsunternehmens, *ecolex* 2011, 835.

¹⁶⁶⁰ Cf. *Meyering*, *ibid.*

¹⁶⁶¹ Cf. CFI of 12.7.2011, T-132/07, *Fuji*, and CFI of 13.7.2011, T-141/07, *Otis* (not yet published); as cited by *Mayer*, *ibid.*

¹⁶⁶² In these cases, only the subsidiary company itself had participated in the infringement of competition law.

¹⁶⁶³ Cf. *Mayer*, Haftung von Gesellschaftern eines Gemeinschaftsunternehmens, *ecolex* 2011, 835.

¹⁶⁶⁴ Cf. *Kling*, Wirtschaftliche Einheit und Gemeinschaftsunternehmen- Konzernprivileg und Haftungszurechnung, *ZWeR* 2011, 169; *Menz*, Wirtschaftliche Einheit und Kartellverbot (2004), as cited in this regard by *Mayer*, *ibid.*

¹⁶⁶⁵ Cf. *Mayer*, *ecolex* 2011, 836. On the necessity of this form of ‘control’ for an imposition of intragroup liability, see already 3.1.1.3, § 3.3.2. above.

¹⁶⁶⁶ See Comm. of 5.12.2007, COMP/38.629, *Chloroprene Rubber*, para. 423, in connection with para. 432. The finding that the parent company actually possessed conscience of the cartel nevertheless renders it effectively accurate, as such an amount of ‘passive’ participation of illicit behavior cannot be tolerated under the principle of ‘personal liability’ inherent to European competition law. See already insightful AG *Mischo* of 16.11.2000, in Case C-286/98 P, *Stora*, [2000] ECR I-9925, para. 51.

- the parent companies agree on ‘essential decisions’ concerning the conduct of the joint venture;¹⁶⁶⁷
- the existence of ‘personal interrelations’ between the parent companies and the joint venture;¹⁶⁶⁸ as well as the fact that
- the parent undertakings have a ‘particular economic interest’ in the products produced by the joint venture.¹⁶⁶⁹

Hereby it becomes apparent that there is also ambivalence in the standard of a ‘single economic entity’ under current European case law for instances of ‘joint control’ in a joint venture subsidiary. While for the application of the ‘group, or concern privilege’ the existence of ‘joint control’ is regularly deemed insufficient for establishing a subsidiary’s lacking autonomy even where one of the parent companies is able to determine the ‘general strategic business decisions’ of the joint venture, this level of control is relied on for justifying the necessity of attributing conduct and liability. All the same, the Commission emphasizes the importance of an (allegedly) consistent mode of ascertaining the existence of a ‘single economic entity’.¹⁶⁷⁰

The current mode of attributing fines between parent companies of a joint venture has strongly been criticized in literature.¹⁶⁷¹ The principle points of disapproval are congruent with those of the general practice of the Commission and the European Courts to extensively draw on the concept of a ‘single economic entity’. This practice has been ascertained to not only be inconsistent, but also in contradiction to a number of general legal principles.¹⁶⁷²

This criticism is nevertheless justified not only for wholly owned subsidiaries and majority shareholdings. The question of a joint venture’s autonomy can likewise not appropriately be determined upon the criterion of mere shareholding participation or the right to assign a subsidiary company’s executive, or management bodies.¹⁶⁷³ In light of the ambivalence of this approach, the assessment of this relationship of corporate group companies of a joint venture

¹⁶⁶⁷ CFI of 12.7.2011, T-132/07, *Fuji*, para. 193.

¹⁶⁶⁸ CFI of 12.7.2011, T-132/07, *Fuji*, para. 199.

¹⁶⁶⁹ CFI of 12.7.2011, T-132/07, *Fuji*, para. 201, as cited by Mayer, *ecolex* 2011, 836.

¹⁶⁷⁰ Cf. e.g. Comm. Dec. of 11.6.2002, Case COMP/36.571/D-1, *Austrian banks - ‘Lombard Club’*, [2004] OJ Nr. L 56/1, para. 477. Critically *Bauer/Reisner*, *WuW* 2007, 737, 738.

¹⁶⁷¹ Mayer, *ecolex* 2011, 835; *Kling*, *WRP* 4/2010, 506 (514); *Meyering*, *WuW* 02/2010, 157 (167f); in context with the ‘concern, or group-privilege’, *Thomas*, *ZWeR* 3/2005, 236 (248); *Buntscheck*, *Konzernprivileg*, 128 ff.

¹⁶⁷² See already 2.2.2.2, § 2.4 above. For the general practice of attributing fines, cf. e.g. *Bauer/Anweiler*, *ÖZK* 2011/71; *Hummer*, *Kartellrechtliche Haftung von Muttergesellschaften*, *ecolex* 2010, 64; *Hoffer*, *Haftung für Kartellverstöße der Töchter*, *Der Standard* 2010/47/02; *Spinks/Meier*, *Cartel Liability in the EU: What Can Parent Companies Say In Their Defence?*, *Mlex magazine* 2011, 61; *Montesa/Givaja*, *When Parents Pay for their Childrens Wrongs: Attribution of Liability for EC Antitrust Infringements in Parent-Subsidiary Scenarios*, *World Competition* 29 (4): 2006, 555-574.

¹⁶⁷³ The mentioned grounds of deliberation may nevertheless be resorted to and further analyzed as indicia of a parent company’s own involvement in an antitrust infringement in the sense of a wholistic appraisal of the facts of the case (i.e. for establishing an appropriate assessment of the concept of an ‘economic entity’ in this particular regard); cf. e.g. Comm. Dec. of 24.1.2007, COMP/F/38.899, *Gas Insuled Switchgear*, para. 389; and Comm. of 20.11.2007, COMP/38.432, *Professional Videotapes*, para. 165 ff, 180/190ff, as cited by *Meyering*, *ibid*. The estranged mode of assessment, referring only to the criterion of a parent company’s (joint) shareholding has already been criticized in regard to the Commission’s decision of *Gosme/Martell* (Comm. of 15.5.1991, IV/32.186).

should also be careful to regard the criteria of an attribution of conduct and liability created for the area of general corporate law.¹⁶⁷⁴

Naturally, a parent company's liability is justified for cases in which the joint venture is not vested with legal capacity itself.¹⁶⁷⁵ Apart from the further evident case of a parent company's awareness of its subsidiary's illicit conduct,¹⁶⁷⁶ an attribution of liability may also be possible where a parent has factually exerted a decisive degree of influence on the subsidiary's commercial policy. This standard may particularly be fulfilled in case a parent company factually decides on the subsidiary's distribution and pricing policy, or other 'core areas' of the joint venture's business policy.¹⁶⁷⁷ Hereby the parent is regularly granted an amount of influence surpassing that of the degree of control regularly existent between affiliated companies of a corporate group.¹⁶⁷⁸

Respecting the standards of 'personal liability' and 'legal separation' under general principles of entity law,¹⁶⁷⁹ a parent company's liability must nevertheless be rejected where the joint venture decides on its commercial conduct in an autonomous fashion. Upon this recognition, parental responsibility must regularly be denied for decentrally lead group companies such as **full-functioning joint ventures**.¹⁶⁸⁰ A schematic assessment of responsibility that presumes the existence of 'decisive influence' on the basis of the parent companies' equal participation in a joint venture, essentially creates a 'liability of status,' inherently unknown to European competition law.¹⁶⁸¹ The reference to 'all economic and legal links' between a parent and its subsidiary company, alleging the latter to have followed the instructions of its parent company 'in all material respects' is furthermore pointless where a parent company merely possesses passive veto rights.¹⁶⁸² The allegation that a parent company could otherwise take advantage of the Commission's previous practice of refraining from attributing liability where 'decisive influence' was not found to exist by consciously diverting antitrust responsibility onto the joint venture company cannot be supported by factual evidence.¹⁶⁸³

¹⁶⁷⁴ Of essential importance in this regard is the standard of 'piercing the corporate veil'. For the assessment of a single parent company, see already 3.1.1.3, § 3.3.2. b. above; similarly *Mayer*, *ecolex* 2011, 836.

¹⁶⁷⁵ Thus, CFI of 27.9.2006, T-314/01, *Avebe vs. EC Commission*, [2006] ECR II-3085, para. 135 ff; as cited by *Kling*, *ibid*.

¹⁶⁷⁶ See already 3.1.1.3, § 3.3.2., c above.

¹⁶⁷⁷ For a detailed assessment of these instances, see 3.2.2.2. below.

¹⁶⁷⁸ Thus likewise, *Thomas*, *ZWeR* 2005, 236, 259, as cited by *Kling*, *ibid*. For a detailed dogmatic analysis of this reasoning, see § 2 below.

¹⁶⁷⁹ Following such an assessment for the treatment of JV's, Cf. *de Pree/Molin*, *Shareholder Liability for Joint Venture Infringements*, *Fordham International Law Journal* 2011, 431; *Thomas*, *Die wirtschaftliche Einheit im EU-Kartellbußgeldrecht*, *KszW* 2011, 10; *Van Vormizeele*, *Die EG-kartellrechtliche Haftungszurechnung im Konzern im Widerstreit zu den nationalen Gesellschaftsrechtsordnungen*, *WuW* 2010, 1008; *Kling*, *WRP* 4/2010; *Meyering*, *Uferlose Haftung im Bußgeldverfahren*, *WuW* 02/2010, 157; *Riesenkampff*, *Die Haftung im Konzern für Verstöße gegen europäisches Kartellrecht*, in: *FS Loewenheim* (2009), 529; differently *Kersting*, *Wettbewerbsrechtliche Haftung im Konzern (Liability for Competition Law)*, *Der Konzern* 2011, available at: <http://ssrn.com/abstract=1884930>.

¹⁶⁸⁰ Thus, *Mayer*, *ecolex* 2011, 836.

¹⁶⁸¹ Against such an approach, see already *Petra Pohlmann*, *Unternehmensverbund*, 42 ff, as cited by *Kling*, *WRP* 4/2010, 515.

¹⁶⁸² In the context of joint ventures, this is regularly the case. Cf. for instance the statement of a Commission's official in the oral proceeding in the case of 13.7.2011, T-45/07, [*Unipetrol*]: "I would imagine that you could have a contract which prevents a parent company from exercising control [...] or where the parent is banned from exercising control", as cited by *Meyering*, *ibid*.

¹⁶⁸³ Cf. *Meyering*, *WuW* 02/2010, 169.

It remains to be seen therefore, whether the ECJ will include these principles for holding parent companies liable in the light of 'joint control' in its subsequent case-law.¹⁶⁸⁴

3.1.2. Conclusion and Intermediate Result

The fundamental criticism of the current approach of attributing liability between companies of a corporate group in European competition law is justified. It may be doubted, whether this approach in fact generates the objectives and policy goals of an effective antitrust enforcement.

Under the recent mode of assessing the conduct of corporate groups in European antitrust law, the principle of 'legal separation', essentially inherent to the assessment of an attribution of liability between legally separate companies of a corporate group, has susceptibly been confined.¹⁶⁸⁵ I have shown that upon an extensive application of an alleged 'unitary' concept of a 'single economic entity'¹⁶⁸⁶ the Commission as well as the European Courts indiscriminately attribute infringements of competition law that have occurred in one company of the corporate group to other undertakings of the same group, hereby essentially disregarding the standard of 'personal liability'.

In the recent decision of the case of *Akzo Nobel*, these principles, in effect creating a form of 'structural' liability' previously unknown to European competition law,¹⁶⁸⁷ have been reinforced by a strong 'legal presumption' for wholly owned subsidiaries. This schematic assessment of drawing exclusively on the criterion of shareholding participation has even been extended to instances of 'joint control' of the parent companies of a joint venture. The Commission has hereby been assumed to possess a certain 'legal discretion' in regard to the company it ultimately holds accountable.¹⁶⁸⁸

I have outlined, however, that the criterion of mere shareholding participation is not sufficient per se for the justification of disrespecting the standard of 'legal separation' under general corporate law. This is because 'control' in this form may essentially be found to exist in every parent-subsidiary relationship.¹⁶⁸⁹

Rather, it must be reviewed which other principles come into play when assessing a parent company's liability for the anticompetitive conduct of its wholly, or majority-owned subsidiaries. Under the legal traditions of the European member states, this issue has widely been regarded under the standard of 'piercing the corporate veil'. This approach adheres to the principle confinement of corporate liability under the principle of 'legal separation', constituting in all industrial states today, the basic point of reference for determining a company's liability under general corporate law.¹⁶⁹⁰ For this purpose, it is necessary to briefly outline the standard inherent to the practice of 'piercing the corporate veil' in order to consequently specify the

¹⁶⁸⁴ In a recent case, a party's action for annulment by the companies in the *Calciumcarbid* decision (against the judgment of CFI T-77/08) has nevertheless been rejected (see judgment of the General Court of 02.12.2012, OJ Nr. C 80/15 of 17.3.2012).

¹⁶⁸⁵ Cf. *Van Vormizeele*, *ibid.*

¹⁶⁸⁶ For this assessment, see *Hofstetter/Ludescher*, *Der Konzern als Adressat*, 487 (488).

¹⁶⁸⁷ See *Kling*, WRP 4/2010, 515.

¹⁶⁸⁸ See *Meyering*, WuW 02/2010, 157 (168 f).

¹⁶⁸⁹ See *Blumberg*, *The Law of Corporate Groups*, § 6.01 (106 ff).

¹⁶⁹⁰ See e.g. *Easterbrook/Fischel*, *Limited Liability and the Corporation*, 52 U.Chi.L.Rev. 89 (1985), 89; and *Winthrop Balline*, in: *Balline on Corporations* 14 (1927), as cited by *Antunes*, *The Liability of Polycorpore Enterprises*, 13 Conn.J. Int'l L. 197 (1998-1999), *supra* note 11.

situations where a disregard of the basic principle of 'legal separation' should be deemed appropriate for the area of antitrust law.

3.2. The Concept of Corporate Liability Implying an Alienated Use of the 'Economic Entity Doctrine' for the Attribution of Responsibility under Current Case-Law

In the previous assessment it has been drawn out that the concept of a 'single economic entity', originally created for the necessary exemption of agreements between a parent company and its dependent subsidiary, has been employed extensively in European antitrust practice to attribute liability and consequently impose a fine on parent companies. Hereby, not only the range of addressees, but also the amount of the fines levied on corporate groups has susceptibly been increased.¹⁶⁹¹

Even if the degree of 'control' exerted by the parent company must be of a 'qualified' nature for an appropriate attribution of antitrust liability, it has been outlined above¹⁶⁹² that the precise criteria of such influence have been insufficiently substantiated by previous case-law and therefore do not comply with general legal principles. However, such a selective disregard of the distinct 'legal personality' of a parent and a subsidiary company requires a differentiated assessment. This is indispensable not only to appropriately consider the reasons for a restriction of the principle privilege of 'limited liability'. Rather, it is necessary to correctly emphasize the incentives that intragroup liability may generate for the policy of international corporate groups under general objectives of European competition law. Hence, the main criteria of efficiency for the formulation of liability norms for European antitrust law will be discussed in the following analysis. After assessing the standard of imposing intragroup (tort) liability, the means the Commission possesses to effectively induce companies to refrain from anticompetitive conduct will consequently be drawn out on the basis of current procedural law.

3.2.1. The Principle Standard of 'Legal Separation' under Corporate Entity Law

The invention of the dogma of 'legal separation' or 'corporate autonomy' has been paramount in the construction of the regulatory framework of business enterprises.¹⁶⁹³ This ideal model of a necessary separation between a company's 'ownership' and the latter's 'management' provides the basic rationale of corporate law, namely the allocation of entrepreneurial risk.¹⁶⁹⁴ This standard has also been consistently approved of by the company laws of the various member states upon the necessity of allowing for economically reasonable investment activity.¹⁶⁹⁵

3.2.1.1. The Principle of 'Limited Liability' and the Consideration of 'Enterprise Principles'

¹⁶⁹¹ Cf. *Hofstetter/Ludescher*, Der Konzern als Adressat, in: FS von Büren (2009), 488.

¹⁶⁹² See 2.2.2.2. above.

¹⁶⁹³ Cf. *Antunes*, The Liability of Polycorporate Enterprises, 13 Conn. J. Int'l L., (1998-1999), 201.

¹⁶⁹⁴ See *Manne*, Our Two Corporations Systems: Law and Economics, 53 VA.L. Rev. 259, 262 (1967), as cited by *Antunes*, *ibid.*

¹⁶⁹⁵ In detail see *Hofstetter*, Sachgerechte Haftungsregeln, 77 ff; (for further references, see 2.2.1., § 4.3).

The norm of **limited liability** reflects two basic principles of pursuing economic activity on an (international) market. First, it is an expression of an 'efficient allocation of risk', namely between the shareholders and the creditors of a company. Secondly, this 'diversification' of the structure of modern businesses must be accompanied with incentives for independent commercial activity by allowing for market activity with merely a confined amount of capital. Only this way a reasonable calculation of entrepreneurial risk becomes possible.¹⁶⁹⁶

This possibility is not only pertinent for the 'unicorporate' enterprise in which a company is directly conducted by the individual entrepreneur, aiming to protect his personal fortune in pursuing a new business idea.¹⁶⁹⁷ Rather, it also holds true for incorporated enterprises (including international corporate groups) where the management role of the single shareholder can be extremely limited.¹⁶⁹⁸ The principle of 'limited liability' provides for the necessary exoneration of the possible hazard connected to the creation of affiliations under the concept of a corporate group.¹⁶⁹⁹ This shift of economic risk, related to the restriction of liability of the corporation's shareholders, is consciously accepted by the company laws of the national legal systems as it is indispensable for generating incentives of providing entrepreneurial (risk) capital.¹⁷⁰⁰

Even if these considerations of economic efficiencies in support of the restriction of liability are plausible for most cases in which (public) shareholders find themselves confronted with powerful contractual groups of creditors,¹⁷⁰¹ this model has been ascertained to necessarily be revised in regard to the existence of subsidiary companies. In this case, additional adjustments are necessary to include situations of non-contractual liability.¹⁷⁰²

This is due to the fact that parent companies, that possess the leads over a subsidiary company, will, in comparison to the situation of a mere stockowner, generally be in an enhanced position of supervision conferred upon them by the means of exerting 'control' under general corporate law.¹⁷⁰³

The more intensively the parent company controls the management of the subsidiary company, the less the costs of the respective entrepreneurial cost of risk will be.¹⁷⁰⁴ Owing to the lack of a contractual relation, non-contractual creditors are not appropriately compensated for their bearing of economic risk.¹⁷⁰⁵

¹⁶⁹⁶ Cf. *Van Vormizeele*, WuW 10/2010, 1016.

¹⁶⁹⁷ See *Antunes*, 13 Conn. J. Int'l L., (1998-1999), 201.

¹⁶⁹⁸ Cf. *Van Vormizeele*, *ibid*; and generally *Christensen*, The Concept of Limited Liability in: US Business Entities, 445: "Clearly, unlike the proprietor or partner, the shareholder does not guide the corporation through every day business", cited by *Antunes*, *ibid*.

¹⁶⁹⁹ Cf. *Hofstetter*, *ibid*, referring to *Posner*, The Rights of Creditors of Affiliated Corporations, U.Chi.L.Rev. 43 (1976), 499 [hereinafter cited as *Posner: Creditors*], 501.

¹⁷⁰⁰ *Schiessl*, in: Münchener Handbuch des Gesellschaftsrechts, Vol 3, 3rd ed. (2009), § 35, para. 1, as cited by *Van Vormizeele*, *ibid*. In this respect it has been argued that the efficiency of a limitation of liability lies in the fact that (under 'normal circumstances') the proficient dispersion of risk between the shareholders and the creditors of a company is anticipated by the law, through which a maximum reduction of contractual transaction costs may be achieved. Cf. *Posner*, *Creditors*, 509.

¹⁷⁰¹ This is for instance the case when banks are involved. Cf. *Hofstetter*, *Sachgerechte Haftungsregeln*, 79.

¹⁷⁰² *Blumberg*, The Law of Corporate Groups, Vol III (Substantive Law), 74-80 and 93-101.

¹⁷⁰³ In detail, see 3.1.1.3, § 3.2.1.

¹⁷⁰⁴ Cf. *Blumberg*, The Law of Corporate Groups III (Substantive Law), 81-89; *Landers*, A Unified Approach to Parent, Subsidiary and Affiliate Questions in Bankruptcy, U. Chi.L.Rev. 42 (1975), 589 (591); *Eucken*, Grundsätze der Wirtschaftspolitik, (1990), as cited by *Hofstetter*, *ibid*.

¹⁷⁰⁵ *Posner*, *Creditors*, 520.

Under the notion of 'enterprise liability' it has therefore been argued that liability should be imposed on a parent company for the risky actions of its subsidiaries, which profit the corporate group as a whole.¹⁷⁰⁶ Nevertheless, this general assertion must be refined in regard to the principles and objectives of the legal area for which it is applied.¹⁷⁰⁷

In common economic and legal literature, the necessity of considering an attribution of 'subsidiarial' conduct for cases of non-contractual creditors is generally accepted. This tense relation becomes particularly significant where the possibility of a parent company to 'manipulatively', or rather 'intrusively' exert control over its subsidiaries generates uncompensated chances of shifting risk on to non-contractual creditors.¹⁷⁰⁸

In the area of **competition law**, it has already been ascertained that the principle necessity of holding parent companies liable for their subsidiary's illicit behavior is commonly recognized in cases where the former factually reviewed their subsidiary's conduct and could have, in this way, prevented the conduct in question.¹⁷⁰⁹ By the inclusion of the principle of 'legal separation' in general corporate law, this standard of assessment is recognized likewise in the national laws of the various member states.¹⁷¹⁰ Furthermore, the restriction of liability to the amount of capital invested has been given accredited value under European legislation itself, where it finds a substantive legal basis in Art 1 (2) of Regulation Nr. 2157/2001¹⁷¹¹ establishing the European Public Company (*Societas Europaea*), and in Art 3 (1) lit b of the Commission proposal on a European Private Company (*Societas Privata Europaea*).¹⁷¹²

However, it has already been noted that this principle necessity of attributing liability is all the same regarded as the 'exception' under general corporate law. Therefore, it is confined to particular legal situations where the circumstances of the case require an assessment beyond the strict border of the legal entity.¹⁷¹³ The substantiation of these circumstances, denoting the criteria under which such a disregard of 'legal personality' essentially characterizing the corporate entity is appropriate, is one of the highly debated issues of 'enterprise law'.¹⁷¹⁴ By this legal standard, multinational corporate groups are regularly not only assessed using (evident)

¹⁷⁰⁶ Originally, see e.g., *Berle, Jr.*, The Theory of Enterprise Entity, 47 Colum. L. Rev. 343.

¹⁷⁰⁷ See *Blumberg*, The Increasing Recognition of Enterprise Principles in Determining Parent and Subsidiary Corporation Liabilities, 28 Conn. L. Rev. (1995-1996), 295, and below.

¹⁷⁰⁸ See *Landers*, U. Chi.L.Rev. 42 (1975), 592 ff; *Stone*, The Place of Enterprise Liability in the Control of Corporate Conduct, Yale L.J. 90 (1980), 1 ff; and on the general potential of shifting assets at the expense of [such] creditors, see *Debus*, Haftungsregeln im Konzernrecht: eine ökonomische Analyse, Frankfurt (1990), Betriebswirtschaftliche Studien Bd. 12, as cited by *Hofstetter*, *ibid*, 80.

¹⁷⁰⁹ See already 3.1.1.3., § 3.3. b. See also *Hofstetter/Ludescher*, Der Konzern als Adressat, in: FS von Bühren (2009), 5 and *Van Vormizeele*, WuW 10/2010, 1016.

¹⁷¹⁰ Despite the essentially different specification of this standard, it has nevertheless attained the status of a 'generally accepted' principle of corporate law: Cf. *Van Vormizeele*, *ibid*, 1015 ff, citing in this regard the various national norms under which this principle has been given expression to as examples of positive law.

¹⁷¹¹ Council Regulation (EC) Nr. 2157/2001 of 8.10.2001 on the Statute of a European company (SE), OJ Nr. L 294, 10/11/2001, 0001- 0021.

¹⁷¹² Proposal for a Council Regulation on the Statute for a 'European private company', COM (2008) 396/3 of 25.6.2008, 9. On the background of this restriction see in detail *Behrens*, in: Dausen, Handbuch des EU-Wirtschaftsrechts, (2009), Vol I, 3rd ed., para. 157; *Hennrichs*, NGZ 2009, 921 (925); *Maul/Röhrich*, BB 2008, 1574 (1575), as cited by *Van Vormizeele*, WuW 10/2010, 1016, noting that the 10th Directive (2009/102/EC of 16.9.2009, OJ Nr. L 258/20ff), on single member private limited liability companies also explicitly recognizes the principle of 'legal separation' on a European level.

¹⁷¹³ See e.g. *Koppensteiner*, Über Zurechnungskriterien im Gesellschaftsrecht [hereinafter cited as, 'Zurechnungskriterien'], in: FS Schmidt (2009), 927.

¹⁷¹⁴ See e.g. *Blumberg*, The Increasing Recognition of Enterprise Principles, 28 Conn. L. Rev. (1995-1996), 295.

criteria such as majority participation or voting rights, but rather in consideration of their factual ‘control’ rights.¹⁷¹⁵

As opposed to a doctrine of universal application, such as ‘entity law’, the consideration of so-called ‘enterprise principles’ is appropriate only where either a statute of the respective legal area so provides,¹⁷¹⁶ or where, under the facts of the particular case, these principles better implement the underlying objectives and policies of the legal area in question. This standard already demonstrates that the aims pursued by the specific area in which such an intra-group attribution of conduct or responsibility is to be carried out must necessarily be taken into account. While for company law this is regularly deemed essential in cases of ‘qualified undercapitalization’ or an illicit transfer of assets between the legal entity and the respective shareholders,¹⁷¹⁷ I have argued in the previous analysis that the standard of European competition law has to lie in the principle objective of ‘deterrence’.¹⁷¹⁸

A striking factor in the cases imposing intragroup (tort) liability is furthermore that many of them involve a high degree of economic integration of the operation of the parent company and its subsidiary.¹⁷¹⁹ In most cases, the affiliated companies are each conducting interrelated fragments of a unified business that is administered through a number of companies for their own purposes.¹⁷²⁰ Hereby, the subsidiary regularly carries out operations, which, in its absence, the parent, or another company of the group would have carried out. This illustrates that it is most often significantly interconnected with the overall business policy of the group.¹⁷²¹

3.2.1.2. The Standard of ‘Organizational Autonomy’

As mentioned above, the possibility of a parent company to (even decisively)¹⁷²² ‘control’ its subsidiaries’ conduct is a central factor in most cases of economic integration.¹⁷²³ Under the standard of ‘piercing the corporate veil’, a variety of criteria substantiating this ‘intrusive’ or ‘decisive’ exertion of control¹⁷²⁴ have therefore been created in most European member states. Given the principle objective of protecting the interests of creditors under general corporate law, these comprise, among others:

- personal interrelations on the level of the companies’ management board,

¹⁷¹⁵ The concept of ‘control’ is typically defined functionally as “*the power [however obtained] to command or direct the management or policies of a corporation*”. See e.g. Bank Holding Company Act, 12 U.S.C.A., § 1841, as cited by *Blumberg*, *ibid*.

¹⁷¹⁶ See e.g. § 13 (2) of the German law on Limited Liability Companies [GmbHG] or § 64 (2) of the respective Austrian law for such a standard under company law.

¹⁷¹⁷ Note that the definition of shareholders includes shareholding companies. See e.g. *Koppensteiner*, *Zurechnungskriterien*, in: FS Schmidt (2009), 930 ff.

¹⁷¹⁸ Cf. *Schwarze/Bechtold/Bosch*, *Deficiencies*, Gleiss/Lutz Rechtsanwälte (2008), 18. *Hofstetter/Ludescher*, *Der Konzern als Adressat*, in: FS von Büren (2009), 501; ECJ of 16.11.2000, C-286/98 P, *Stora*, [2000] ECR I-9925, para. 49.

¹⁷¹⁹ *Blumberg*, *The Law of Corporate Groups*, Vol.III, (Substantive Law), §10.02, 191.

¹⁷²⁰ Cf. *Blumberg*, *ibid*, 192. Cf. the similar assessment of a ‘corporate group’ under European antitrust law GA *Mischo*, in the case of *Stora* (Case C-286/98 P, [2000] ECR I-9925), para. 8 ff, particularly para. 37.

¹⁷²¹ Cf. *Blumberg*, *ibid*.

¹⁷²² In this regard, see also the assertions of Advocate General Mischo in the case of *Stora*, cited above, at A73.

¹⁷²³ See *Blumberg*, *The Law of Corporate Groups*, Vol. III, § 10.02, 187.

¹⁷²⁴ See *Blumberg*, *The Law of Corporate Groups*, Vol. III, § 6.01, 106.

- the use of the same commercial name by the parent and the subsidiary,¹⁷²⁵
- financial, - administrative, or operational dependence of the subsidiary,¹⁷²⁶
- a manipulation of corporate assets,¹⁷²⁷
- the inadequacy of a subsidiary's capitalization,¹⁷²⁸ or
- a lack of adhering to corporate formalities.¹⁷²⁹

All legal orders to which such an imposition of intragroup liability is known nevertheless have in common that an attribution of responsibility is possible only in exceptional cases¹⁷³⁰ and additionally requires an active form of illicit conduct by a controlling shareholder.¹⁷³¹ While the principles of 'legal separation' and 'piercing the corporate veil' have originally been construed in the context of civil law claims, they have now essentially been extended to tort, or even 'criminal-akin' charges.¹⁷³² A parent company's responsibility on the basis of mere *capital* links, as currently applied in the practice of the European competition institutions, is nevertheless unfamiliar to all national legal orders.¹⁷³³

Such an assessment of parental liability on the basis of mere structural considerations would result in a comprehensive obligation of the latter to review its subsidiary's conduct.¹⁷³⁴ The establishment of such a duty, irrespective of the degree of a parent company's active involvement in its subsidiary's commercial conduct nevertheless essentially disregards the legal foundation of a corporation's '**organizational autonomy**'.¹⁷³⁵ The organizational form of a corporate group would be entirely deprived of its flexibility. However, this specific characterization of corporate groups or concerns, allowing for the management of a group to choose the degree or intensity of its administration in either a 'centralized' or a 'decentralized' fashion, constitutes one of the principal reasons for their international proliferation and success.¹⁷³⁶

¹⁷²⁵ Cf. *Faull/Nikpay*, The EC Law of Competition, (2007), 8.565 and *Blumberg*, *ibid*, 195, who insofar refers to the holding out of a 'unified public persona' to the general public.

¹⁷²⁶ For Austrian law, see e.g. *Jabornegg*, Die Lehre vom Durchgriff im Recht der Kapitalgesellschaften, WBl 1989, VIII, c.; and *Torggler*, Fünf (Anti-)Thesen zum Haftungsdurchgriff, JBl 2006, 85, pt. C.

¹⁷²⁷ For the instance of an illicit granting of a loan to a company's executive bodies, see *Koppensteiner*, Zurechnungskriterien, in: FS Schmidt (2009), 930. Furthermore, this concerns all cases of a fraudulent intervention by the 'controlling' shareholder or shareholding-company. See BGHZ 54, 222 (224); *Mandörfer/Timmerbeil*, WM 2004, 362 (364), as cited by *Van Vormizeele*, WUW 10/2010, 1017.

¹⁷²⁸ *Torggler*, *ibid*, 85, c.; *Koppensteiner*, Zurechnungskriterien, 930.

¹⁷²⁹ This may, for instance, be assumed for an intervention that deprives a subsidiary of its separate existence. ('Existenzvernichtender Eingriff'): See *Spahlinger/Wegen*, Internationales Gesellschaftsrecht in der Praxis, (2005), 93-96, cited by *idem*, *supra* note 62.

¹⁷³⁰ This means in a confined number of circumstances.

¹⁷³¹ *Andenas/Woolridge*, European Comparative Company Law, (2009), 480, as cited by *Van Vormizeele*, WuW 10/2010, 1018.

¹⁷³² *Van Vormizeele*, *ibid*, 1018. In detail, see *Blumberg*, The Law of Corporate Groups, Vol. III (Substantive Law), particularly Chapter 6 ('Piercing the Veil: General Doctrine', 105 ff), and Chapter 8 ('Corporate Groups and Tort Law: Intragroup Tort Liability, General Doctrine, 157 ff).

¹⁷³³ Even for the assumption or transfer of losses on the basis of an intragroup contract (such as under § 302 (1) of the German Stock Corporations Act) not the amount of capital interrelation, but an (internal) domination, or transfer-of-profits agreement is the norm. Cf. *Emmerich/Habersack*, Konzernrecht, (2008) § 20, para. 34. For this specific assessment under European antitrust law see *Hofstetter/Ludescher*, Der Konzern als Adressat, in: FS von Büren (2009), 505.

¹⁷³⁴ *Hofstetter/Ludescher*, Der Konzern als Adressat, in: FS von Büren (2009), 504.

¹⁷³⁵ *Hofstetter/Ludescher*, *ibid*.

¹⁷³⁶ See *Druey/Vogel*, Das Schweizerische Konzernrecht in der Praxis der Gerichte, Zürich (1999), 9 f, as cited by *Hofstetter/Ludescher*, 505.

As the objectives of an allegedly 'effective cartel enforcement' cannot be attributed a higher legal standard than the fundamental principle of a confinement of **entrepreneurial risk**, competition law must duly respect the principles of general corporate law.¹⁷³⁷ This essentially comprises the dogma of 'legal separation' as an established legal principle in the national laws of the various member states.

3.2.2. Assessment of the Standard for Attributing Liability under European Antitrust Law

3.2.2.1. The Consideration of Corporate Affiliations for the Determination of 'Parental Responsibility'

Under a purely formal view, there is no imperative legal reason for extending a subsidiary's antitrust liability to its (indirect) parent company.¹⁷³⁸ It has already been ascertained that every legal entity is principally responsible for its own conduct on the market.¹⁷³⁹ As the existence of a corporate affiliation does not change the respective company's legal status as an 'undertaking,' the Commission encounters no legal difficulty to enforce its decision.

Practical deliberations have nevertheless shown that an appropriate consideration of existent corporate affiliations is necessary in order to prevent group companies from circumventing the competition provisions by artificially partitioning their illegal acts in a coordinated way.

A necessary functional application of the competition provisions,¹⁷⁴⁰ aiming at an appropriate consideration of the 'true economic realities' between the companies involved in an antitrust infringement must therefore comprehend the relation of corporate group undertakings in their entirety.¹⁷⁴¹ This is the essential purpose of determining the existence of an 'economic entity' between a parent and a subsidiary company.

Only upon this functional interpretation of the competition principles, the actual level of a separate legal entity's participation in an infringement is duly taken into account. Hereby, the degree of interrelation between the group undertakings must be analyzed by a substantiated and coherent assessment of the specific areas of business on which a parent company may, in fact, exert control.¹⁷⁴² This functional interpretation of Art 101 (1) TFEU¹⁷⁴³ makes the necessity of a positive legal basis for an attribution of antitrust liability superfluous. However, the current situation, essentially imposing the task of substantiating the legal standard for attributing antitrust responsibility upon the ECJ, can only be approved of where the Court adheres to a minimum standard of consistency. Furthermore, this standard must comply with established

¹⁷³⁷ Cf. *Hofstetter*, Haftungsregeln (1995), 77 ff (83).

¹⁷³⁸ *Thomas*, Unternehmensverantwortlichkeit (2005), 132.

¹⁷³⁹ See already 3.1.1.3., § 3.3.2, d.

¹⁷⁴⁰ See already 3.2.1. above.

¹⁷⁴¹ Cf. *Thomas*, Unternehmensverantwortlichkeit (2005), 133, 140; *Pohlmann*, Der Unternehmensverbund im Europäischen Kartellrecht, 373.

¹⁷⁴² For a detailed assessment see 3.2.2.2. below.

¹⁷⁴³ The principle necessity of such an 'effective' interpretation of the law derives from the fact that the wording of the competition principles in effect does not (and - under the system of the Treaty - should not) give an answer to the assessment of corporate affiliations under European antitrust law. For the reasons of this, see already 3.1.1.3., § 3.1. above.

legal principles existing in the national laws of its various member states.¹⁷⁴⁴ This includes the principles and objectives inherent to the necessity of disregarding the concept of 'legal separation' between separate legal entities, which can be summarized under the notion of 'piercing the corporate veil'.

In regard to the necessary functional assessment of the competition provisions, **European practice** has shown that an appropriate assessment of corporate affiliations is sometimes complicated by the difficulty of distinguishing the respective legal entity of a corporate group in which the competition infringement has occurred.¹⁷⁴⁵ Often, the executive bodies of a company externally represent both the parent and the subsidiary companies.¹⁷⁴⁶ The European institutions have therefore attempted to overcome this difficulty using an extensive application of the concept of a 'single economic entity', creating, as drawn out above,¹⁷⁴⁷ a far-reaching legal presumption on the basis of mere shareholding criteria.

Apart from the inadequate consideration of general legal principles of European procedural law, the above analysis has illustrated that this practice stands in sharp contrast to the company law orders of the various member states.¹⁷⁴⁸ While the national legal orders allow for an abrogation from the principle of 'legal separation' only in exceptional cases, the current practice of the European competition institutions has been found to result in a regime of strict liability, in effect ignoring the precondition of 'personal liability'.¹⁷⁴⁹ Despite the European institution's assertion of the legal presumption for wholly owned subsidiaries to be 'rebuttable', past decisions have given little clarity which circumstances this proof necessarily includes.¹⁷⁵⁰

Furthermore, the above analysis has shown that the Commission does not hesitate to hold parent companies that possess a majority shareholding, or even mere holding companies liable for antitrust infringements that entirely occur within a subsidiary company. Upon ascribing the Commission a procedural 'discretion' for ascertaining which company of a corporate group it hereby wishes to hold liable,¹⁷⁵¹ this practice has gone so far as to rule

¹⁷⁴⁴ Some voices in literature hereby express the 'necessity' or wish of an adoption of 'coherent' legislation in this regard. See e.g. *Schwarze/Bechtold/Bosch*, Deficiencies, Gleiss/Lutz Rechtsanwälte, 19; and *Scheunig*, in: Schulze/Zuleeg (ed.), *Europarecht* (2006), 234. It has nevertheless been argued above that such a 'necessity' cannot be justifiably approved of, as the Court's case law in the Union's legal order, possess an equal legal standing of positive law and can thus not be tributed an inferior legal validity. (In detail see 3, §1, above.)

¹⁷⁴⁵ Cf. *Faull/Nikpay*, *The EC Law of Competition*, (2007), 8.555 and *Thomas*, *Unternehmensverantwortlichkeit* (2005), 132.

¹⁷⁴⁶ See Commission decision of 23.7.1984, *Flatglass*, [1984] OJ Nr. L 212/13 ff, as cited by *Thomas*, *ibid*, 132.

¹⁷⁴⁷ See already 2.2.2., § 2.4.2. above.

¹⁷⁴⁸ Cf. also *Van Vormizeele*, WuW 10/2010, 1008 (1018); *Schwarze/Bechtold/Bosch*, Deficiencies, Gleiss/Lutz Rechtsanwälte (2008), 52.

¹⁷⁴⁹ *Kling*, *Die Haftung der Konzernmutter*, WRP 4/2010, 506 (515); *Meyering*, *Uferlose Haftung*, WuW 02/2010, 157 (169).

¹⁷⁵⁰ See already 2.2.2.1, § 4 above. See also *Montesa/Givaja*, *When Parents Pay for their Children's Wrongs: Attribution of Liability for EC Antitrust Infringements in Parent-Subsidiary Scenarios* [hereinafter cited as: 'Attribution of Liability'], *World Competition* (2006), 29 (4), 555 (566); *Kling*, WuW 02/2010, 511; *Riesenkampff/Krauthausen*, ECLR, issue 1 (2010).

¹⁷⁵¹ See *Bauer/Reisner*, *Erweiterte Zurechnung*, WuW 7 u. 8/2007, 737 (742); *Meyering*, WuW 02/2010, 168; 1 CFI of 14.12. 2006, *Lombard Case*, T-259-264 and 271/02 (WuW/E EU-R 1262 = WuW 2007, 824), paras. 331 and 335.

several companies of a corporate group ‘jointly and severally’ liable for an infringement that has taken place in only one of the group companies.¹⁷⁵²

Principally, it is out of question that the prosecution of cartellization requires a strict assessment of the factual financial power accumulated behind the negotiation or implementation of an anticompetitive arrangement. This is particularly due to the frequent inaccessibility of incriminating evidence, often asserted to essentially characterize a cartel.¹⁷⁵³ Apart from the fact that the respective companies are hereby seen to possess a ‘monopoly’ in regard to the ownership of such evidence, increasing technological advancements aggravate the detection of incriminating evidence.¹⁷⁵⁴ This leads to the situation that cartelists often remain in control over the existence and elimination of such evidence.¹⁷⁵⁵

All the same, the necessity of a rigorous prosecution of cartels cannot justify a potential ‘trade-off’ between an ‘effective enforcement’ and procedural guarantees.¹⁷⁵⁶ Rather, a measure of enforcement must objectively be assessed in regard to its substantive content.¹⁷⁵⁷

The ascertainment of the legal term of ‘an undertaking’ in European case-law has no longer anything in common with this concept under the national laws of the member states.¹⁷⁵⁸ One may therefore justifiably pose the question whether the Court still remains in its range of competence to not only interpret the law, but to furthermore develop *case-law* under the standard inherent in the development of a legal doctrine.¹⁷⁵⁹

The Court has been attacked for ‘judicial activism’ on multiple occasions.¹⁷⁶⁰ It has often been asserted that rulings go beyond the wording, scope and the underlying objectives of the relevant provision. The general tenor of this criticism is that the Court has often redrawn the rules in the name of interpreting them and has hereby regularly attached a disproportionate amount of importance to their necessary ‘effectiveness’ to the detriment of all other objectives.

It has been pointed out above, however, that the Court’s task of promoting European integration makes a certain further development of the competition principles unavoidable. Moreover, true ‘judicial activism’ remains the exception and has only been applied in a minority of cases.¹⁷⁶¹

The assertion that the controversial issue of attributing antitrust liability between corporate group companies should therefore be regulated on a positive legal basis, rather than

¹⁷⁵² See Commission Decision of 23.7.1984, *Flatglass*, [1984] OJ Nr. L 212/13 ff, and and CFI, Case T-9/99, *HFB a.o. vs. EC Commission*, [2002] II-1487.

¹⁷⁵³ Cf. *Scordamaglia*, *Comp.L.Rev.* (2010), Vol 7 Issue (1), 7.

¹⁷⁵⁴ See *Jalabert-Doury*, Digital evidence searches in competition investigations: best practices for effective fundamental rights: results of an international survey among defense lawyers, *Concurrences: revie des droits de la concurrence*, No. 4 (2009), pp. 65-73, as cited by *idem*.

¹⁷⁵⁵ Cf. *Scordamaglia*, *ibid*.

¹⁷⁵⁶ For the current debate of the approprieness of the ECJ in this regard, see *Scordamaglia*, *Comp.L.Rev.* (2010) Vol 7 Issue (1), *supra* note 4.

¹⁷⁵⁷ *Schwarze/Bechtold/Bosch, Gleiss/Lutz Rechtsanwälte* (2008), Deficiencies in EC Competition Law, 23.

¹⁷⁵⁸ In detail, see § 2. below, and *Van Vormizeele*, Die EG-kartellrechtliche Haftungszurechnung im Konzern im Widerstreit zu den nationalen Gesellschaftsrechtsordnungen, in: *WuW* 2010, 1008 ff, as cited by *Bauer/Anweiler*, *ibid*.

¹⁷⁵⁹ For a detailed justification of the Court’s task under European Union law, see *de Waele*, *European Law* [2010], Vol 6 No (1), p. 3 f, and 3. § 1. above.

¹⁷⁶⁰ On a detailed assessment of the characteristics of this term of ‘legal activism’ pointing to the Court’s eager pro-integrationist approach, see e.g. *Gulmann*, in: *Weherill & Beaumont*, *EU Law*, London, (1999), 191; *BverfG*, 2 be 2/08, 30.6.2009, with further remarks, as cited by *de Waele*, *ibid*.

¹⁷⁶¹ In this regard, much of the criticism of the Court is deemed unfounded, as it merely includes a selective analysis of its case-law. See *de Waele*, *European Law* [2010], Vol 6 No (1), 13.

leaving this to (ECJ) adjudication¹⁷⁶² nevertheless oversees that this would only shift the difficulty of this assessment to another level. For the adoption of explicit legislation, a consensus would have to be found on a certain ‘common denominator’ of the instances in which such an intra-group attribution of liability is possible. Apart from the fact that it would therefore have to be discussed on which legal basis such a positive norm could appropriately be established, such an approach would not solve the difficulty of assessing in which precise circumstances a disregard of a company’s legal personality may legitimately be assumed. Furthermore, it essentially oversees the ECJ’s task of not only interpreting the law, but also drawing out new principles in reference to the necessary advancement of the European integration process. For these reasons, the assertion that European case law is factually not capable of drawing out on an appropriate standard for attributing antitrust liability from a subsidiary to a parent company cannot be followed.

As a legislator, however, the ECJ is bound by several basic standards, such as the principles of the rule of law and constitutionalism.¹⁷⁶³ These prescribe that its decisions must not only be consistent in themselves but must also respect general legal standards established in the laws of its member states. To render a new legal principle appropriate, the ECJ should be careful not to disregard common legal traditions of the various member states.

In regard to the determination of antitrust responsibility in the context of (international) corporate groups, it is thus important to note that none of the member states comprise such a regime of strict liability as drawn out by the European institutions in recent case law.¹⁷⁶⁴ Rather, the mere acknowledgment that the true financial power of the concern or group is to be regarded in setting a fine in antitrust cases is – appropriately – perceived sufficient to grant an ‘effective enforcement’ of the antitrust principles.¹⁷⁶⁵ Given this background, it has not been deemed necessary to extend parental liability to such an exaggerated extent.¹⁷⁶⁶

In regard to the criticism of the Court’s structural approach, in effect creating a certain ‘clan liability’ in European antitrust law,¹⁷⁶⁷ it is therefore essential to review the precise circumstances under which an attribution of liability is appropriate under the *factual understanding* of ‘control’, also intrinsic to the European Merger Regulation.¹⁷⁶⁸ Even though the concept of corporate ‘control’ under the ECMR applies differently and has a different purpose,¹⁷⁶⁹ this would essentially reflect the common functional understanding of ‘enterprise principles’ inherent to the national laws of the member states. Furthermore, such an approach

¹⁷⁶² For this line of reasoning, see *Schwarze/Bechtold/Bosch*, Gleiss/Lutz Rechtsanwälte (2008), Deficiencies in EC Competition Law, 52.

¹⁷⁶³ The latter principle, essentially derived from it through the national laws of the various member states, see also *Buntscheck*, Konzernprivileg, 10 ff and in regard to the principle necessity of these standards for the judiciary, cf. *Dworkin*, Taking Rights Seriously, (1977), 22; and *De Waele*, *ibid*, 16.

¹⁷⁶⁴ See *Bauer/Anweiler*, Verneinung der Haftung einer Muttergesellschaft, ÖZK 2011/2, 78.

¹⁷⁶⁵ Cf. e.g. the ruling of the Austrian constitutional court: OGH, 8.10.2008, 16 Ok 5/08, *Aufzugs- und Fahrtreppenkartell*, para. 3; *Petsche/Tautscher*, in: *Petsche/Urlesberger/Vartian*, Kartellgesetz 2005, Kurzkomentar 2007, § 29, para. 13.

¹⁷⁶⁶ Cf. *Bauer/Anweiler*, *ibid*.

¹⁷⁶⁷ Cf. *Soyez*, Die Bussgeldleitlinien der Kommission - Mehr Fragen als Antworten [The Commission Guidelines for Fining Undertakings - More Questions than Answers], EuZW 19/2007, 596-600, 700, as cited by *Hofstetter/Ludescher*, Der Konzern als Adressat, 487.

¹⁷⁶⁸ Thus likewise, *Faull/Nikpay*, The EC Law of Competition, (2007), 8.561. For the explicit advantages of this approach, see already 3.1.1.3, § 3.1. above.

¹⁷⁶⁹ In detail, see *Broberg*, The Concept of Control in the Merger Control Regulation, ECLR 2004, 742 and *Wils*, The Undertaking as Subject of EC Competition Law and the Imputation of Infringements to Natural or Legal Persons, E.L.Rev. (2000), Apr. 99-116, as cited by *Faull/Nikpay*, *ibid*.

would be particularly useful in order to grant the necessary coherent assessment of corporate group companies for the purpose of the cartel ban.

3.2.2.2. The Respective Business Areas over which Parental 'Control' May Lead to the Assumption of an Actual Exertion of 'Decisive Influence'

An inclusion of parent companies in the direct responsibility for a cartel-related infringement can therefore only be justified in case the parent company has either been involved in a breach of competition law itself, or could have effectively prevented the occurrence of the latter.¹⁷⁷⁰ This fact is to be assessed upon an appropriate consideration of the standards established for this legal issue under general company law,¹⁷⁷¹ which must nevertheless be substantiated by the element of a gross negligent conduct in the sense of a *culpable* breach of a legal obligation.¹⁷⁷² This is necessary in order to duly take into account the criminal-akin characterization of cartel charges required for an attribution of liability in intragroup 'tort' cases.¹⁷⁷³

An economically efficient regime of antitrust liability effectively harmonizes the legal values of 'responsibility' and 'control'. Generally formulated, where a company 'controls' a certain commercial process, it should conversely be made responsible for any illegal conduct occurring hereby.¹⁷⁷⁴ In the context of (international) corporate groups, this means that a parent company should only be made responsible for infringements in case it has actively exerted 'control' over the respective area of its subsidiary's business in which an infringement has occurred. This necessity, upon which the notion of 'decisive influence' is to be appropriately evaluated, finds its rationale in the fact that the characterization of a company as a 'parent company' necessarily entails its possibility of exerting some form of control over its subsidiary company. The forms and appearances of this control may nevertheless vary in practice. As the example of a mere 'holding' company in the case of *Alliance One* shows,¹⁷⁷⁵ the existence of majority (or even 100%) shareholding does not necessarily mean that control is *actually* exerted.

A parent company's duty to supervise its subsidiary's conduct - thus preventing an infringement from occurring in the first place - can therefore only be justified in respect to areas that it effectively 'controls'.¹⁷⁷⁶ It has been outlined, that the requisite degree of *factual* 'control' should hereby appropriately be made in reference to Art 3 ECMR, in order to take into account

¹⁷⁷⁰ This means where it could have contributed to the prevention given the means accessible to it. Cf. *Hofstetter/Ludescher*, in: FS von Bühren (2009), 506 and *Faull/Nikpay*, The EC Law of Competition, (2007), 8.559. See e.g. ECJ of 16.11.2000, C-286/98 P, *Stora Kopparberg Bergslags AB vs. Commission*, [2000] ECR I-29925, para. 10.

¹⁷⁷¹ See *Hofstetter*, *Sachgerechte Haftungsregeln* (1995), 81 ff.

¹⁷⁷² In detail, cf. *Rütsch*, *Strafrechtlicher Durchgriff bei verbundenen Unternehmen?*, (1987), 38 ff, and in detail under 4.1.2.

¹⁷⁷³ See already 2.2.2., § 2.4.1.

¹⁷⁷⁴ *Hofstetter*, *Sachgerechte Haftungsregeln*, (1995), 81 ff, and 197.

¹⁷⁷⁵ CFI of 27.10.2010, T-24/05, *Alliance One International vs. Commission*, [2010], ECR II-05329, para. 141. See already 3.1.1.3, § 3.3.2.b.

¹⁷⁷⁶ Cf. *Druey*, *Leitungsrecht und -pflicht im Konzern*, in: Charlotte M. Baer (ed.), *Vom Gesellschaftsrecht zum Konzernrecht*, (2000), 1-33, 4; *Hofstetter*, *ibid*, 197.

the circumstances or specificities of the particular case.¹⁷⁷⁷ In the respective areas of business, which a parent company factually controls, it should conversely be made responsible to ensure that infringements of the law are averted. This is necessary in order to ensure that a controlling company effectively adheres to its obligations of an effective supervision deriving from the principle advantage of 'organizational autonomy'.¹⁷⁷⁸

Before describing a possibility of efficiently reviewing a parent company's adherence to this duty of supervision in consideration of the objectives of European competition law,¹⁷⁷⁹ it is essential to critically examine the respective areas of business over which a parent company's 'control' may legitimately lead to the existence of 'decisive influence' under the standards of 'enterprise law'.

§ 1. The Case of a Single Legal Representation

In previous decisions, the Commission has sometimes asserted a parent and a subsidiary company to constitute a 'single economic entity' on the basis that they submitted a common response to the Commission's statement of objections, often sharing the same legal representative. In this sense it was ascertained that the parent had appeared as the group's 'sole interlocutor' during the administrative proceedings and had thus represented the companies in a concerted manner.¹⁷⁸⁰ In 'piercing the corporate veil' practice, this conduct is sometimes referred to as the holding out of a 'unified public persona'.¹⁷⁸¹

At times, it has also been asserted that the use of the same commercial name by a parent and a subsidiary company signals that the commercial interests of the controlling undertaking and its subsidiaries are essentially intertwined.¹⁷⁸² In *Minoan Lines*, for instance, the ECJ¹⁷⁸³ concluded that the use of the same logo by the principal and the agent implied that they could be 'assimilated' commercially.¹⁷⁸⁴ The problematic inherent to this reasoning becomes evident once more in the recent case of *Itochu vs. Commission*.¹⁷⁸⁵

The applicant of this case, a Japanese company of the name *Itochu Corp.* with its headquarters in Kyoto, had been active on the European market for video consoles through a number of subsidiaries, directly situated in Europe. In March 1995, the Commission took up investigations in the video games industry after which it confronted *Itochu Hellas*, a - partly directly, partly indirectly - wholly-owned subsidiary of *Itochu Corp.*¹⁷⁸⁶ with a statement of

¹⁷⁷⁷ See already 3.1.1.3, § 3.3. above.

¹⁷⁷⁸ Hofstetter/Ludescher, in: FS von Bühren (2009), 506.

¹⁷⁷⁹ Note again, that the final objective is to 'deter' companies from future misconduct.

¹⁷⁸⁰ Cf. *Faull/Nikpay*, The EC Law of Competition, (2007), 8.568 and *Montesa/Givaja*, Attribution of Liability, World Competition (2006), 29 (4), 555 (566). Case 107/82, *AEG vs. Commission*, [1983] ECR 3151, para. 49; Case C-286798 P, *Stora vs. Commission*, [2000] ECR I-9925, para. 29 and most recently CFI of 30.4.2009, T-12/03, *Itochu vs. Commission*, [2009] ECR II-909; (WuW/E EU-R 1562).

¹⁷⁸¹ In detail, see *Blumberg*, The Law of Corporate Groups, (1987), Vol. III, (Substantive Law), § 10.04, 195f. In these cases, affiliated corporations are seen to conduct operations of the group under the group's name and, frequently, without conspicuous identification of their separate organization.

¹⁷⁸² Cf. Commission of 3.5.2006, Case COMP/F/C.38.620, *Hydrogen Peroxide*, OJ [2006] Nr. L 353.

¹⁷⁸³ Hereby the Court confirmed the findings of the CFI of 11.12.2003, in case T-66/99, *Minoan Lines*, [2003] ECR II -05515).

¹⁷⁸⁴ Cf. ECJ C-121/04 P, *Minoan Lines*, not published, as cited by *Faull/Nikpay*, The EC Law of Competition, (2007) 8.565.

¹⁷⁸⁵ CFI of 30.4.2009, T-12/03, *Itochu vs. Commission*, [2009] ECR II-909, WuW/E EU-R 1562.

¹⁷⁸⁶ [Hereinafter *Itochu*].

objections for infringing Art 101 (1) TFEU.¹⁷⁸⁷ On 28 July 2000, the Commission received a response in the names of *Itochu Corp.* and *Itochu Hellas*, alleging that the former was to be exempted from the proceeding due to the fact that it had in no way exerted ‘control’ on the conduct of its subsidiary.

As the Commission requested information for a substantiation of this assertion, *Itochu Corp.* replied that:

- the statement of objections had mainly been answered by *Itochu Hellas*;
- it had not presented itself as the Commission’s ‘sole interlocutor’;
- it had not interfered with its subsidiaries’ commercial policy (specifically not in that of its indirect subsidiaries such as *Itochu Hellas*);
- this subsidiary had been active on a distinct product and sales market;
- it had never participated in the conclusion or implementation of the sole distribution agreement between *Itochu Hellas* and the third party of *Nintendo*, and finally
- that *Itochu Hellas* possessed a large workforce locally.¹⁷⁸⁸

In its review of the case, the CFI separated these arguments into two parts. On the one side, it found them to relate to *Itochu*’s conduct during the administrative procedure, and on the other side to the organization and operation of the *Itochu* group as an internationally active corporate group.

In regard to the first part, *Itochu*’s argumentation that it had not presented itself as the **Commission’s ‘sole interlocutor’** becomes clear upon previously existing case-law. This fact had sometimes been regarded as an aggravating circumstance for rebutting the presumption of ‘decisive influence’.¹⁷⁸⁹ For this argumentation, the Commission could even rely on its explicit reinforcement by ECJ adjudication.¹⁷⁹⁰

The pertinence of this reasoning may furthermore be observed in the CFI’s review of the case of *Akzo Nobel*. As outlined above, the discussion in this case evolved around the question whether this aspect of a common legal presentation could be regarded an ‘additional circumstance,’ indicating the parent company’s actual exertion of ‘decisive influence’. Despite the fact that the ECJ negated the necessity of ‘additional elements’ for the legal presumption of this amount of influence, the practice of deducing the existence of ‘intrusive’ control from the fact of a ‘common legal representation’ must altogether be questioned.

First, the fact that both parent and subsidiary company submit a single response to the Commission’s statement of objections and hereby possibly share the same legal representative may have no bearing whatsoever on the subsidiary’s market conduct.¹⁷⁹¹ Furthermore, the reaction of a parent company to actively defend itself for being accused of illicit conduct cannot reasonably be regarded as an indication that it has actually exerted an intrusive amount of ‘control’ on its subsidiary in regard to the infringement committed. Different companies often

¹⁷⁸⁷ CFI of 30.4.2009, T-12/03, *Itochu vs. Commission*, [2009] ECR II-909, para. 5.

¹⁷⁸⁸ CFI of 30.4.2009, T-12/03, *Itochu vs. Commission*, [2009] ECR II-909, para. 54.

¹⁷⁸⁹ See CFI Case T-354/94, *Stora Kopparbergs Bergslags vs. EC Commission*, [1998] ECR II-2111, para. 85 ff; ECJ of 16.11.2000, C- 286/98P, *Stora Kopparbergs Bergslags AB vs. EC Commission*, [2000] ECR I-29925, para. 29.

¹⁷⁹⁰ ECJ, *supra* note above.

¹⁷⁹¹ A company’s market conduct is essentially referred to in order to assess the latter’s independence since the ECJ’s judgment of ‘ICI’. See ECJ of 14.7.1972, Case 48/69, *Imperial Chemical Industries Ltd. vs. Commission of the European Community*, [1972] ECR 619). Cf. also *Montesa/Givaja*, When Parents Pay for their Children’s Wrongs, World Competition 29 (4): (2006), 567.

share the same legal advisor in relation to a particular set of proceedings.¹⁷⁹² As this is regularly done for mere practical reasons, it does not mean that the single companies are not commercially autonomous. Rather, it solely indicates their common interest in the outcome of the case.¹⁷⁹³

To assess the instance of a common defense as an aggravating factor rather constitutes a susceptible incision of a company's rights of defense and therefore essentially stands in contrast to the principle of **self-incrimination**. The fact that a legal person who is confronted with a conviction attempts to rebut a legal presumption on which this conviction is based cannot justifiably be held against it. It would be a stark deterioration of a company's rights of defense if the fact it brought forward specific criteria to rebut the said presumption was in effect regarded to constitute a reinforcement of the latter.¹⁷⁹⁴

It is remarkable therefore, that the CFI, in the case of *Itochu*, regarded the parent company's conduct of defending not only itself but also its subsidiary as an indication of its interference with the latter's market conduct. This furthermore contravenes the standard that a company must be conceded a right to withhold information in case that it would, by answering the Commission's inquiry, admit the infringement.¹⁷⁹⁵ Therefore, a parent company must be able to defend itself against the allegation of a breach of competition law without fearing that this will actually be considered as an aggravating factor in respect to the base of the claim.¹⁷⁹⁶

Secondly, on a more practical level, the consequence of the Commission's line of reasoning for the operation of the procedure has strongly been criticized. Due to the fear of being held responsible on the basis of a common legal representation, parent companies may, in future, try to avoid liability by sending different replies to the Commission's statement of objections. This would nevertheless complicate the procedure by constituting an additional practical burden to the Commission and - in the case of an appeal - to the consequent judicial proceedings. It would also make litigation more expensive altogether.

The second part of *Itochu's* assertions concerned the group's organization. The CFI rejected the parent company's substantive argument of the group to constitute a decentralized and independent organization of businesses on the basis that the applicant "*had not adduced any specific evidence in support of this claim*".¹⁷⁹⁷

According to the CFI, no account could be given to the fact that the parent company was never involved in the negotiation, conclusion, or implementation of the distribution agreement between the third party of *Nintendo* and its subsidiary *Itochu Hellas*. Moreover, it was seen irrelevant that the latter had developed a business separate from the parent company's own core business area.¹⁷⁹⁸ "*In order to impute to a parent the acts undertaken by its subsidiary*", the

¹⁷⁹² *Montesa/Givaja*, *ibid.*

¹⁷⁹³ Cf. *Montesa/Givaja*, *ibid.*

¹⁷⁹⁴ This is even more so in the case the parent company contends the subsidiaries' liability for certain or the entire facts alleged by the Commission.

¹⁷⁹⁵ See CFI of 20.2.2001, T-112/98, *Mannesmannröhren-Werke AG vs. EC Commission*, [2001] ECR I-4539. In practice, this criterion is nevertheless interpreted in a strict sense. Cf. *supra* note below.

¹⁷⁹⁶ See however ECJ of 18.10.1989, in Case 374/87, *Orkem vs. Commission*, [1989] ECR 3283, paras. 28-31, where the ECJ held that the (procedural) right against self-incrimination is nevertheless limited to natural persons only. For a criticism of this approach, see also *Kling*, WRP 4/2010, 511 f.

¹⁷⁹⁷ CFI of 30.4.2009, T-12/03, *Itochu vs. Commission*, [2009] ECR II-909, para. 57, correctly finding that the number of employees in service for *Itochu Hellas* were not sufficient per se to demonstrate the independence of the latter.

¹⁷⁹⁸ CFI of 30.4.2009, T-12/03, *Itochu vs. Commission*, [2009] ECR II-909, para. 58.

Court asserted, “*there is no requirement to prove that the parent company was directly involved in, or was aware of the offending conduct.*”¹⁷⁹⁹

In the opinion of the CFI, the fact that the subsidiary disposed of an independent business plan, including its own marketing and pricing policy did not constitute “*the slightest evidence*” that the parent had in fact abstained from exerting ‘decisive influence’ on its subsidiary’s market conduct.¹⁸⁰⁰ Without adducing further elements underlining the insufficiency of the applicants assertion of a separate commercial conduct, the CFI held the parent company responsible for the antitrust infringement of its subsidiary on the basis that they constituted ‘a single undertaking’ for the purpose of Art 101 (1) TFEU.¹⁸⁰¹ The Commission was therefore seen to have correctly addressed its decision to the parent company, consequently calculating the fine’s level on the basis of the latter’s turnover.

In light of the above reasoning that the Commission must, however, take into account the circumstances of ‘control’ at the time of the infringement.¹⁸⁰² The fact that a parent company acts in defense of a subsidiary *ex post facto* should not be decisive in attributing formal liability for having exercised ‘decisive influence’ during the infringement. Thus it has been ascertained that it may only be appropriate¹⁸⁰³ to attribute liability to the controlling parent company for the period of time in which the control structure of the company remained unchanged after the end of its participation in the infringement.¹⁸⁰⁴

In its subsequent assessment of the fact of ‘joint representation’ in the case of *Akzo Nobel*, the ECJ even entirely blurred the precondition of ‘decisive influence’, by holding that: “[...] *additional circumstances such as the fact that it was not disputed that the parent company exercised influence over the commercial policy of its subsidiary, or that both companies were jointly represented during the administrative procedure,*” had been mentioned by the CFI “*for the sole purpose of identifying all the elements on which the Court had based its reasoning [...]*”.¹⁸⁰⁵

This formulation includes an ambivalent standard. On the one hand, the Court asserts that ‘additional elements’, that is elements other than the existence of full ownership are not required for the presumption of ‘decisive influence’. On the other hand, it indicates the existence of such elements to be pertinent to reinforce the latter in a precise case. This argumentation is just as inconclusive as the ECJ’s general formulation of the legal presumption for wholly owned subsidiaries.¹⁸⁰⁶ Such formulations evidently lack the factual exertion of ‘decisive influence’ on a company’s market conduct, which is nevertheless decisive for attributing tort-like liability between legally separate corporate entities.

§ 2. The Existence of a Common Commercial Strategy or Financial Dependence

¹⁷⁹⁹ CFI, *ibid.*

¹⁸⁰⁰ CFI of 30.4.2009, T-12/03, *Itochu vs. Commission*, [2009] ECR II-909, para. 58.

¹⁸⁰¹ For a detailed criticism of this approach, see already § 1., § 1.2.

¹⁸⁰² ECJ of 16.11.2000, C- 286/98P, *Stora Kopparbergs Bergslags AB vs. EC Commission*, [2000] ECR I-29925, para. 29. In detail see 3.1.1.3., § 3.3.2. above.

¹⁸⁰³ Depending again on the amount of the parent company’s control at the time of the subsidiary’s anticompetitive conduct.

¹⁸⁰⁴ Cf. *Faull/Nikpay*, *The EC Law of Competition*, (2007), 8.569.

¹⁸⁰⁵ ECJ of 10.9.2009, C-97/08 P, *Akzo Nobel NV vs. Commission*, [2009] ECR I-08237, para. 62.

¹⁸⁰⁶ See already 2.2.2.2., § 2.3.

In a number of instances, parent companies have challenged the assumption of ‘decisive influence’ upon the assertion that they were only involved in ‘high level strategic decisions’ concerning the policy of the group as a whole, or that they constituted a pure financial holding company with no operational role in the conduct of its subsidiary.¹⁸⁰⁷ Upon this argumentation, the respective parent companies attempted to prove that the quantity of ‘control’ they possessed did not precede the standard inherent to the natural relation of a parent and a subsidiary company and could therefore not amount to the degree of being considered ‘decisive’. Hereby it was regularly ascertained that the parent company had not intrusively intervened with the subsidiary’s commercial policy, or that the parent company’s interest in its subsidiary’s conduct was of a purely ‘**financial nature**’.

This ‘financial-interest’ argument has also explicitly been referred to by Advocate General *Kokott* in her Opinion in the case of *Akzo Nobel* as an instance in which the presumption of ‘decisive influence’ could be rebutted.¹⁸⁰⁸ Further examples named by the Advocate General were that the parent company only *temporarily* held 100% of its subsidiary’s shares, or that the parent company was prevented from fully exercising its control rights for ‘legal reasons’.¹⁸⁰⁹

The Court has nevertheless refrained from explicitly endorsing this approach.¹⁸¹⁰ The instance of a parent company to constitute a pure holding company was ascertained as principally insufficient to rule out the possibility of the latter to exert ‘decisive influence’ on its subsidiary’s market conduct by ‘coordinating financial investments’.¹⁸¹¹ The existence of ‘high level strategic decisions’ was rather interpreted to demonstrate the parent company’s function of ensuring the ‘unity’ of the group, thus confirming the existence of a ‘single economic entity’.¹⁸¹² Only in the case of *Alliance One* the General Court negated the responsibility of an intermediate holding company on the basis that it did not have any commercial activity on its own and that its interest in the joint venture was of a ‘purely financial’ nature.¹⁸¹³ Even though this case concerned a joint venture and therefore did not concern a 100%- shareholding participation, it is noteworthy due to the fact that the Court accepted the argument of a ‘pure financial interest’ and consequently refrained from holding the parent company liable.

Despite the fact that it consequently remains unclear to what extent the European Courts will consider the ‘financial-interest’ exception in future cases,¹⁸¹⁴ there are strong practical reasons in favor of this approach.

Principally it cannot be contested that a parent company exerts influence on its subsidiary companies by adopting a general business strategy for the pursuit of the group’s long-term business goals, including specific financial targets.¹⁸¹⁵ In this respect, it has sometimes even been asserted that a subsidiary’s executives may be induced to engage in an

¹⁸⁰⁷ See e.g. most recently CFI of 30.9.2009, Case T-175/05, *Akzo Nobel NV vs. Commission*, [2009] ECR II-184, paras. 102 – 104; and Case T-168/05, *Arkema SA vs. Commission*, [2009], ECR II-180, para. 159.

¹⁸⁰⁸ See *Akzo Nobel a.o. vs. Commission* (C-97/08 P, Opinion of AG *Kokott*, [2009] ECR I-8237, paras. 86 ff.

¹⁸⁰⁹ See *Vanderborre/Goetz*, in: International Comparative Legal Series (2012), Cartels and Leniency, Rebutting the Presumption of Parental Liability’, under IV.

¹⁸¹⁰ Cf. ECJ of C-97/08P, *Akzo Nobel vs. Commission*, [2009] ECR I-08237, para. 73.

¹⁸¹¹ See *Atlee/Botteman/Joshua*, Cartels and Leniency, in: The European Antitrust Review, (2012) Global Competition Review, available at:

<http://www.globalcompetitionreview.com/reviews/37/sections/130/chapters/1374>.

¹⁸¹² See CFI of 14.7.2011, Case T-190/06, *Total Elf Aquitaine vs. Commission*, (not yet reported).

¹⁸¹³ See page 3.2.2.2. above.

¹⁸¹⁴ For an employment of this term, see *Vanderborre/Goetz*, in: International Comparative Legal Series (2012), Cartels and Leniency, ‘Rebutting the Presumption of Parental Liability’.

¹⁸¹⁵ Instances of the latter would be: ROI, general investment decisions and commercial revenue. See *Hofstetter/Ludescher*, Der Konzern als Adressat, in: FS von Bühren (2009), 507.

anticompetitive conduct on the basis of a parent company's ambitious formulation of specific strategic or financial targets.¹⁸¹⁶

However, in light of the factual realities of investing capital today,¹⁸¹⁷ it cannot justifiably be argued that a parent company principally exerts 'decisive influence' on a subsidiary company's market conduct by merely investing in it.¹⁸¹⁸ The attribution of responsibility in these cases would substantially contravene the incentives of shareholding companies to provide capital. Furthermore, the illegality of the parent company's conduct - essentially required for an attribution of intragroup 'criminal-akin' liability¹⁸¹⁹ - cannot be perceived on a substantive basis.¹⁸²⁰

In case that parental 'control' is therefore restricted to mere general strategic targets or financial aims, the connection to an 'infringement' of competition law is not sufficiently strong to disregard their legal separation. Under the standard of 'factual control' comprised likewise by Art 3 ECMR¹⁸²¹ this can certainly not be based upon the fact that the parent was refrained from exerting decisive influence 'for legal reasons'.¹⁸²²

In regard to the economic necessity of creating incentives for cross-border investments and the indispensability of international corporate groups to adopt some form of long-term strategic planning for the companies belonging to its concern, the existence of 'decisive influence' should not be assumed on this basis. Regarding the high degree of abstraction of decisions in these business areas, parent companies should therefore not be obliged to review its subsidiary's market conduct where they merely possess a financial stake in the latter, or have adopted a general commercial business strategy for the entire group without being actively involved in the respective entities' commercial conduct. This would also better harmonize with the principle standard of a corporate group's 'organizational autonomy' according to which a legal entity may only be held liable for the specific commercial risk it has created.¹⁸²³ This is due to the fact that the necessity of compensating the market for a company's 'organizational default' becomes questionable for mere financial stakeholdings or the formulation of a general business strategy.¹⁸²⁴

In light of the sheer vastness of business decisions adopted on this level of corporate integration, a parent company's duty to comprehensively 'supervise' its subsidiary's market conduct cannot be an appropriate standard for attributing antitrust responsibility. In cases of mere financial investments or the issuance of a general commercial strategy, the principal

¹⁸¹⁶ Cf. *Hofstetter/Ludescher*, Der Konzern als Adressat, in: FS von Bühren (2009), *ibid*.

¹⁸¹⁷ For instance by means of a private equity fund.

¹⁸¹⁸ In a recent proceeding however, Goldman Sachs announced that it had received Objections from the Commission on the basis of its apparent control solely by means of its capital funds in one of the alleged participants, a company named Prysmian. See Mlex, 21.7.2011, as cited by *Atlee/Botteman/Joshua*, *supra* note 38.

¹⁸¹⁹ For this characterization of competition law fines, see under 2.2.2.2., § 2.3.

¹⁸²⁰ See e.g. *Nina A. Mendelson*, A Control-Based Approach to Shareholder Liability for Corporate Torts, 102 Colum. L. Rev. 1203, 1252 (2002), and for an overview of different jurisdictions: *Sandra K. Miller*, 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, 36 Am. Bus. L.J. 73, 84-85 (1998), as cited by *Meredith Dearborn*, Enterprise Liability: Reviewing and Revitalizing Liability for Corporate Groups, California Law Review (2009), Vol. 97: 195, 200.

¹⁸²¹ Cf. 3.2.2.2. above.

¹⁸²² See however the assertion of Advocate General *Kokott* in the case of *Akzo Nobel*, cited above.

¹⁸²³ Cf. *Posner*, The Rights of Creditors of Affiliated Corporations, U.Ch.L.Rev. 43 (1976), 499, 509; *Landers*, A Unified Approach to Parent, Subsidiary and Affiliate Questions in Bankruptcy: U.Ch.L.Rev. 42 (1975), 589, 591-592; *Blumberg*, The Law of Corporate Groups, Vol. III, (Substantive Law), (1987), as cited by *Hofstetter*, Sachgerechte Haftungsregeln, 78 (and in further detail, *idem*, 81 ff).

¹⁸²⁴ Cf. *Hofstetter*, *ibid*.

assumption of an actual exertion of 'decisive influence' should therefore legitimately be refrained from. The degree of 'control' exerted in these cases cannot justifiably lead to the assumption of a parent company's organizational misconduct¹⁸²⁵ on the basis that a subsidiary has not acted autonomously at the time of the infringement.

§ 3. Influence on the Operative or Personal Level

The stronger a parent company's active influence on the business conduct of its subsidiary becomes, the more stringent the above named organizational duty of 'supervision' is to be interpreted. Upon the reference of 'factual control' inherent to the standard of attributing liability for 'criminal-akin' charges, such a duty of supervision can only be assumed where the parent company actively influences its subsidiary's conduct in the area in which the infringement occurred.¹⁸²⁶

The areas most 'sensitive' to competition law infringements have sometimes appropriately been circumscribed by the ECJ as a company's 'distribution and pricing policy'.¹⁸²⁷ Hereby, the notion 'decisive influence' was restricted to the companies' **commercial policy** in the strict sense.¹⁸²⁸

Where a parent company therefore interferes with a subsidiary's day-to-day management in these areas of business, may this be on the basis of directions, (detailed) reporting duties, or a common management,¹⁸²⁹ a comprehensive duty to supervise the latter's conduct may legitimately be assumed. This includes the parent company's duty to remedy abuses, which have occurred all the same. In these cases, it is therefore appropriate to attribute the parent company the burden of proving that it has sufficiently complied with its supervisory duty deriving from the essential privilege of 'organizational autonomy'.¹⁸³⁰

The determination of the modes upon which a parent company factually exerts influence in these business areas comprises elements of 'business,' as well as 'personal linkages'.¹⁸³¹ In

¹⁸²⁵ For the necessity of this standard in reference to the principal concept of a corporate group's 'organizational autonomy' see 4. below.

¹⁸²⁶ Without this foundation of factual control, see likewise: *Hofstetter/Ludescher*, Der Konzern als Adressat, in: FS von Bühren (2009), 507.

¹⁸²⁷ Cf. ECJ of 14.7.1972, C 48/69, *Imperial Chemical Industries vs. Commission*, [1972] ECR 619, paras. 136/141; ECJ of 25.10.1983, C-107/82, *AEG-Telefunken AG vs. Commission*, [1983] ECR 3151, para. 50, as cited by *Hofstetter/Ludescher*, *ibid*, where the Court explicitly refers to the company's 'distribution and pricing policy'.

¹⁸²⁸ For this conclusion, (without providing a further foundation or reference), see also *Mayer*, Haftung von Gesellschaftern eines Gemeinschaftsunternehmens, *ecolex* 836. Examples of instances that a company's commercial policy in the strict sense comprises can be derived from the Court's case law, mentioning in particular: the setting of prices, including discounts, sales targets, gross margins, sales costs, cash flow, stock options or decisions on the range and characteristics of products to be sold. See Case C-73/95, *Viho vs. Commission*, [1996] ECR I-54587, para. 15, as cited by *Montesa/Givaja*, *World Competition* 29 (4): (2006), 569.

¹⁸²⁹ For a more detailed analysis of this aspect, see the following pages of this thesis.

¹⁸³⁰ On a detailed assessment of this allocation of the burden to prove the adherence to corporate supervisory duties on the basis of economic efficiencies, see *Hofstetter*, *Sachgerechte Haftungsregeln*, 92. For a possible way of parent companies to defend themselves on the basis of their adherence to this duty of supervision, see under 4. below.

¹⁸³¹ See *Stanbrook/Berasegi*, as cited by *Montesa/Givaja*, *ibid*.

both cases, however, the amount of influence must indicate a sufficient connexion to an 'infringement' of competition law.¹⁸³²

Indicia pointing to the **lack** of a parent company's actual influence in these areas can particularly be derived from the practice of 'piercing the corporate veil' in tort cases.¹⁸³³ These comprise: the existence of separate plants or offices, the subsidiary's autonomous determination of its commercial business policy, the latter's separate insurance for this business conduct, a company's separate equipment, separate officers or general management, the subsidiary's control of its own labor relations or contracts, the latter's autonomous decision-making concerning pricing policy, as well as its existence as a separate profit center.¹⁸³⁴ The mere 'appointment' of a subsidiary's managers by the parent company is principally insufficient to denote the factual amount of influence required. This is irrespective of whether this management is to be in charge of the sales and marketing activities of the subsidiary.¹⁸³⁵

Even if a parent company's comprehensive duty to supervise its subsidiary's conduct can only exist in these 'core areas' of a subsidiary's commercial policy that are particularly susceptible to anticompetitive behavior, it must nevertheless be extended to situations in which a parent company could factually not have been unaware of its subsidiary's illicit behavior. This is appropriate when putting the parent company's organizational duty of supervision in relation to the standard of 'legal separation' under principles of 'enterprise law'. It has been outlined above that this standard nevertheless requires a confined interpretation of 'decisive influence'. A parent company's failure to recognize an infringement of competition law must therefore be assessed upon the factual realities of the group's organization.

This means that a parent company can only be held responsible for an infringement of competition law by one of its subsidiaries where explicit evidence of illicit behavior was available to it and where it consequently fell short of acting upon this information.

Possible examples requiring a more detailed scrutiny of the parent company to review its subsidiary's conduct can be derived from existent case-law to comprise:

- the approval of precise annual budgets by the parent company;
- evidence that the business plans of the subsidiary had been amended on the basis of suggestions by the parent company and were consequently reviewed by the latter, or
- a subsidiary's regular communication for prior approval of its draft plans to the parent company concerning its future commercial conduct and the subsequent implementation of these plans.¹⁸³⁶

¹⁸³² Hofstetter/Ludescher, *ibid*, see already 3.1.1.3., § 3.3.2.c. above.

¹⁸³³ This is particularly due to the fact that this approach accepts a subsidiary as a separate business operation. In detail see Blumberg, *The Law of Corporate Groups*, Vol. III, (Substantive Law), § 11.03, 213 ff.

¹⁸³⁴ In cases in which 'control' was not sufficiently intrusive and indicia of separate operation of these 'core areas' were evident, an economic integration of operations, group identification or the parent company's administrative support for the subsidiary were insufficient to change the result. Cf. Blumberg, *ibid*, 241.

¹⁸³⁵ Differently however, the ECJ in the above cited case of *Viho*, (ECJ of 24.10.1996, C-73/95, *Viho Europe BV vs. Commission of the European Community*, [1996] ECR I-5457 para. 15f).

¹⁸³⁶ For an assessment of these circumstances, pointing to possible situations of 'decisive influence', see Nathalie Doury, *Parental Liability in the Setting of EU Antitrust Fines: Recent Case Law Provides Further Guidance*, Mayer Brown, Antitrust & Competition, available at: <http://www.mayerbrown.com>.

In this context it is important to point out once more,¹⁸³⁷ that the issuance of an instruction by the parent company, which in turn leads to the adoption of anticompetitive behavior by the subsidiary denotes the former's *own* involvement in the infringement. In these cases, it is therefore inappropriate to speak of the necessity of an 'attribution' of responsibility even where the actual illicit conduct is consequently carried out by officers of the subsidiary company.

On the level of interrelation between a parent and a subsidiary company containing both business, as well as 'personal linkages' therefore, the existence of 'personal identity' of the management essentially responsible for the infringement is particularly relevant, because it points to the fact that the parent company will be informed of and may be involved in the commercial conduct of the subsidiary.¹⁸³⁸ The existence of management linkages between a parent and a subsidiary must therefore be substantiated on the basis of 'personal liability' on the level of the individual.¹⁸³⁹

§ 4. Intermediate Result

The above analysis has shown that 'decisive influence' requires a differentiated assessment in order to comply with the standard of 'factual control' necessary for an attribution of responsibility of 'criminal-akin' charges. This assessment must be put in relation to the 'organizational privilege' of a parent company to conduct its market conduct by means of a separate legal entity, i.e. a subsidiary company.

In today's economic reality, the **organizational form** of a corporate group, i.e. the comprehension of several legally independent companies under a uniform 'leadership',¹⁸⁴⁰ has become the dominant form of structuring entrepreneurial activity.¹⁸⁴¹ Thus, this form of conducting business has widely replaced that of the 'single corporate enterprise'.¹⁸⁴² Even if the incentives of forming such an organization are manifold, one of its vital benefits is the restriction of liability to the separate legal entities of the group under the concept of 'corporate autonomy'.¹⁸⁴³ Hereby a certain calculation of the commercial risk connected to an international commercial activity is facilitated.¹⁸⁴⁴

On precisely this basis the tense relationship of the principle of 'legal separation' and an 'effective enforcement' of the competition provisions must be resolved. A system that confronts

¹⁸³⁷ See already 3.1.1.3, § 3.3.2. above.

¹⁸³⁸ See for instance, Case T-354/94, *Stora vs. Commission*, [1998] ECR II- 2111, para. 80, as cited in this regard by *Faull/Nikpay*, The EC Law of Competition, (2007) 8.567.

¹⁸³⁹ For a critical assessment of the current practice of the European institutions in this regard, see below under 4.1.

¹⁸⁴⁰ For such an assessment of the structure of a 'corporate group', see *Emmerich/Habersack*, Konzernrecht, 9th edition, (2008), § 4, para. 1.

¹⁸⁴¹ Cf. *Van Vormizeele*, Die EG-kartellrechtliche Haftungszurechnung im Konzern im Widerstreit zu den nationalen Gesellschaftsrechtsordnungen, WuW 10/2010, 1008; *Dearborn*, Enterprise Liability: Reviewing and Revitalizing Liability for Corporate Groups, Cal. Law Rev. (2009), Vol. 97: 195, 199 ff.

¹⁸⁴² For a detailed analysis of the historical background, see e.g. *Antunes*, The Liability of Polycorporate Enterprises, 13 Conn. J. Int'l L. 197, (1998-1999), 198 ff; furthermore *Horn*, in: Horn/Kocka, Recht und Entwicklung der Großunternehmen im 19. und frühen 20. Jahrhundert, 1979, 166 ff; *Menz*, Wirtschaftliche Einheit und Kartellverbot, (2004), 17f; *Timm*, JuS 1999, 553 (554f), as cited by *Van Vormizeele*, *ibid.*

¹⁸⁴³ The latter is sometimes also referred to as a company's legal independence, see *Antunes*, *ibid.*

¹⁸⁴⁴ Cf. *Andenas/Woolridge*, European Comparative Company Law, (2009), 480; *Kallfass*, Ökonomische Analyse der Konzernbildung, in: Mestmäcker/Behrens, Gesellschaftsrecht der Konzerne, (1999), 19, (33 ff); *Immenga*, Der Preis der Konzernierung, in: FS Böhm (1975), 253.

a legal subject with an impasse by essentially using the required presentation of evidence against it,¹⁸⁴⁵ cannot rationally be justified. Such an approach must not only be rejected upon the objective of economic efficiency, but also in order to grant the adherence to general principles of law.

For an assumption of a parent company's **actual 'control'** therefore, the criterion of mere stock ownership, or the latter's determination of the group's general strategic policy constitute an insufficient basis for the imposition of antitrust liability.

If one is to appropriately confer the general standard of 'piercing the corporate veil' to an efficient system of enforcement, parental control in the sense of 'decisive influence' can only comprise the specific areas of a company's market conduct the competition provisions aim to protect.¹⁸⁴⁶ Under the principle of 'personal liability' these are to be supplemented by situations in which a parent company could not have been unaware of an illicit conduct in the light of apparent evidence presented to it.

For an attribution of liability and the imposition of fines in competition law, the Commission should duly regard the standard of assessment drawn out by the Court of First Instance in its '*Avebe*'-judgment.¹⁸⁴⁷ According to this standard, the Commission "*cannot assume the existence of 'decisive influence' without verifying whether that influence has actually been exerted in the precise case*".¹⁸⁴⁸ According to the holding of the CFI,¹⁸⁴⁹ it is rather upon the Commission to demonstrate the existence of such an amount of influence "*on the basis of factual evidence, including, in particular, any management power one of the undertakings may have over the other*".¹⁸⁵⁰ While a parent company must hereby prove that it has adhered to its organizational duty of duly supervising its subsidiary's conduct in case it determined the latter's commercial policy,¹⁸⁵¹ the aspect of 'factual evidence' pointing to an antitrust infringement must be substantiated by the Commission.

4. An Assessment of Corporate Group Liability on the Basis of '**Organizational Autonomy**'

In regard to the duty of a parent company to duly supervise its subsidiary's conduct in the commercial areas that it decisively influences, the question arises what this obligation specifically includes. In other words: what must a parent company bring forward in order to prove that it has done everything in it (organizational) means to ensure that the conduct of its subsidiary is in line with the competition provisions? This sort of evidence must necessarily allude to the parent company's duty to effectively structure the corporate group it controls on

¹⁸⁴⁵ See § 1 of this section.

¹⁸⁴⁶ See § 3 of this section.

¹⁸⁴⁷ CFI of 27.9.2006, T-314/01, *Avebe*, [2006] ECR II- 3085, para. 135 ff, as cited in this regard by *Kling*, WRP 4/2010, 515.

¹⁸⁴⁸ CFI of 27.9.2006, T-314/01, *Avebe*, [2006] ECR II- 3085, para. 136, hereby referring to an insofar established standard of case-law under the decisions of: ECJ of 28.6.2005, Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, *Dansk Rørindustri and Others*, [2005] ECR I-5425, para. 117, and ECJ of 16.11.2000, C-294/98 P, *Metsä-Serla Oyj and Others vs. Commission*, [2000] ECR-10065, para. 27.

¹⁸⁴⁹ This position was subsequently confirmed by the ECJ in the case of *Akzo Nobel* (C-97/08 P, [2009] ECR I-0823).

¹⁸⁵⁰ CFI, *ibid*, citing 'to that effect': ECJ of 28.6.2005, Joined Cases C-189/02 P *a.o.*, *Dansk Rørindustri*, paras. 118 to 122, ECJ of 2.10.2003, Case 196/99 P, *Aristrain*, [2003] ECR I-11005, para. 95-99; Case T-9/99, *HFB a.o.*, [2002] ECR II-1487, para. 527.

¹⁸⁵¹ This would again have to be proven by the Commission on the basis of Art 2 Reg. 1/2003.

the basis of this amount of influence. This duty can even be seen to represent the counterbalance of the fundamental privilege of a corporate group's 'organizational autonomy'.¹⁸⁵²

Based on the principle of 'personal liability', essentially inherent to the competition provisions, the Commission may, by decision, impose fines on undertakings and associations of undertakings that have either **intentionally or negligently** infringed the competition provisions.¹⁸⁵³ Apart from an objective breach of competition law, the additional element of a culpable behavior is required on a subjective level.¹⁸⁵⁴

On the basis of the principle of 'legal separation', juristic persons principally act through their organizational bodies.¹⁸⁵⁵ The necessity to attribute individual conduct to an undertaking is derived from its managerial division of duties and responsibilities.¹⁸⁵⁶ On the level of corporate groups, this organizational freedom includes the possibility of a parent, that is, a 'controlling' company, to carry out its market conduct by the means of a subsidiary company.¹⁸⁵⁷

In this respect, an undertaking can only be held liable pursuant to Art 23 (2) of Reg. 1/2003 where an *individual* acting on behalf of this undertaking has acted in an intentional or negligent way. In case that an individual representative of the subsidiary company has therefore *intentionally* committed an infringement of competition law, its conduct must primarily be attributed to the company for which it has acted.¹⁸⁵⁸ This holds true irrespective of whether the intentional conduct is carried out directly through the undertaking that the individual is entitled to represent, or whether it is carried out by means of a subsidiary company.¹⁸⁵⁹ The 'attribution' of conduct in these cases merely denotes the assignment of a certain illicit act to the legal person that this individual is authorized to represent.¹⁸⁶⁰

More difficult to assess, however, are cases in which a company's organizational bodies have neither committed the antitrust infringement themselves, nor have had knowledge of the anticompetitive conduct of their employees.¹⁸⁶¹ In these cases, one has to consider whether the management of the company can be held responsible for neglecting duties of 'organizational supervision'.¹⁸⁶² On the level of the single undertaking this is assessed on the basis of the standard of care implicit to 'sound management'.¹⁸⁶³ A company's management may consequently be blamed for such a *negligent* omission of its duties where it has, according to the circumstances of the specific case, not adhered to the **requisite degree of care** that sound

¹⁸⁵² This is due to the fact that risks are carried most efficiently by those legal subjects that are capable to control them in the most economic fashion. See *Calabresi*, Some Thoughts on Risk Distribution and the Law of Torts, Yale L. J. 70 (1961), 499 (517-519), as cited by *Hofstetter*, Haftungsregeln (1994), 81.

¹⁸⁵³ See Art 23 (2) of Regulation 1/2003.

¹⁸⁵⁴ Cf. *Hofstetter/Ludescher*, Der Konzern als Adressat, in: FS von Bühren (2009), 495.

¹⁸⁵⁵ *Hofstetter/Ludescher*, *ibid.*

¹⁸⁵⁶ *Mestmäcker/Schweitzer*, Europäisches Wettbewerbsrecht, § 21, para. 18.

¹⁸⁵⁷ In detail see *Hofstetter*, Sachgerechte Haftungsregeln, (1994), 81 ff.

¹⁸⁵⁸ See already 3.1.1.3, § 3.3.2.b, above.

¹⁸⁵⁹ I.e. in the form of a 'direction'. In cases of an intentional infringement, a possible disregard of the separate entity of the subsidiary derives from the standard of the 'abuse of the corporate form' under 'piercing the corporate veil-practice'. In detail, see *Blumberg*, The Law of Corporate Groups, (1987), Vol III, Substantive Law, § 6.02., 112.

¹⁸⁶⁰ On the necessity of the acting individual to be authorized to represent the respective undertaking, see 4.1.1. below.

¹⁸⁶¹ *Hofstetter/Ludescher*, Der Konzern als Adressat, in: FS von Bühren (2009). 'Intentional' conduct cannot be assumed in these cases.

¹⁸⁶² See also *Mestmäcker/Schweitzer*, Europäisches Wettbewerbsrecht, § 21, para. 18.

¹⁸⁶³ For the determination of this concept by the example of German corporate law, see e.g. *Spindler*, in: *Fleischer*, Handbuch des Vorstandsrechts, (2006) § 15, 77 ff, as cited by *Koch*, Compliance-Pflichten im Unternehmensverbund?, WM 22/2009, 1013 (1014).

management would require.¹⁸⁶⁴ By the standard of negligence applied by the ECJ when interpreting the competition provisions, this standard involves the obligation of a company to undertake all possible efforts to prevent the occurrence of anticompetitive conduct in the first place and to act upon the detection of an illicit behavior that is committed anyhow.¹⁸⁶⁵

The fact that the amplified degree of division of organizational duties and responsibilities in corporate groups nevertheless constitutes an increased challenge of adhering to this standard has thus been assessed to require a 'systematic organization of supervision'.¹⁸⁶⁶ On the level of corporate groups, it has therefore been ascertained justified to interpret the standard of legal supervision in the sense of a general obligation of a 'functional organization'.¹⁸⁶⁷ This obligation, in effect leading to the fact that a parent company should appropriately only be held responsible for 'organizational defects',¹⁸⁶⁸ must nevertheless be put in relation to the above-mentioned economic efficiencies a company incurs from the principle of 'organizational autonomy'.¹⁸⁶⁹

Hence, it has been asserted that only a confined degree of organizational duties of a company's management may appropriately be derived from this standard.¹⁸⁷⁰ In light of the multitude of actions taking place in international corporate groups today, such an assessment is not only appropriate but also necessary in order to duly take into account the economic efficiencies related to the formation of a corporate group. The economic principles of establishing a corporate group should not be undermined by the creation of a regime of strict liability.

4.1. The Consideration of Compliance Efforts under Current Procedural Standards of European Competition Law

In regard to the problematic standard of holding parent companies liable under current European antitrust law, it has increasingly been claimed in literature that this ambivalence of 'economic efficiency' and antitrust liability could be resolved upon an appropriate consideration of '**corporate compliance measures**'.¹⁸⁷¹ 'Legal compliance' is hereby defined as the systematic

¹⁸⁶⁴ Cf. Hofstetter/Ludescher, Der Konzern als Adressat, in FS von Bühnen (2009): "[...] es setzt dies die Missachtung einer Sorgfaltspflicht durch die Organe voraus" ['(...) this requires defiance of the management's duty of care].

¹⁸⁶⁵ See e.g. ECJ of 16.11.2000, C-286/98 P, *Stora*, [2000] ECR I-9925, para. 9, where Court held that it was insofar irrelevant that a parent company had 'no legal means' to act on this recognition under national company law. The Court ascertained that the parent company could rather have "attempted to bring the infringement to an end by making a simple request to the effect to the [subsidiary's] management board".

¹⁸⁶⁶ Cf. Hofstetter/Ludescher, Der Konzern als Adressat, in: FS von Bühnen (2009), *ibid.*

¹⁸⁶⁷ Cf. Roberto/Petrin, Organisationsverschulden aus zivilrechtlicher Sicht [hereinafter: Organisationsverschulden] in: M.A. Niggli/Marc Amstutz (ed.), Verantwortlichkeit im Unternehmen: Zivil- und strafrechtliche Perspektiven, Basel (2007), 77 ff, as cited by Hofstetter/Ludescher, *ibid.*

¹⁸⁶⁸ Cf. Roberto/Petrin, Organisationsverschulden, 79.

¹⁸⁶⁹ In detail, see Hofstetter, Sachgerechte Haftungsregeln, 81 ff; Alison Anderson, Conflict of Interests: Efficiency, Fairness and Corporate Structure, in: UCLAW Law Rev. 25 (1978), 738.

¹⁸⁷⁰ See Koch, Compliance-Pflichten im Unternehmensverbund?, WM 22/2009, 1013 (1014), with a different conclusion than adopted in this thesis however.

¹⁸⁷¹ See e.g. Hofstetter, Korrekturbedürftige Bussen-Exzesse im europäischen Kartellrecht: Plädoyer für die Berücksichtigung der Compliance-Anstrengungen in Unternehmen, NZZ v. 29.5.2008, 29; Wirtz, WuW 2001, 342; Dreher, ZWeR 1/2004, 75; Lamp, BB 2002, 2237; Hauschka, BB 2004, 1178; Pampel, BB 2007; Fleischer, BB 2008, 1070, 1072, and Bosch/Colbus/Harbusch, WuW 7 u. 8/2009, 740. In detail, see 4.1.2. below.

concept to ensure that a business enterprise adheres to the relevant laws, regulations or business rules as a manifestation of organizational ‘due diligence’ in the context of corporate management.¹⁸⁷² Even if the Commission currently adopts a negative attitude towards the consideration of corporate compliance programs for the outcome of the procedure,¹⁸⁷³ there are strong arguments in favor of this approach.

Without going into detail on the principle design and implementation of corporate compliance measures, the reasoning behind this methodology will be drawn out in respect to the Commission’s interpretation of an actual exertion of ‘decisive influence’, allowing for an attribution of antitrust liability. In respect to the increasing eminence of European antitrust law on an international level, the positive repercussion that an appropriate consideration of corporate compliance measures may have for the necessary harmonization of international competition law regimes will consequently be discussed in a final point of assessment.

4.1.1. The Insufficient Identification of ‘Personal Liability’ in European Competition Law

In order to ascertain the procedural standard under which parent companies may be held responsible for antitrust infringements of their subsidiaries under the notion of ‘organizational deficiency’, it is necessary to review in more detail the criteria of an ‘intentional’ or ‘negligent’ conduct.

In its case-law, the ECJ has at times ascertained that an infringement is committed ‘intentionally or negligently’, where “*the undertaking concerned cannot be unaware of the anti-competitive nature of its conduct, whether or not it was aware that it was infringing the competition rules of the Treaty*”.¹⁸⁷⁴

The standard of intentional or negligent conduct is therefore either consciousness of the anticompetitive behavior,¹⁸⁷⁵ or the cognition of the commercial circumstances that justify an infringement of organizational duties of supervision. ‘Intention or negligence’ principally refers to the characterization of the conduct of individuals acting on behalf of an undertaking.¹⁸⁷⁶ In this regard, current adjudication not only lacks the necessary amount of clarity required by the principle of legal certainty, but also disregards the procedural standard of ‘personal liability’, essentially inherent to the competition provisions.

4.1.1.1. Intentional Conduct

¹⁸⁷² Cf. [translation of], *Creifelds*, Rechtswörterbuch, 19th edition 2007, 251 http://www.nmsbvi.k12.nm.us/Records/records_def.htm.

¹⁸⁷³ In detail, see 4.1.1. below.

¹⁸⁷⁴ CFI of 6.10.1994, T-83/91, *Tetra/Pak*, [1994] ECR II-755, paras. 238 ff; with reference to: ECJ of 8.11.1983, *Société Anonyme I.A.Z., (International Belgium a.o. vs. Commission)*, [1983] ECR 3369, para. 45; See furthermore ECJ of 18.9.2003, C-338/00 P, *Volkswagen vs. Commission*, [2003] ECR I-9189, para. 94.

¹⁸⁷⁵ In the case of so-called ‘hard-core cartels’ such consciousness is regularly assumed: Cf. ECJ of 18.9.2003, C-338/00 P, *Volkswagen vs. Commission*, [2003] ECR I-9189, para. 94, as cited by *Hofstetter/Ludescher*, Der Konzern als Adressat, in: FS von Bühren (2009), 492; see also *Faull/Nikpay*, The EC Law of Competition, (2007), 8.592.

¹⁸⁷⁶ Cf. *Engelsing/Schneider*, in: Münchner Kommentar zum Europäischen und Deutschen Wettbewerbsrecht, Vol I, (2007), Art 23 Reg. 1/2003, para. 27; *Dannecker/Biermann*, in: Immenga/Mestmäcker, EG-Wettbewerbsrecht, Part 2, 4th ed. (2007), preliminary remarks to Reg. 1/2003, para. 60.

According to pertinent case law, the intentional actions of any person who is authorized to act for the respective undertaking are sufficient to trigger the liability of the undertaking, i.e. the actions of such a person are deemed to be actions of the undertaking.¹⁸⁷⁷ The Court has even adopted the view that it is- in this respect- not necessary for there to have been action or even knowledge on the part of the legal entity's principal managers. Irrespective of whether the acting person was entitled to conclude an agreement that in effect violates Art 101 TFEU, the conduct of this person may be attributed to the respective undertaking.¹⁸⁷⁸

The problematic related to this criterion in practice must be seen in the ambiguous way in which the European institutions attribute conduct between undertakings of a corporate group under the notion of a 'single economic entity'.¹⁸⁷⁹ Under this approach, the intentional conduct of any manager of any subsidiary company belonging to the corporate group may be attributed to the final parent company or head of the group on the basis of its mere shareholding participation.

It has been outlined above, however, that this approach essentially disregards the differentiated classification of 'control' between legally separate entities under principles of enterprise law and must thus be rejected upon the hazard of creating a liability regime of status.¹⁸⁸⁰

4.1.1.2. Negligent Conduct

In regard to the **second criterion** of 'negligent conduct' it is important to note that the Court has never provided a definition of this term.¹⁸⁸¹

In his Opinion in the case of *General Motors*, Advocate General Mayras asserted that:

"the concept of negligence must be applied where the author of the infringement, although acting without any intention to perform an unlawful act, has not foreseen the consequences of his action"

¹⁸⁷⁷ *Schwarze/Bechtold/Bosch*, Deficiencies, Gleiss/Lutz Rechtsanwälte (2008), 47.

¹⁸⁷⁸ ECJ of 7.6.1983, joined cases 100-103/80, *Musique Diffusion française vs. Commission*, [1983] ECR 1983, 1825, para. 96. In light of the standard the ECJ has hereby adopted it has been ascertained that it is in practice 'virtually impossible' to successfully argue that the actions of an employee are not attributed to the undertaking. See: *Gleiss/Lutz*, Deficiencies, 48. In consideration of the fact, however, that it is doubtful for an employee lacking some form of managerial power to engage in an anticompetitive conduct, the practical peril this may pose on the level of the single undertaking is rather limited. It is nevertheless correct that on the basis of the necessary relation of functions and responsibilities of a corporation, 'intentional conduct' is to be confined to the company's management, i.e. the individuals entitled to represent and legally oblige the respective company.

¹⁸⁷⁹ See already critically 2.2.2.2, § 2.4. and 3.1.1.3, § 3.3.2. References in the following thesis to the 'management' of a company, should be understood in the sense of the parent company's management.

¹⁸⁸⁰ Such an establishment of strict liability on the basis of mere capital links nevertheless disregards the substantial economic efficiency of creating corporate groups and investing capital internationally. In detail, see e.g. *Wallace*, *The Multinational Enterprise*, (2002), 661; *Hofstetter*, *Sachgerechte Haftungsregeln*, 5 ff (particularly p. 17); *Druey*, *Konzernrecht*, 306-307.

¹⁸⁸¹ Cf. *Wils*, *The Optimal Enforcement of EC Antitrust Law*, 78.

in circumstances where a person who is normally informed and sufficiently attentive could not have failed to foresee them".¹⁸⁸²

The standard inherent to 'intentional' and 'negligent conduct' under current competition law may nevertheless be derived from ECJ adjudication.¹⁸⁸³ In its *Volkswagen*-judgment, for instance, the ECJ held that for the *intentional* nature of an infringement it is not necessary for the Commission to identify the individuals that have "*acted improperly within the undertaking or who ought to have been held responsible for any defective organization of the undertaking*".¹⁸⁸⁴ According to the Court, such a requirement would "*seriously impinge on the effectiveness of European competition law enforcement*".¹⁸⁸⁵

The ambivalence of the ECJ's approach in this regard becomes evident upon the fact that it on the one side refers to an 'undertaking' for establishing whether the infringement was committed 'intentionally or negligently', but, on the other side, seems to acknowledge that only individuals are capable of acting in this way. In addition, the Commission and European Courts do not clearly distinguish between 'intentional' conduct on the one side, and negligent conduct on the other.¹⁸⁸⁶ In its decision practice, the Commission has furthermore not restricted itself to clearly delineating the existence of 'intentional conduct' - including the fact that a company's management "*could not have been unaware of an infringement*" -¹⁸⁸⁷ from the legal circumstances comprised by 'negligent conduct'.¹⁸⁸⁸

The standards of assessment inherent to these forms of 'culpability' nevertheless differ substantially.¹⁸⁸⁹ While in the first case the intention on the level of an individual is the norm, 'negligent conduct' must be ascertained on the basis of 'care' inherent to the standard of sound management mentioned above.¹⁸⁹⁰ As the severity of the infringement is greater in the event of intent, 'negligent conduct' must therefore have different consequences, i.e. be sanctioned with lower fines.¹⁸⁹¹

In regard to the necessity of considering general legal principles for the area of European competition law,¹⁸⁹² the undifferentiated assessment of culpability endorsed by the Commission

¹⁸⁸² See See Opinion of the Advocate General of 29.10.1975, C-26/75, *General Motors vs. Commission*, [1975] ECR 1389, as cited by Wils, *ibid*.

¹⁸⁸³ See e.g. ECJ of 11.7.1989, C-246/86, *Belasc a.o. vs. EC Commission*, [1989] ECR 2191, para. 41; ECJ of 8.11.1983, C-96/82, *IAZ vs. Commission*, [1983] ECR 3369, para. 45; and ECJ of 18.9.2003, C-338/00 P, *Volkswagen vs. Commission*, [2003] ECR I-9189, para. 98, as cited in this regard by Hofstetter/Ludescher, *Der Konzern als Adressat*, in: FS von Bühren (2009), 492.

¹⁸⁸⁴ ECJ of 18.9.2003, C-338/00 P, *Volkswagen vs. Commission*, [2003] ECR I-9189, *ibid*.

¹⁸⁸⁵ ECJ of 18.9.2003, C-338/00 P, *Volkswagen vs. Commission*, [2003] ECR I-9189, para. 97.

¹⁸⁸⁶ Cf. *Schwarze/Bechtold/Bosch*, *Deficiencies*, Gleiss/Lutz Rechtsanwälte, 48.

¹⁸⁸⁷ Cf. Joined Cases T-45/98 and T-47/98, *Krupp Thyssen vs. Commission*, [2001] ECR II- 3757, para. 200, as cited in this regard by Faull/Nikpay, *The EC Law of Competition*, (2007), 8.592.

¹⁸⁸⁸ The Commission has occasionally found that infringements have been committed 'intentionally or negligently'. See e.g. Commission of 23.11.1972, Case IV/26.894, *Pittsburg Corning Europe*, [1972] OJ Nr. L272/35, where the Commission has stated that the respective infringements had been committed "*intentionally or least negligently*". See also Commission of 14.5.1997, Case IV34.621, *Irish Sugar plc.*, [1997] OJ Nr. L 258/1, as cited by Gleiss/Lutz, *ibid*.

¹⁸⁸⁹ Under European case law it is not even entirely clear, whether the fact that a company 'could not have been unaware' is comprised by the notion of 'intentional conduct' in the latter sense. See Gleiss/Lutz, *Deficiencies*, 48, and essentially against this interpretation of ECJ adjudication: Faull/Nikpay, *The EC Law of Competition*, 8.592.

¹⁸⁹⁰ See already 3.2.2.2, § 3. above.

¹⁸⁹¹ *Schwarze/Bechtold/Bosch*, *Deficiencies*, Gleiss/Lutz Rechtsanwälte, 48.

¹⁸⁹² See 3.2.2.2, § 3 above.

and the ECJ is not acceptable. In disrespecting the distinct standard inherent to intentional and negligent conduct, the European institutions not only violate the principle of 'proportionality',¹⁸⁹³ but also those of 'legal certainty' and 'personal liability'.

In relation to the assessment of attributing conduct between companies of a **corporate group**, this means that in case the persons involved in the anticompetitive agreement comprise managers of the subsidiary undertaking, their intentional conduct should primarily be attributed to the latter.¹⁸⁹⁴ In respect to the fact that in these cases the subsidiary constitutes an appropriate addressee against which a fine may be imposed,¹⁸⁹⁵ this conclusion cannot be overridden by the alleged increased amount of 'deterrence' the Commission expects from the imposition of a fine on its 'controlling' parent company.¹⁸⁹⁶ Where the management of a company has not acted in a culpable way, it cannot be deterred.¹⁸⁹⁷

As 'intention' and 'negligence' are subjective in nature,¹⁸⁹⁸ the assumption of '**negligent conduct**' must also be made in relation to this 'individualized' conduct. The degree of fault should be assessed upon the standard of care, required for an adequate management of a company. Nevertheless, the only organizational means that a company's management possesses to *prevent* its employees¹⁸⁹⁹ from engaging in an anticompetitive conduct is the implementation of efficient incentives of their 'compliance' to the competition provisions.¹⁹⁰⁰

In consideration of the multilayer organizational structure of a corporate group, it must accordingly be scrutinized what this 'individualized' standard of care inherent to a sound management necessarily comprises in respect to a 'functional organization' of a corporate group.

4.1.2. The Significance of 'Corporate Compliance Measures' in Setting Fines on 'Controlling' (Parent) Companies

In light of this necessary 'individualized' standard of corporate negligence, the assessment of 'organizational deficiency'¹⁹⁰¹ must necessarily consider the internal measures that a controlling parent company employs in order to review its agents' conduct.

¹⁸⁹³ Thus, *Schwarze/Bechtold/Bosch*, Deficiencies, Gleiss/Lutz Rechtsanwälte, 48.

¹⁸⁹⁴ See already page 3.1.1.3., § 3.3.2, c above. The intention of the individuals in this case must namely primarily be ascribed to the legal entity for which they have acted. Similarly, see *Hofstetter/Ludescher*, Der Konzern als Adressat, in: FS von Bühren (2009), 495.

¹⁸⁹⁵ See already 3.1.1.2., § 3 above.

¹⁸⁹⁶ Cf. *Hofstetter/Ludescher*, Der Konzern als Adressat, in: FS von Bühren (2009), 509. For the ambiguous determination of the notion of 'control' for the imposition of intragroup liability, see 3. above.

¹⁸⁹⁷ The attempt of the European competition authorities to 'extend' the level of fines on the basis of increased deterrence can be derived from the lacking 'individualization' of conduct outlined above. In this sense it has been ascertained, that a 'criminalization' of anticompetitive conduct, that is holding the individuals responsible for an infringement liable for *criminal* behavior, is essentially necessary to grant an (economically effective) amount of 'deterrence'. See e.g. *Wils*, The Optimal Enforcement of EC Antitrust Law, 188 ff; and *Wagner von Papp*, Kriminalisierung von Kartellen, WuW 03/2010, 268 ff and *idem*, in: Möschel/Bien (eds.), Kartellrechtsdurchsetzung durch private Schadenersatzklagen, Baden-Baden (2010).

¹⁸⁹⁸ See *Engelsing/Schneider*, Art 23 Reg. 1/2003, para. 27; *Dannecker/Biermann*, preliminary remarks to Reg. 1/2003, para. 60.

¹⁸⁹⁹ This necessarily includes individuals of the company's management itself.

¹⁹⁰⁰ Cf. *Hofstetter/Ludescher*, Der Konzern als Adressat, in: FS von Bühren (2009), 496.

¹⁹⁰¹ In this case, a parent company can legitimately be held liable for its subsidiary companies' anticompetitive behavior.

As ‘corporate negligence’ can therefore only be established upon a fault-based approach, a parent company must be given the possibility to prove that it has *not* acted in a negligent way, i.e. that it has fulfilled the criterion of a ‘functional’, that is, effective organization. In case that the respective company has nevertheless implemented all necessary and economically reasonable measures in order to prevent and detect an antitrust infringement, it should conversely not be blamed for ‘organizational default’.¹⁹⁰²

In respect to the above mentioned necessity of the European institutions to clearly distinguish between the standard of ‘intentional’ and ‘negligent’ conduct in order to comply with general legal principles, this assessment must also hold true for attributing liability between companies of a corporate group.

In consideration of the understanding of ‘**corporate compliance**’ outlined above,¹⁹⁰³ the fact that companies have implemented an antitrust compliance program aimed at detecting and preventing their actors from engaging in an anticompetitive behavior should therefore duly be taken into account.¹⁹⁰⁴ Hereby, the efforts that a company’s management undertakes to review its agents’ conduct must be considered in respect to the essentially different subjective nature of ‘intentional’ and ‘negligent conduct’.¹⁹⁰⁵

An effective compliance program should therefore systematically supervise, instruct and, when indicated, sanction the conduct of its employees in order to ensure their law-abiding behavior.¹⁹⁰⁶ In respect to the objective of ‘deterrence’ that is implicit to the competition provisions, this approach is principally not only constructive, but also generates substantial procedural efficiencies, which I will outline in the following section.¹⁹⁰⁷

4.1.2.1. The Preventive Value and Efficiency of Antitrust Compliance Programs

In legal practice, the principal significance of ‘corporate compliance’ is widely recognized. Due to its high practical relevance for establishing a certain ‘corporate culture’ and the substantial efficiencies that are connected to its adoption for companies, clear and generally recognized standards of their content exist today.¹⁹⁰⁸ By means of a consistent monitoring and auditing

¹⁹⁰² Cf. *Hofstetter*, Korrekturbedürftige Bussen-Exzesse im europäischen Kartellrecht: Plädoyer für die Berücksichtigung der Compliance-Anstrengungen in Unternehmen, NZZ v. 29.5.2008, 29.

¹⁹⁰³ See 3.2.2.2. § 3. above.

¹⁹⁰⁴ Generally, see *Wirtz*, WuW 2001, 342; *Dreher*, ZWeR 1/2004, 75; *Lamp*, BB 2002, 2237; *Hauschka*, BB 2004, 1178; *Pampel*, BB 2007; *Fleischer*, BB 2008, 1070, 1072.

¹⁹⁰⁵ Cf. *Schwarze/Bechtold/Bosch*, Deficiencies, Gleiss/Lutz Rechtsanwälte, 48, pointing to the different, ‘subjective background’ that these forms of culpability imply.

¹⁹⁰⁶ See *Bosch/Colbus/Harbusch*, Berücksichtigung von Compliance-Programmen in Kartellgeldbußverfahren, WuW 7 u. 8/2009, 740. For a detailed analysis of the content and standards an effective compliance program requires, see *Dreher*, ZWeR 1/2004, 96 ff.

¹⁹⁰⁷ See e.g. *Bosch/Colbus/Harbusch*, *ibid*; *Traugott*, Die Rolle von Compliance Programmen bei der Bemessung von Kartellstrafen, Compliance Praxis 1/2012, 9; *Dreher*, Kartellrechtscompliance, ZWeR 1/2004, 75, 79ff.

¹⁹⁰⁸ See e.g. United States Sentencing Guidelines, Guidelines Manual, available at: <http://www.ussc.gov/guidelines/index.cfm>, Chapter 8; Office of Fair Trading- OFT’s guidance on the appropriate amount of a penalty, available at: <http://www.oft.gov.uk/OFTwork/publications/publication-categories/guidance/competition-act/> Step 4, Section 2, 16; See furthermore the UK Bribery Act of 2010, Chapter 23, Pt 7 (Failure of commercial organisations to prevent bribery).

program breaches of competition law are to be anticipated and hazardous situations effectively averted.¹⁹⁰⁹

Despite the fact that no compliance program can guarantee a complete elimination of anticompetitive behavior, it essentially raises the threshold of inhibition for committing infringements and at the same time documents the management's intent to comply with its organizational supervisory duties.¹⁹¹⁰ Because the respective strategy is regularly adapted to the commercial profile of the concerned undertaking, the principle awareness of the specific risks of the particular market on which the company is active is substantially increased. At the same time, this aspect makes it clear that the 'effectiveness' of the program's implementation depends on the efficiency with which the company anticipates these specific risks and accordingly acts upon them. In this way, the implementation of internal compliance measures allows a company to make the best possible use of the Commission's leniency notice,¹⁹¹¹ as well as its recently implemented settlements procedure.¹⁹¹² It furthermore creates structures that, on the one side, confine the range of individuals for illicit conduct within the concerned undertaking, and on the other side, detect committed infringements precociously in order to fully remedy their defects.¹⁹¹³

It has also been mentioned that a certain 'corporate climate' is thereby instituted that not only condemns the engagement in alleged 'trivial offenses,' but furthermore sets a positive example for companies of the same branch of commerce.¹⁹¹⁴ By anticipating the negative effects of a cartel agreement, antitrust compliance also protects the addressees of sanctions from the considerable legal consequences of being found guilty of an antitrust infringement by raising not only the awareness of its own agents, but also those of a different legal entity that it factually or legally controls.¹⁹¹⁵ In this way, the implementation of corporate compliance programs constitutes a substantial contribution to the general prevention of anticompetitive behavior.¹⁹¹⁶

For all these reasons, the existence of corporate compliance programs has been recognized to constitute a mitigating circumstance in a number of jurisdictions.¹⁹¹⁷ Likewise, the Organization for Economic Cooperation and Development also actively encourages the implementation of preventive measures for the abatement of anticompetitive behavior.¹⁹¹⁸

4.1.2.2. The Ambiguous Approach to Antitrust Compliance Measures of the European Commission

¹⁹⁰⁹ *Barbist*, EU-Wettbewerbsrecht: 'Compliance Matters', in: *Compliance Praxis* 1/2012, 7f.

¹⁹¹⁰ Cf. *Moosmayer*, Die neuen Leitlinien der Europäischen Kommission zur Festsetzung von Kartellgeldbußen, *wistra* 2007, 91, 94.

¹⁹¹¹ Commission Notice on Immunity from fines and reduction of fines in cartel cases of 8.12.2006, (2006/C 298/11).

¹⁹¹² Commission Regulation (EC) No 622/2008 amending Regulation (EC) No 773/2004, of 20.6.2008, regarding the conduct of settlement procedures in cartel cases.

¹⁹¹³ *Bosch/Colbus/Harbusch*, *WuW* 7 u. 8./2009, 745.

¹⁹¹⁴ Cf. *Bosch/Colbus/Harbusch*, *WuW* 7 u. 8./2009, *ibid*; *Traugott*, *Compliance Praxis* 1/2012, 9.

¹⁹¹⁵ Similarly, *Dreher*, *ZWeR* 1/2004, 75 (80).

¹⁹¹⁶ This has even indirectly been recognized by the CFI in its decision of '*Evonik Degussa*', (CFI of 5.4.2006, T-279/02, *Degussa vs. Commission*, [2006] ECR II-897, para. 361), where the Court held an appropriate assessment of a fine to require the consideration of special preventive reasons.

¹⁹¹⁷ See e.g. United States Sentencing Guidelines, Guidelines Manual, Chapter 8; Office of Fair Trading-OFT's guidance on the appropriate amount of a penalty, Step 4, Section 2, 16.

¹⁹¹⁸ See OECD, 3rd report on the implementation of the 1998 Recommendation of 15.12.2005, 27, available at: www.oecd.org/competition.

In its current guidelines, the Commission principally acknowledges the significance of antitrust compliance measures by outlining for the first time the key components an efficient compliance program necessarily comprises.¹⁹¹⁹ Hereby, it welcomes the efforts of companies to implement such measures as a 'valuable contribution' to the enhancement of the level of competition throughout the Union and the creation of specific ethical standards for the various sectors of the European economy.

On the concrete design of compliance programs in the area of antitrust law, the Commission emphasizes the necessity of a clearly formulated strategy that should be adjusted to the area of business in which the respective company is active. Hereby, the undertaking's specific risk profile is to be determined in respect of its particular commercial branch, the frequency, and range of interaction with competitors, and the structure of this market in general.¹⁹²⁰ In order to grant the effective implementation of a company's specific compliance 'strategy', the Commission emphasizes that the latter should be installed throughout the 'entire organization'. This is deemed essential for creating 'a culture of respect for the law' within the company. For this reason, the Commission underscores the importance for companies to adopt a clear internal record¹⁹²¹ in which the specific situations of risk as well as the possible sanctions for breaches of the competition provisions are sufficiently reflected.¹⁹²²

The authority points out, however, that pure lip service or abstract and formalistic compliance-efforts are insufficient and cannot replace the existence of proper internal reporting mechanisms.¹⁹²³ In this respect, the Commission even steps in for a strong 'management commitment', as the actual adherence of the measures adopted must be reviewed by a clear "*tone from the top*".¹⁹²⁴

At the bottom line however, the Commission remains on the position that companies are advised to implement these guidelines for the sole reason of the substantial costs related to 'non-compliance', i.e. the sanctions that companies may incur in case that an infringement is detected anyhow.

In this regard, the Commission explicitly states that it does not accept compliance programs as a mitigating circumstance or as a basis of averting liability.¹⁹²⁵ In case that an infringement is detected, the existence of these 'valuable' measures has - according to the Commission - in effect not been able to prevent the occurred infringement and can thus not be considered for the assessment of the fine.¹⁹²⁶ From the fact that an infringement has taken place

¹⁹¹⁹ See Commission guidance: 'Compliance Matters', of 24.11.2011, available at: http://ec.europa.eu/competition/antitrust/compliance/compliance_matters_en.pdf [hereinafter referred to as 'Commission guidance']. For an analysis of the Commission's change of perception towards 'compliance programs', see in detail: *Bosch/Colbus/Harbusch*, WuW 7 u. 8./2009, 744, emphasizing that in the case of 'British Sugar' (Commission of 18.7.1988-IV/30.178, [1998] OJ Nr.L 284/41, para. 86) the Commission had still regarded the existence of such a program as an aggravating circumstance.

¹⁹²⁰ The latter aspect specifically refers to the impediments for new companies to enter the market, or the particular position of the respective company on this market. See 'Commission guidance', p. 15 ff.

¹⁹²¹ This may, for instance, be done in the form of a 'manual'. See 'Commission guidance', 15.

¹⁹²² Cf. *Barbist*, EU-Wettbewerbsrecht: 'Compliance Matters', in: *Compliance Praxis* 1/2012, 7.

¹⁹²³ Commission's guidance, 17.

¹⁹²⁴ Literally cf. Commission guidance, 16.

¹⁹²⁵ Cf. *Traugott*, *ibid.* The required standard for an efficient compliance program, implementing all necessary regulatives and measures for detecting and preventing an antitrust infringement under the circumstances of the particular case is in practice regularly referred to as 'Best Practice Compliance'. See e.g. *Hofstetter/Ludescher*, *Der Konzern als Adressat*, in: *FS von Bühren* (2009), 496 f.

¹⁹²⁶ Cf. Commission of 21.12.2005, Case COMP/F/38.443, *Rubber chemicals*, para 345; Comm. of 31.5.2006, F/38.645, *Methacryles*, para. 386

it is automatically deduced that the program has failed in practice. Hence, the implementation of an antitrust compliance program entails no legal consequences. A substantive assessment of the respective compliance structure that has been implemented throughout the organization is hereby negated from the start.¹⁹²⁷ In the following analysis it will be outlined that this approach cannot be approved of.

§ 1. The Standard of Intention or Negligence

Due to the pertinence of general legal principles for the interpretation of the competition provisions, the Commission must not only respect the principles of 'legal clarity' and 'consistency', but also appropriately implement the presumption of innocence.¹⁹²⁸ It is nevertheless inconsistent to explicitly comprise the criterion of 'negligent' conduct in the legal norm on which authoritative actions are based, but to deprive the norm's addressees of any points of reference of its standard in practice. This contradicts the standard inherent to the above named legal principles and at the same times constitutes a breach of the Commission's discretion for setting fines.¹⁹²⁹

'Intentional conduct' is characterized by the fact that the negative impact of an infringement is explicitly desired by the individual, showing that the latter has decided in favor of committing the infringement.¹⁹³⁰ In the case of 'negligence' however, such conscious conduct is essentially lacking. While intentional conduct implies an unambiguous commitment to the impairment of a legal asset, 'negligence' is defined as conduct that falls below the standards of behavior established by law for the protection of others against an unreasonable risk of harm.¹⁹³¹ A person has thus acted negligently if he or she has departed from the conduct expected of a 'reasonably prudent person' acting under similar circumstances. For juridical persons this 'reasonably expected prudence' inherent to the standard of negligence is addressed to the managing bodies (i.e. the legal organs) of the respective entity. This is due to the fact that under the law of torts, according to which the competition principles are to be effectively assessed,¹⁹³² 'negligence' requires the breach of a specific legal duty.¹⁹³³ While on the level of the single corporation this 'legal prudence' is manifested by the standard of due care inherent to sound management, it has been outlined above that on the level of the corporate group the adherence to this principle is ascertained upon the standard of 'corporate deficiency'. 'Negligence' therefore comprises the failure to take action.¹⁹³⁴

¹⁹²⁷ Traugott, in: Compliance Praxis 1/2012, 9.

¹⁹²⁸ Cf. Schwarze, Rechtsstaatliche Defizite des Europäischen Kartellverfahrens, WuW 1/2009, 8, mentioning as a further point the obligation of granting comprehensive and effective judicial protection.

¹⁹²⁹ On a critical assessment of the Commission's discretion of setting fines, see Schwarze, *ibid*; furthermore Schwarze/Bechtold/Bosch, Deficiencies, Gleiss/Lutz Rechtsanwälte, 27 f.

¹⁹³⁰ Cf. Fuchs, Österreichisches Strafrecht [Austrian Criminal Law], Allgemeiner Teil I, 67; and Gifis, Barron's Law Dictionary, 5th ed., 263. See furthermore Wils, The Optimal Enforcement of EC antitrust law, 78: "Intention can thus be derived either from the awareness that the behavior is forbidden by Community law or from the awareness of the behavior's anti-competitive object".

¹⁹³¹ See Steven H. Gifis, Barron's Law Dictionary, 5th ed., 338.

¹⁹³² For the characterization of the competition fines as 'criminal-akin', see already 2.2.2.2., § 2.3 above.

¹⁹³³ In detail, see Markesinis and Deaken's Tort Law, Oxford University Press (2007), Ch II, [The Tort of Negligence], 113.

¹⁹³⁴ Cf. in relation the differentiated standard for 'individual negligence' where negligence may also be assumed on the basis of an active involvement.

Thus it becomes clear that intentional behavior comprises a much stricter accusation of default than that of mere inattention despite a principal abidance by the law. This assessment furthermore indicates that for the area of antitrust law, the aspect of 'negligent conduct' is only practically relevant on the level of *attributing conduct* between companies of a corporate group.¹⁹³⁵

It has been pointed out above, however, that European practice does not clearly distinguish between these two forms of culpability.¹⁹³⁶ In consideration of the outline of case-law above, it may even be questioned whether the Commission regards 'negligent' conduct at all when making use of its legal discretion of setting fines. Even if the term of an authority's 'legal discretion' denotes that the latter's action does not require a detailed legal regulation,¹⁹³⁷ the authority must nevertheless exercise its power 'in the sense of the law'.¹⁹³⁸ By refraining from a clear legal standard for 'negligent' conduct, the Commission essentially misemploys its power of discretion by holding parent companies liable for their subsidiary's anticompetitive conduct upon an extensive use of a 'single economic entity'.

In respect to the principle of 'personal liability', the Commission should therefore give undertakings a possibility to establish that, under the specific situations of the case, they have not acted 'negligently'.¹⁹³⁹ The sole means for determining negligence in the sense of 'corporate deficiency' nevertheless amounts to the ascertainment of the measures that a company factually implements in order to steer the conduct of its individuals. It has been outlined therefore, that in antitrust law, the internal procedures that a company undertakes to grant the adherence of its individuals to the competition provisions should duly be considered. The assessment of the specific implementation of the program must nevertheless also take into account the principle relation of 'control' between two affiliated entities on the basis of the legal and factual circumstances of the case.¹⁹⁴⁰

Under an appropriate assessment of 'corporate negligence', the Commission should therefore consider the specific organization, structure, and factual implementation of antitrust compliance programs when determining the fine.¹⁹⁴¹ In case that a company's program fulfills the standards expected under the circumstances of the case, i.e. where it has undergone all necessary and economically reasonable measures in order to prevent and detect an antitrust infringement, this should not only be considered as a mitigating circumstance, but also lead to a negation of the latter's liability.

¹⁹³⁵ See also *Faull/Nikpay*, The EC law of Competition, (2007), 8.592, asserting that an argument of 'negligence' or 'lack of awareness' that the restrictive conduct constituted a breach of Article 81 EC will be rejected fairly automatically.

¹⁹³⁶ *Schwarze/Bechtold/Bosch*, Deficiencies, Gleiss/Lutz Rechtsanwälte, 48.

¹⁹³⁷ See *Gifis*, Barron's Law Dictionary, 5th ed., 149.

¹⁹³⁸ Critically on the Commission's current use of its power see also *Gleiss/Lutz*, Deficiencies in European Community Competition Law, 18 ff.

¹⁹³⁹ On the distribution of the 'burden of proof' in this regard, see in detail below under 4.1.2.3. While on the level of the single undertaking this 'burden of proof' of a company's management is factually limited by the practical relevance of an employee without managerial function to engage in an anticompetitive conduct, the standard inherent to negligence on the level of the entire group is of substantial importance.

¹⁹⁴⁰ On the means of influence that may be relevant for this relation see *Druey*, Konzernrecht, 306-307 and OECD, Structure and Organization of International Groups (1987), as cited by *Hofstetter*, Haftungsregeln, 17 f.

¹⁹⁴¹ Cf. *Bosch/Colbus/Harbusch*, WuW 7 u. 8/2009, 744. This must necessarily be put in relation to the specific structure of the cartel agreement. For an overview, see e.g. the speech of *Kolasky*, (Deputy Assistant Attorney General of the Antitrust Division of the DOJ) at the Corporate Compliance Conference (2002), available at: <http://www.justice.gov/r/public/speeches/224389.htm>.

§ 2. The Aspect of Prevention

In adopting the current position of attributing no legal consequences to the existence of compliance programs, the Commission misconceives their **preventive value**.¹⁹⁴² The authority hereby underestimates the possibility of creating specific (procedural) incentives of steering the conduct of individuals, thus enhancing the general level of inhibition for engaging in anticompetitive conduct.¹⁹⁴³ The Commission nevertheless not only possesses the procedural means to do this,¹⁹⁴⁴ but should consider this aspect in respect to the general objectives of an optimal antitrust enforcement.

The most obvious objective of antitrust enforcement is to ensure that the competition provisions are not violated and that the anticompetitive effects, which they seek to avoid, are indeed averted.¹⁹⁴⁵ This aim is primarily achieved by the enforcement-aspect of ‘**deterrence**’, that is by creating a credible threat of sanctions in case of an antitrust violation so as to alter the potential violator’s cost/benefit calculation and thus steer him to refrain from committing violations.¹⁹⁴⁶ The fundamental importance of ‘deterrence’ is hereby not only emphasized by legal literature,¹⁹⁴⁷ but also by the Commission and the European Courts.¹⁹⁴⁸ Thus, antitrust fines are supposed to steer companies towards conduct that is in line with the competition provisions.¹⁹⁴⁹ The Commission emphasizes that fines should therefore not only have a sufficiently deterrent effect in order to sanction the undertakings concerned (specific deterrence), but also deter other undertakings from engaging in, or continuing behavior contrary to Articles 101 and 102 of the Treaty (general deterrence).¹⁹⁵⁰

‘Deterrence’ is particularly effective in the area of antitrust law because antitrust violations result from business decisions.¹⁹⁵¹ In structuring corporate liability upon this objective, the European institutions must nevertheless take into account that the competition provisions are merely addressed to ‘undertakings’. As the conduct of an ‘undertaking’ consists of the (deliberate) actions of the individuals taking these decisions, the aspect of specific deterrence nevertheless requires a differentiated assessment on the basis of act-based liability

¹⁹⁴² *Bosch/Colbus/Harbusch*, *ibid*, 745.

¹⁹⁴³ In detail, see *Arlen/Kraakmann*, *Controlling Corporate Misconduct*, N.Y.U. Law Review (1997), 687, particularly 693 f.

¹⁹⁴⁴ See Art 23 (2) of Reg. 1/2003.

¹⁹⁴⁵ Cf. *Wils*, *Principles of European Antitrust Enforcement*, (2005), 116.

¹⁹⁴⁶ Cf. *Wils*, *ibid*; and generally, *idem*, *The Optimal Enforcement of EC Antitrust Law*, (2002), in particular section 2.1.3.

¹⁹⁴⁷ See *Wils*, *Efficiency and Justice in European Antitrust Enforcement*, (2008), 55, (para. 182), and *Bright*, *EU Competition Policy: Rules, Objectives and Deregulation*, *Oxford Journal of Legal Studies*, (1996) Vol. 16, No. 4, 535. Differentiated *Jones/Sufrin*, *EC competition law: text, cases, and materials*, Oxford (2008), 41 f.

¹⁹⁴⁸ See Commission guidelines (2006/C 210/02), on the appropriate assessment of the fine, particularly para. 31; ECJ of 29.6.2006, C-289/04 P, *Showa Denko vs. Commission*, [2006] ECR I-5859, para. 61; C-308/04 P, *SGL Carbon vs. Commission*, [2006] ECR I-5977, para. 37.

¹⁹⁴⁹ See Commission guidelines (2006/C 210/02), para. 4, as cited by *Hofstetter/Ludescher*, *Der Konzern als Adressat*, in: FS von Bühren (2009), 498.

¹⁹⁵⁰ Commission guidelines, *ibid*.

¹⁹⁵¹ See *Feinberg*, *The Enforcement and Effects of European Competition Policy: Results of a Survey of Legal Opinion*, (1985) 23, *Journal of Common Market Studies* 373, 376, as cited by *Wils*, *Principles of European antitrust enforcement*, 116.

regimes to which antitrust law belongs.¹⁹⁵² Whenever agents act in the ‘best interest’ of the firm, may it be because they ‘share interests’, or because they do as they are told, strict vicarious liability is the benchmark in case that these decisions are illegal.¹⁹⁵³ Given this assumption, forcing a firm to internalize the costs of misconduct logically compels its agents to avoid it.¹⁹⁵⁴

If this assumption does not hold, namely if the company held responsible has different interests from its agents and cannot control them costless, simple vicarious liability may no longer be the preferred corporate incentive regime.¹⁹⁵⁵ In this case, the company held responsible cannot be deterred from misconduct simply by setting the fine high enough to ensure that its agents would prefer to avoid it.

It has been claimed therefore, that companies should instead be induced to take direct action themselves to deter their agents from committing wrongs, including measures to prevent misconduct, as well as policing measures that detect and sanction such conduct.¹⁹⁵⁶ Because such a ‘sharing of interests’ between a firm and its agents must be replaced by the factual relation of ‘control’ for the domain of attributing liability in European competition law, the manner in which the Commission interprets the term of an ‘undertaking’ completely undermines this aspect of special prevention. By attributing the conduct of any company’s agent belonging to a corporate group to the head of the group on the basis of mere capital links, the European competition authorities misperceive that the general threat of a fine generates no additional value where ‘control’ is factually not exerted.¹⁹⁵⁷

In respect to the undifferentiated way in which the Commission currently sets the final sum of a fine,¹⁹⁵⁸ it is furthermore questionable whether this practice effectively generates any additional value for an optimal enforcement of the antitrust provisions under the aspect of ‘general prevention’.

‘Deterrence’ is not the only conceivable instrument to reduce the likelihood of antitrust violations. This is because corporate managers are not necessarily just ‘profit maximizers’ for themselves and their principals, but may also feel a moral responsibility to live with the law, whether or not they are likely to be caught.¹⁹⁵⁹ Psychological research suggests that this normative commitment is generally an important factor in explaining compliance with the law.¹⁹⁶⁰ To reduce antitrust violations, it has therefore been ascertained that one may, apart from organizing deterrence, try to find ways to increase a manager’s normative commitment to the antitrust rules.¹⁹⁶¹

¹⁹⁵² In opposition to ‘harm-based’ regimes of liability, a party is made responsible for the expected harm due to an act, regardless of whether harm actually occurs. In detail, see *Shavell*, *Foundations of an Economic Analysis of Law*, 483 ff.

¹⁹⁵³ In detail, see *Polinsky/Shavell*, *Should Employees Be Subjected to Fines and Imprisonment Given the Existence of Corporate Liability?*, 13 *Int’l Rev. L. & Econ* 239 (1993); *Sykes*, *The Economics of Vicarious Liability*, 93 *Yale L. J.* 1231 (1984), as cited by *Arlen/Kraakmann*, *Controlling Corporate Misconduct*, N.Y.U. Law Review (1997), 687, 690.

¹⁹⁵⁴ *Arlen/Kraakmann*, *ibid*, 693.

¹⁹⁵⁵ Cf. *Arlen/Kraakmann*, *ibid*.

¹⁹⁵⁶ In detail, see *Arlen/Kraakmann*, *Controlling Corporate Misconduct*, N.Y.U. Law Review (1997), 695 ff; *Lauffer/Studler*, *Corporate Intentionality, Desert, and Variants of Vicarious Liability*, 37 *Am. Crim. L. Rev.* (2000), 1285ff; *Arlen/McLeod*, *Beyond Master-Servant: A Critique of Vicarious Liability*, University of Southern California Law School: Law and Economics Working Paper Series (2005), 25ff.

¹⁹⁵⁷ This means, where no control has been exerted by a parent company’s management.

¹⁹⁵⁸ See e.g. *Schwarze*, *WuW* 1/2009, 6f; *Schwarze/Bechtold/Bosch*, *Deficiencies*, *Gleiss/Lutz Rechtsanwälte*, 27 ff.

¹⁹⁵⁹ See *Stone*, *Sentencing the Corporation*, 71 *Boston University Law Review* (1991), 383, 389.

¹⁹⁶⁰ See *Tyler*, *Why People Obey the Law*, Yale University Press, (1990), as cited by *Wils*, *ibid*.

¹⁹⁶¹ See generally *Dau-Schmidt*, *An Economic Analysis of the Criminal Law as a Preference-Shaping Policy*, *Duke Law Journal*, (1990), 1; *Kahan*, *Social Influence, Social Meaning and Deterrence*, 83 *Virginia Law*

By connecting no legal consequences to the adoption of internal measures that aim to enhance this normative commitment of individuals, the Commission nevertheless deprives itself of the possibility to consider the efficiencies this approach would generate for an optimal enforcement of the competition provisions.

§ 3. Dogmatic Inconsistency towards Leniency

The Commission's current approach is furthermore dogmatically inconsistent in relation to its leniency notice.¹⁹⁶² According to this notice, companies may come into the privilege of immunity from an antitrust fine, or at least receive a substantial reduction of the latter in case that they comprehensively cooperate with the Commission.¹⁹⁶³ A request for leniency may nevertheless be made irrespective of whether the concerned company has undergone any efforts to enhance the law-abiding behavior of its agents, namely by establishing internal measures enhancing the above named 'culture of respect' towards the competition provisions.¹⁹⁶⁴ It is merely considered how fast and comprehensively the concerned undertakings inform the Commission of the anticompetitive conduct of its agents.¹⁹⁶⁵

Given this situation, undertakings that have adopted a compliance program encounter a further disadvantage. As most compliance programs possibly sanction the individuals that have been involved in the infringement, these may only be willing to cooperate with the company's internal compliance monitoring body and disclose the circumstances of the cartel under the precondition that their efforts are properly appreciated.

This nevertheless requires a consideration of their efforts irrespective of whether the information provided is the first to reach the Commission. Under a careful deliberation of their benefits, corporate agents would otherwise not be induced to help clarify the facts of the cartel. As this aspect would nevertheless substantially raise the transparency of the facts of the agreement and could furthermore provide the Commission with additional information concerning other potential antitrust violations, not only the rapidness, but also the (substantiated) content of the information provided by a company should be taken into account.

Companies adopting such measures would furthermore be induced to create specific internal incentives¹⁹⁶⁶ for the respective personell to come forward in order to be able to

Review, (1997), 349; *idem*, Social Meaning and the Economic Analysis of Crime, 27 Journal of Legal Studies (1998), 609, and *Kyal*, Deterrence's Difficulty, 95 Michigan Law Review, (1997), 285.

¹⁹⁶² Cf. *Dreher*, ZWeR 1/2004, 88; *Heinichen*, as cited by *Bosch/Colbus/Harbusch*, WuW 7 u. 8/2009, supra note 41, 746; *Schwarze/Bechtold/Bosch*, Deficiencies, Gleiss/Lutz Rechtsanwälte, 66.

¹⁹⁶³ Commission Notice on immunity from fines and reduction of fines in cartel cases, (2006/C 298/11). The Commission's current position on the range of immunity companies belonging to a corporate group hereby receive seems to be congruent with that of its assessment of a 'single economic entity'. In detail, see *Zimmer/Paul*, Kartellbußgeldrechtliche Haftung und Haftungsbefreiung im Konzern, WuW 10/2007, 970, (972f).

¹⁹⁶⁴ Cf. *Bosch/Colbus/Harbusch*, WuW 7 u. 8/2009, 746. For this formulation by the Commission, see Commission guidance, 15.

¹⁹⁶⁵ Critically, see *Schwarze/Bechtold/Bosch*, *ibid*, 55 ff, outlining the notice's problematic standard in relation to the right against self-incrimination, principally recognized by the ECJ of 18.10.1989, in Case C-374/87, *Orkem vs. Commission*, [1989] ECR 3283, para. 35.

¹⁹⁶⁶ In literature it has been suggested that there are particularly strong incentives under so-called 'composite' regimes of liability, see *Arlen/Kraakmann*, Controlling Corporate misconduct, N.Y.U. Law Review (1997), Section II; *Kaplow/Shavell*, Optimal Enforcement with Self-Reporting Behavior, 102, J. Pol. Econ.(1994), 583 ff.

comprehensively cooperate with the Commission under the leniency notice. By disregarding these efforts in its current assessment of antitrust fines, the Commission places companies that actively engage in reviewing the lawfulness of their agents' conduct at an inferior position to those who have not undertaken such efforts. Because of the difficulty of inducing their employees to cooperate with the compliance management of the corporate group and at the same time respond as quickly as possible to the Commission's allegations, these companies are punished twofold by the current approach of the Commission.¹⁹⁶⁷ Hereby the authority essentially overlooks the possibility of creating incentives for companies to induce their individuals to disclose all relevant data and facts of the anticompetitive agreement while at same time respecting the company's rights of defense.¹⁹⁶⁸

4.1.2.3. Reversal of the Commission's Burden of Proof in the Sense of an Organizational 'Compliance Defense'

The sole reason for a corporate group to undergo the efforts connected to compliance programs are therefore either a positive legal consequence or a legal duty. The evaluation of these internal measures nevertheless requires a differentiated assessment on the basis of the specific relationship of 'control' between a parent and a subsidiary company.

According to Art 23 (2) Reg. 1/2003, it is principally upon the Commission to prove that a company has acted 'intentionally' or 'negligently'. Because the conduct of individuals must be attributed to the legal entity for which they have acted, 'intentional conduct' can only exist where the managerial bodies of the respective undertakings have acted with the intent of breaching the competition provisions. This comprises the situation that a company's management is aware of the fact that its conduct could infringe competition law but does not adhere to its investigative duties by clarifying that this is not the case.¹⁹⁶⁹ For the complex of holding parent companies liable, it must be noted that the intentional conduct of a subsidiary's management must hereby primarily lead to the liability of the latter.¹⁹⁷⁰ Only in a second step its interrelation to a parent company is to be considered.

Where the parent companies' managing bodies are found to have acted intentionally themselves however, may it be by actively interfering with their subsidiary's conduct or even passively tolerating the illicit conduct of the latter,¹⁹⁷¹ the parent company is to be held

¹⁹⁶⁷ Similarly *Bosch/Colbus/Harbusch*, WuW 7 u. 8/2009, 746. The assessment of *Schwarze/Bechtold/Bosch* ['Deficiencies'] nevertheless contains a certain ambiguity in suggesting that compliance programs principally render the cooperation with the respective employees who have committed the antitrust infringement 'more difficult'. For an outline of a certain 'prisoners dilemma' [without explicitly referring to this term] of companies that have implemented compliance programs and consequently seek for leniency, see also *McEvoy/Fenton/Thomas*, U.S. Sentencing Commission Requests Comment For Credit on Compliance Program Even When 'High Level' Personnel Participated in the Infringement', available at: <http://www.mondaq.com/unitedstates/article.asp?articleid=95158>.

¹⁹⁶⁸ In detail, see 4.1.2.3 below.

¹⁹⁶⁹ In German antitrust law it has been recognized likewise that a faulty breach of antitrust law must be negated where the respective individual verified that this could not be the case with a diligent amount of care. See BGH of 16.12.1986, *Taxi Zentrale Essen*, WuW/E BGH 2341, 2344.

¹⁹⁷⁰ See already 4. above.

¹⁹⁷¹ Cf. ECJ of 16.11.2000, C-286/98 P, *Stora*, [2000] ECR I-9925, para. 9. The ECJ nevertheless generally holds that it is sufficient that a company "could not have been unaware that the contested conduct had at its object or effect the restriction of competition": see judgment of 11.7.1989, C-246/86, *Belasco a.o. vs. Commission*, [1989] ECR 2191, para. 41. For a criticism of this standard, see already 4.1.1.2. above.

responsible for its *own* intentional conduct. An attribution of 'intentional subsidarial conduct' can therefore only be ascertained upon the parent company's own *negligence*, namely its failure to act in light of a specific legal duty to prevent its subsidiaries from infringing the competition provisions.¹⁹⁷² Upon the finding that the Commission is well advised to consider corporate compliance efforts for determining whether a company's management has acted negligently, an appropriate assessment of 'organizational negligence' should therefore duly consider the specific structure of a compliance program.

Under general principles of company law, the mere possibility to control a possible cause of risk cannot suffice to assume a general 'liability for premises'.¹⁹⁷³ A specific **legal duty** of a company's management to prevent illegal behavior can therefore only be assumed to a certain extent. This duty must necessarily be put in relation to the respective conduct the company carries out on the market.

Accordingly, the question of a parent company's legal duty to prevent its subsidiaries from engaging in an anticompetitive conduct (for which it could accordingly be blamed on the basis of 'corporate negligence') essentially depends on the assessment of its specific 'control relation' towards the subsidiary. Given the multilayer organizational structure of a corporate group, the existence of a specific legal duty to supervise a subsidiary's conduct can therefore only be assumed where the parent company or head of the group has created the potential source of risk, or was in fact able to control it.¹⁹⁷⁴ The structure and characteristics of the respective compliance program thus essentially depend not only on the area of business, in which the subsidiary is active,¹⁹⁷⁵ but also on the degree of a parent company's active interference with the conduct of its subsidiary.

As a result, a parent company's 'duty' to implement a comprehensive compliance structure may principally only be assumed for those areas which it actively controls upon a decisive amount of influence.¹⁹⁷⁶ This approach¹⁹⁷⁷ at the same time endorses the Commission's request of coherently implementing 'compliance programs' throughout the 'entire organization',¹⁹⁷⁸ even assessing that this is best done by a 'top-down management'.¹⁹⁷⁹

The distinct approach that has at times been asserted, postulating that antitrust compliance programs should best be implemented only on the level of the single group undertaking in order to avert the parent company's liability,¹⁹⁸⁰ not only implements the

¹⁹⁷² Cf. already page 4.1.2. above. On the limited practical range of 'negligent' conduct cf. also *Wils*, The Optimal Enforcement of EC antitrust law, (2002), 78, and *Kolasky* (Deputy Assistant Attorney General of the Antitrust Division of the DOJ) at the Corporate Compliance Conference (2002), available at: <http://www.justice.gov/r/public/speeches/224389.htm>, II.; "Without exception, the conspirators were fully aware they were violating the law in the United States and elsewhere, and their only concern was avoiding detection".

¹⁹⁷³ Thus correctly *Spindler*, Unternehmensorganisationspflichten, (2001), 945; *idem*, in: *Fleischer*, Handbuch des Vorstandsrechts, (2006) § 15, 77; *Dreher*, ZWeR 2004, 75, 103, as cited by *Koch*, *ibid*.

¹⁹⁷⁴ Cf. *Koch*, Compliance-Pflichten im Unternehmensverbund, WM 22/2009, 1019. For an assessment of this in the area of EC competition law, see already 3.2.2.2.

¹⁹⁷⁵ If at all, on the level of the single undertaking it has been ascertained that a certain compliance-duty in the sense of a necessary degree of supervision can only be justified for particularly hazardous business operations: cf. *Koch*, WM 22/2009, 1016.

¹⁹⁷⁶ In detail, see 3.2.2.2 above.

¹⁹⁷⁷ Similarly, in effect *Hofstetter/Ludescher*, Der Konzern als Adressat, in: FS von Bühren (2009), 496 ff.

¹⁹⁷⁸ This term is again not to be understood in the sense of a legal entity, but in the sense of economically affiliated companies.

¹⁹⁷⁹ Cf. Commission guidance, 'Compliance matters', 15.

¹⁹⁸⁰ See *Karst*, Kartellrechtscompliance im Konzern, WuW 02/2012, 150-156.

Commission's ambiguous approach of assessing corporate group liability upon the notion of a 'single economic entity', but furthermore misperceives the specific preventive value that compliance programs may have for the conduct of internationally active corporate groups.¹⁹⁸¹

Even if a parent company's responsibility to comprehensively supervise the conduct of its subsidiaries depends on the organizational circumstances of the specific case, a general standard of appropriate internal revision is well established today upon the increasing international recognition of corporate compliance programs.¹⁹⁸² While singular meetings and generalized written instructions are not deemed sufficient for the assumption of 'best practice' compliance, regularly held seminars and on-the-spot revisions illustrate a company's commitment to prevent antitrust infringements from occurring.¹⁹⁸³ Where a parent company can thus prove to have reviewed its subsidiary's conduct in the specific areas of business in which it has actively been engaged,¹⁹⁸⁴ it should not be blamed for misconduct that could not be detected upon the organizational means imminent to this specific control relation. In no case can this appropriately be ascertained on the basis of mere capital linkages. Where a compliance program exists but does not adhere to this 'best practices standard',¹⁹⁸⁵ the respective parent company should conversely be held (fully) responsible and the program not be considered a mitigating circumstance.¹⁹⁸⁶

Finally, in relation to the Commission's burden of proving the existence of intentional or negligent behavior under Art 23 (2) TFEU, the information bias in regard to the content and implementation of the program must not be overlooked.

Given the fact that it is regularly the company, which has been accused of an illicit conduct that possesses the specific information, means and documents of the respective compliance program, it has been proposed to reverse this burden of proof by the implementation of a 'best practice' compliance defense. In this sense it has been suggested that the legal entity the Commission intends to hold responsible must prove that it cannot be blamed for 'organizational deficiency' on the basis of an (appropriate) implementation of a compliance

¹⁹⁸¹ This particularly concerns communicating the principles inherent to European competition law throughout the organization, thus creating the 'culture of respect' necessary for their appropriate implementation.

¹⁹⁸² On a comprehensive assessment of optimal organizational responsibility in the light of corporate compliance efforts, see e.g. *Arlen/Kraakmann*, Controlling Corporate Misconduct, N.Y.U. L. Rev. (1997), 687.779, as cited by *Hofstetter/Ludescher*, *ibid*, under the cue of 'best practice compliance', 499. On further aspects to consider in order to establish an effective compliance program (regarding the particular circumstances of the company), see: *Fleet*, Antitrust Compliance in the Current Administration and the Next?, available at: <http://www.gtlaw.com/NewsEvents/Publications/Alerts?find=155762&printver=true>; *idem*, Compliance Manuals for the New Antitrust Era, (1990) American Bar Association; Speech of *Kolasky* (Deputy Assistant Attorney General of the Antitrust Division of the DOJ) at the Corporate Compliance Conference (2002), available at: <http://www.justice.gov/r/public/speeches/224389.htm>, and for the area of antitrust law: *Dreher*, Kartellrechtscompliance, *ZweR* 2004, 75 ff.

¹⁹⁸³ For examples from German adjudication, see BGH of 21.10.1986, KRB 5/86, *Prüfgruppe*, WuW/E BGH 2329, 2331; BGH of 24.3.1981, KRB 4/80, *Revisionsabteilung*, WuW/E BGH 1799, as cited by *Bosch/Colbus/Harbusch*, WuW 7 u. 8./2009, 743.

¹⁹⁸⁴ For the area of competition law, the relevant areas in this regard have already been ascertained under 3.2.2.2.

¹⁹⁸⁵ For this purpose it could be adequate for the Commission to adopt a Communication, Guidelines or even propose European Legislation outlining the specific standards for different branches of business.

¹⁹⁸⁶ *Pampel*, Die Bedeutung von Kartellrechts-Compliance im Kartellordnungswidrigkeitenrecht, *BB* 2007, 1636, 1638.

program.¹⁹⁸⁷ The effective implementation of the program throughout the organization should therefore constitute a necessary, but not a sufficient condition to relieve the company from liability.¹⁹⁸⁸ Considering the fact that a parent company may hereby rebut its responsibility for infringements that have occurred despite its exertion of 'decisive influence' in the areas of conduct that it controls on the basis of this amount of influence, such a reversal of the Commission's burden of proof does not contravene the presumption of innocence inherent to European competition law. Such a allocation of the onus of proof would furthermore relieve parent companies from the dilemma they see themselves confronted with under the Commission's current interpretation of an 'undertaking'.¹⁹⁸⁹

4.1.2.4. Résumé

Under the principles of corporate 'enterprise law', appropriately considering the amount of 'control' existent between a parent company and its subsidiary, the anticompetitive conduct of a subsidiary can only be attributed to its 'controlling' parent company where the latter has negligently failed to supervise its subsidiary's conduct despite its factual exertion of 'decisive influence' on the latter's commercial conduct.

For juridical persons, 'negligent conduct' is ascertained upon the standard of care inherent to a 'sound management'. As this standard of care devolves into the duty of a 'functional organization' on the level of the corporate group,¹⁹⁹⁰ a parent company can only be blamed for negligent conduct on the basis of 'organizational deficiency'. Under the necessary factual assessment of 'control' in European antitrust law, a parent company's duty to efficiently supervise its subsidiary's conduct should hereby be confined to the commercial domain in which a parent company has exerted an 'intrusive' amount of control.¹⁹⁹¹

In case a subsidiary's agents have committed an antitrust infringement, the parent company must be able to effectively defend itself under the standard of a 'functional organization'. Hereby it must show that it has implemented all appropriate, necessary and economically reasonable measures to prevent the occurrence of an antitrust infringement, namely that it has effectively organized and sufficiently reviewed the conduct of its controlled affiliates.¹⁹⁹²

For this purpose, the parent company should be able to rely on the fact that it has implemented a compliance program throughout the organization of companies, adhering to the standard of 'best-practices' compliance. In case the parent company hereby proves to have done everything in its organizational means to control the conduct of its subsidiaries in the commercial areas that it actively manages, it should appropriately not be held liable. In this case, the subsidiary company itself constitutes an appropriate addressee of the Commission decision.

¹⁹⁸⁷ See *Hofstetter/Ludescher*, Der Konzern als Adressat, in: FS von Bühren (2009), 499, affirming that such a defense would have to be accurately defined and realistic in regard to the particular infringement. For the necessity of this possibility, see e.g. *Shavell*, Foundations of an Economic Analysis of Law, (2004), 518 f.

¹⁹⁸⁸ In the sense of a *conditio-sine-qua-non*, see e.g. *Pampel*, BB 2007, 1636, 1638.

¹⁹⁸⁹ See 3.1.1.2. above.

¹⁹⁹⁰ See *Hofstetter*, Sachgerechte Haftungsregeln, (1994), 89 ff.

¹⁹⁹¹ For an approach in this direction under general company law, see *Spindler*, Unternehmensorganisationspflichten (2001), 945 ff, as cited by *Koch*, *ibid*.

¹⁹⁹² Cf. *Hofstetter*, NZZ of 29.5.2008, 29.

4.2. The Consideration of Compliance Measures: A Harmonization of Antitrust Jurisdictions

On a worldwide market, economic collaborations and strategic alliances of companies are a universal phenomenon. Global cooperation and corporate concentrations have in common that they often share the application scope of more than one territorially limited jurisdiction.¹⁹⁹³ Each jurisdiction must therefore define its extraterritorial application range upon the facts of a case to consider. Regardless of the concerned corporation's 'nationality', the economic effects of its actions may occur on the domestic, foreign, or - to an increased extent - on the international market.¹⁹⁹⁴ Given that today's economy is global, so is competition law enforcement. The inadequacy of traditional jurisdictional principles, particularly prevalent in the area of competition or antitrust law,¹⁹⁹⁵ derives to a large extent from the inherent tension between the existence of an international system of sovereign states based upon the principles of territoriality and the essentially non-territorial nature of the modern multinational corporation.¹⁹⁹⁶

The application of - generally speaking - European Union law therefore needs to be confined on the one hand, from the genuine competences of its member states and from a claim for jurisdiction by third countries, on the other. While conflicts of competence between the Union and its member states are essentially resolved by the primacy of the latter, the situation towards third countries can be perceived as more like that between independent states.¹⁹⁹⁷ States regularly aim to maximize the effectiveness of their politics.¹⁹⁹⁸ This leads to the tendency, wherever possible, of expanding their territorial jurisdiction and competences.¹⁹⁹⁹ For this reason, the extraterritorial application of antitrust law constitutes a compelling challenge to the international legal community.²⁰⁰⁰ Indeed, it was antitrust law where issues of extraterritorial jurisdiction first emerged and which has, over time, become widely recognized as one of the areas most prone to extensions of jurisdictional reach, not infrequently engendering international conflict.²⁰⁰¹

Articles 101 and 102 TFEU do not contain an explicit rule on their international application scope. The applicability of Art 101 (1) TFEU²⁰⁰² to restraints of competition generated in 'third

¹⁹⁹³ *Mestmäcker/Schweitzer*, Europäisches Wettbewerbsrecht, § 6, para. 2.

¹⁹⁹⁴ Cf. *Mestmäcker/Schweitzer*, Europäisches Wettbewerbsrecht, § 6, para. 2.

¹⁹⁹⁵ See e.g. *Barnet/Müller*, Global Reach, The Power of the Multinational Corporation (1974); *Lindblom*, Politics and Markets, The World's Political-Economic Systems (1977), 95 and *Kindleberger* (ed.), The International Corporation, (1970), as cited by *Schenck*, Jurisdiction over the Foreign Multinational in the EEC: Lifting the Veil on the Economic Entity Theory, [hereinafter cited as: 'Lifting the Veil on the Economic Entity Theory'], U. Pa. J. Int'l Bus. L., [1989], 495.

¹⁹⁹⁶ See e.g. *Barnet/Müller*, 14-15, as cited by *Schenck*, *ibid*, 496.

¹⁹⁹⁷ *Mestmäcker/Schweitzer*, *ibid.*, § 6, para. 3. Note that since the Lisbon Treaty, the Union itself possesses international legal personality for its specific areas of competence. See already 2.2.2.2, § 2.4. above.

¹⁹⁹⁸ *Schwarze*, Die extraterritoriale Anwendbarkeit des EG-Wettbewerbsrecht - Vom Durchführungsprinzip zum Prinzip der qualifizierten Auswirkung, WuW 12/2001, 1190 (1191).

¹⁹⁹⁹ *Schwarze*, *ibid*.

²⁰⁰⁰ Cf. *Cynthia Day Wallace*, The Multinational Enterprise, (2002), 661.

²⁰⁰¹ *Wallace*, The Multinational Enterprise, 699.

²⁰⁰² The application of Art 102 TFEU on corporate groups of companies is not comprised by the subject matter of this thesis, see already 1.3.3.

countries' is to be determined therefore by means of its interpretation under the **rules of international law**, including the principles of international courtoise (*comity*) and the conflict of laws.²⁰⁰³

In this context it has been controversially debated which principle of international law is to be given priority when establishing the EU's competence of ruling on an international antitrust case.²⁰⁰⁴ Specifically two principles, namely the principle of 'territoriality' and the so-called 'effects'-doctrine, dominate the discussion. Each uses a different connecting factor for determining a jurisdiction's application scope.

In today's globalized economy, multinational corporate groups arguably constitute the most frequent addressees of Commission decisions in antitrust matters. When applying the competition provisions on 'undertakings', the Commission should not only duly respect principles of international law, but also take into account the development of globally recognized standards of assessing corporate group liability.

After a brief review of the principles of international law that come into play for an extension of antitrust jurisdiction, their possible harmonization will be analyzed in consideration of corporate compliance measures. The analysis will hereby focus on the jurisdictional practice of the EU and its most important trading partner, the United States, just to name the two most prominent jurisdictions influencing international standards and customary law in the area of competition law.

4.2.1. The Extension of Jurisdiction in Antitrust Matters and the Principles of International Law

Any treatment of antitrust matters without a discussion of extraterritorial jurisdiction and the so-called '**effects'-doctrine** has been deemed essentially incomplete.²⁰⁰⁵ The justification of this doctrine, as well as the evaluation of its constraints in regard to the conventional principle of territoriality, generally accepted in international law today, has been central to jurisprudence, legal practice, and academic discussion in this area of law.²⁰⁰⁶ The 'effects'-doctrine, terminologically already implying the very absence of a physical presence within the territory of the state experiencing the effects of an antitrust infringement,²⁰⁰⁷ has sometimes also been assessed as the 'corollary' to the principle of territoriality.²⁰⁰⁸ In other instances, it was referred to as a unique principle of extending territorial jurisdiction.²⁰⁰⁹ Developed from a conflict-of-laws perspective, scholarly and political interest hereby focuses on the confinement of the application of the *lex fori* to restrictions of competition initiated abroad, but destined for the domestic market.

Apart from the 'effects'-doctrine, which has sometimes confusingly been termed the 'objective principle of territoriality', further relevant principles of international law are those of

²⁰⁰³ Cf. *Rehbinder* in: Immenga/Mestmäcker, Wettbewerbsrecht, 4th ed. (2007), IntWbR, para. 1.

²⁰⁰⁴ *Meessen*, Völkerrechtliche Grundsätze des Internationalen Kartellrechts (1975); *Basedow*, Weltkartellrecht, 20; *Huber*, ZGR (1981) 510, 511; *Beck*, RIW (1990), 91, 92.

²⁰⁰⁵ Cf. *Wallace*, The Multinational Enterprise, 661.

²⁰⁰⁶ Cf. *Mestmäcker/Schweitzer*, Europäisches Wettbewerbsrecht, § 6, para. 11.

²⁰⁰⁷ See *Wallace*, The Multinational Enterprise, 700.

²⁰⁰⁸ See *Blumberg*, The Multinational Challenge to Corporation Law: The Search for a New Corporate Personality, [hereinafter: 'The Multinational Challenge'], (1993), 175.

²⁰⁰⁹ "Extraterritorial Jurisdiction", IDI Nineteenth Commission, *Travaux préparatoires*, supra note 22 (observations of *L. Henkin*), 166.

‘subjective territoriality’, as well as the principle of ‘personality’.²⁰¹⁰ The latter principle refers to the ‘nationality’ of the undertaking concerned, which is either determined by its registered office (headquarters), the center of its business activity, or by the law under which it was incorporated.²⁰¹¹ According to this principle, a state is authorized to interfere regardless of the undertaking’s current residence. Whether a ‘passive’ principle of personality exists, permitting states to protect its nationals from infringements initiated abroad is nevertheless contentious due to its possible extensive consequences.²⁰¹²

The principle of (subjective) ‘territoriality’, on the other hand, refers to the competence of a state to exert its discretionary sovereignty on facts of a case that take place on its territory.²⁰¹³ This is independent of whether domestic or foreign, private or legal persons are concerned. Problematic, however, is the extension of subject matter jurisdiction to those cases that only partly take place on the domestic market as this may in fact lead to a parallel jurisdiction of more than one state.²⁰¹⁴ While the state in which the (illicit) conduct is administered may rely on its ‘subjective’ principle of territoriality, another state may base its authority of regulative intervention on the principle of ‘objective’ territoriality, i.e. the ‘effects’-doctrine.²⁰¹⁵

On the whole, all theories leading to an extension of the strict principle of ‘personality’ have remained contentious for the area of antitrust law, which is why one cannot speak of established customary international law in this regard.²⁰¹⁶ Even if ‘international competition law’ is therefore primarily national law,²⁰¹⁷ concurring jurisdiction in antitrust cases must not strictly be avoided. Given the increasing importance of competition law in today’s globalized economy, however, it is essential to harmonize its standards for companies that are active on an international level.

Before analyzing the ambivalent standard of liability that internationally active companies are confronted with today, it is instructive to briefly outline the jurisdictional antitrust practice of the United States that has, in many instances, substantially influenced European competition law.²⁰¹⁸

4.2.1.1. The ‘Effects Doctrine’ and Interest Balancing in U.S. Antitrust Law

²⁰¹⁰ *Schwarze*, Die extrerritoriale Anwendbarkeit des EG-Wettbewerbsrechts, WuW 12/2001, 1192.

²⁰¹¹ Cf. *Schwarze*, *ibid.*

²⁰¹² *Meng*, in: Groeben, Thiesing, Ehlermann, Kommentar zum EU-/EG-Vertrag, Vol. V, 5th ed., Baden-Baden (1997), annex: Extrerritoriale Anwendung des EU-Rechts, 1225, para. 39. Some authors have furthermore suggested an extension of the principle of ‘personality’ under the so-called theory of ‘control’; see *Schwarze*, WuW 12/2001, 1193.

²⁰¹³ Cf. *Lane*, EC Competition Law, (2000), 278.

²⁰¹⁴ Cf. *Schwarze*, *ibid.*, 1193.

²⁰¹⁵ *Schwarze*, *ibid.*, 1193.

²⁰¹⁶ *Schwarze*, *ibid.*

²⁰¹⁷ Attempts of harmonization in the sense of establishing principles of ‘true international law’ have failed in this regard. The Institut de Droit International did not succeed in adopting a draft resolution by its 19th Commission, specially tasked with studying the question of extrerritorial jurisdiction, due to a diversity of views reflected in the 1993 Dresden Symposium. In detail see *Wallace*, The Multinational Enterprise, 679 and *Meessen*, (ed.), Extraterritorial Jurisdiction in Theory and Practice, (1996).

²⁰¹⁸ Siehe *Fleischer/Körber*, Der Einfluss des amerikanischen Antitrust Rechts auf das Europäische Wettbewerbsrecht, WuW 6/2001, 6-19.

In the United States, Congressional power to enact antitrust legislation derives from the Constitution's 'Commerce Clause', which authorizes Congress to regulate commerce between its states and with foreign nations.²⁰¹⁹ Section 1 of the Sherman Act interdicts any "*contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among several States, or with foreign nations*". Although the 'control' envisaged by U.S. antitrust law at the time of its enacting was primarily designed to be exercised over U.S. firms, the Sherman Act and the Clayton Act, constituting the two pioneering antitrust laws, have taken foreign commerce into consideration since their inception.²⁰²⁰

4.2.1.2. A First Approach to Extraterritorial Jurisdiction

Surprising as it may seem in today's highly charged international economic legal environment, the United States has a long-standing presumption against the extraterritorial application of her laws.²⁰²¹ The American Law Institute, in its *Restatement Third*,²⁰²² even acknowledges that much of the experience regarding the application of jurisdictional principles, including the controversy surrounding this issue, has involved U.S. laws regulating economic activities. Particularly antitrust is considered one of the two areas²⁰²³ in which the United States most actively regulate transnational operations.²⁰²⁴

As the precise formulation of Section 1 of the Sherman Act nevertheless leaves open the exact extent to which it is applicable to cases involving foreign elements, the clarification of this issue is essentially left open to jurisprudence.²⁰²⁵ In its earliest decision in the *Banana case*,²⁰²⁶ the U.S. Supreme Court denied the applicability of U.S. antitrust law on grounds of reasoning, which are in core still relevant today. In this case, the claim of an American Banana Company alleging that another U.S. company, United Fruit, had violated the Sherman Act by monopolizing and restraining trade in bananas between Central America and the United States was dismissed. The majority opinion applied a strict rule of construction, holding that the Sherman Act did not apply to conduct outside the territory of the United States even where both parties operating

²⁰¹⁹ See U.S. Constitution, Art I., § 8, cl. 3; as cited by Wallace, *ibid*.

²⁰²⁰ See Wallace, The Multinational Enterprise, 704: "*While commerce 'with foreign nations', as expressed in the Sherman Act, would have originally referred to commerce carried on by a strictly American company doing business abroad, the wording of the Act fortuitously left the way open to include any type of foreign commercial activity [...]*."

²⁰²¹ Wallace, The Multinational Enterprise, 706; citing *Foley Bros., Inc. v. Filardo*, 336 U.S. 281 (1949); and for exceptions to this principle assumption, Twenhafel, (Comment), 4 Tulane Journal of International and Comparative Law (1996), 309-321.

²⁰²² In American Jurisprudence, 'Restatements of the Law' are a set of treaties on legal subjects that seek to inform judges and lawyers about general principles of common law. Formulated by the non-governmental American Law institute they do not necessarily reflect the position of the US government, but are nevertheless considered to embody the most thorough contemporary academic reflections concerning the exercise of sovereign power. The *Restatement of the Law (Third)* concerns 'Foreign Relations Law of the United States', see: *St. Paul*, Minn.: American Law Institute Publishers, 1987) [hereinafter cited as "*Restatement (Third)*"].

²⁰²³ The other area being securities regulation, See *Restatement (Third)*, supra note 27, 414, Subchapter C, 282-283.

²⁰²⁴ Cf. Wallace, The Multinational Enterprise, 704.

²⁰²⁵ Cf. Meessen, Schadenersatz bei weltweiten Kartellen, WuW 11/2005, 1116; cf. the situation under EC law mentioned above.

²⁰²⁶ *American Banana Co. vs United Fruit Co.*, 213 US 347 (1909).

abroad where American companies.²⁰²⁷ Justice *Holmes* specified that any other interpretation would in effect be contrary to the principle of national sovereignty.²⁰²⁸

4.2.1.3. The Alcoa Case and the 'Effects' Doctrine in U.S. Antitrust Law

While this first ruling was strictly confined to the country in which the respective act occurred (as postulated by the principle of 'territoriality'), a substantially different approach was adopted in the Supreme Court's *Alcoa decision* of the year 1945. According to this ruling, a sufficient link to the territory of the United States is established in case the intended *effects* of the anticompetitive conduct arise in its terrain.²⁰²⁹ Similar to the *Lotus* judgment of the ICJ,²⁰³⁰ introducing the classical principle of 'objective territoriality' to the corpus of international law, *Alcoa* is seen as the leading case establishing the pure 'effects'-doctrine in antitrust law. According to this doctrine, a state has jurisdiction over events that take place outside its territory, but where the 'economic effects' of such conduct materialize within its territory.²⁰³¹

The case concerned an international cartel arrangement between French, Swiss, British, and Canadian aluminum producers that had entered production and import-quota agreements. Essential was the fact that an American parent company was included into the investigation solely on the basis of its control relation to the foreign subsidiary company. Consequently, the former was fined for the anticompetitive conduct of the latter, even though the original contention, asserting it to have been a direct member of the conspiracy, had been dropped.²⁰³² As the majority of its shareholders were also shareholders in the Canadian company, the Court resorted to the parent company of *Alcoa* on the base of jurisdiction *in personam*. In its now classical seminal dictum, the Court held that:

*'We should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States. On the other hand, it is settled law [...] that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends, and these liabilities other states will ordinarily recognize'.*²⁰³³

Accordingly, already a marginal effect on the domestic market was deemed sufficient to affirm the application of U.S. antitrust jurisdiction. Even though *Alcoa* remained eternally controversial,²⁰³⁴ it introduced the 'effects'-doctrine as a basis of exercising extraterritorial

²⁰²⁷ Cf. *Wallace*, The Multinational Enterprise, 709.

²⁰²⁸ See *ibid* and supra note 41, 356.

²⁰²⁹ *US v. Aluminum Co. of America*, 148 F. 2d 416 (2d Cir. 1945).

²⁰³⁰ *The Case of the "S.S.Lotus"* (France v. Turkey), [1927] P.C.I.J., ser. A, No.10.

²⁰³¹ Cf. *Wallace*, The Multinational Enterprise, 710.

²⁰³² Cf. *Wallace*, The Multinational Enterprise, 711.

²⁰³³ *US v. Aluminum Co. of America*, 148 F. 2d 416 (2d Cir. 1945), 443, 444.

²⁰³⁴ See e.g. *Lopka/Godek*, Another Look at Alcoa: Raising Rivals' Cost Does Not Improve the View, 35 *Journal of Law and Economics* (1992), 311, 327. The case furthermore explicitly left open whether the 'effects'-doctrine was to be applied where *all* elements to the case were foreign-based.

jurisdiction. Under the condition that the above named prerequisites are fulfilled, *Alcoa* has been assessed to essentially be in conformity with the principle of ‘objective territoriality’.²⁰³⁵

4.2.1.4. Restraints of Extraterritorial Jurisdiction under Considerations of International Law

Outside the United States, the application of the ‘effects’-doctrine was at first more or less accepted. Other states focused on fending off single extraterritorial effects of applying U.S. antitrust law by the means of judicial, administrative, and finally sovereign legal acts.²⁰³⁶ Indeed, it is impossible to deny that a far reaching ‘effects’-doctrine may lead to interstate conflicts due to an increased possibility of an accumulation of national jurisdictions.²⁰³⁷

The extraterritorial application of American antitrust law therefore led to so-called ‘blocking-statutes’ in some of the states that aimed to detain their own nationals from contributing to the application of foreign norms, aiming to detract them from duties under these laws.²⁰³⁸

Thus, the **confinement** of the ‘effects’-doctrine was repeatedly discussed on an international level.²⁰³⁹ In respect to this development, the American Law Institute went on to formulate a ‘jurisdictional rule of reason’ in an attempt to consider these objections in its *Restatement (Third)*.²⁰⁴⁰ Under this rule, the exercise of jurisdiction on cases that did not directly occur on the domestic market required “*a substantial, direct, and foreseeable effect upon or in the regulating state.*”²⁰⁴¹ A confinement of jurisdiction was hereby based on international, as well as substantive law.²⁰⁴²

The U.S. Supreme Court consequently approved of this interpretation of the ‘effects’-doctrine for the area of antitrust law. In its subsequent adjudication, the Court therefore went on to apply U.S. antitrust law regardless of the concerned parties’ nationality,²⁰⁴³ or the place in which the cartel agreement was enforced under the condition that it had ‘*a direct, foreseeable, and substantive anticompetitive effect*’ on the U.S. market.²⁰⁴⁴

Such a qualified extraterritorial application of U.S. antitrust law upon the consideration of an international ‘interest balancing’ was, however, not applied in a consistent manner. Thus,

²⁰³⁵ Cf. *Wallace*, The Multinational Enterprise, 713; citing for a defense of Judge Learned Hand’s opinion *Kelley*, The Prescriptive Jurisdictional Reach of U.S. Antitrust Law: Judge Learned Hand’s Requirement of a ‘Substantive’ Anticompetitive Effect, 23 *Inter-American Law Review* (1991), 235-236. See also *Meessen*, *Völkerrechtliche Grundsätze des Internationalen Kartellrechts*, 123.

²⁰³⁶ *Meessen*, *Schadenersatz bei weltweiten Kartellen*, WuW 11/2005, 1117.

²⁰³⁷ Cf. *Meessen*, *Völkerrechtliche Grundsätze des Internationalen Kartellrechts*, 119.

²⁰³⁸ *Mestmäcker/Schweitzer*, *Europäisches Wettbewerbsrecht*, § 6, para. 29 ff. Under the principles of EU law, it is nevertheless doubtful whether the member states are even authorized to apply such ‘blocking-statutes’. This question is certainly to be denied as far as the statutes interfere with the ‘common commercial policy’ regulated under Art 207 TFEU (see *Mestmäcker/Schweitzer*, *ibid*, 32).

²⁰³⁹ *Schwarze*, WuW 12/2001, 1192.

²⁰⁴⁰ *Mestmäcker/Schweitzer*, *Europäisches Wettbewerbsrecht*, § 6, para. 16.

²⁰⁴¹ Cf. *Restatement Third*, § 402.

²⁰⁴² Cf. *Lowenfeld*, *Rec. des Cours* 163 (1979-II) 311- 445; and for the detailed principles *Mestmäcker/Schweitzer*, *ibid*.

²⁰⁴³ This is essentially the state to which it has the ‘closest affiliation’.

²⁰⁴⁴ Cf. *Meessen*, *Schadenersatz bei weltweiten Kartellen*, WuW 11/2005, 1117; and for a comprehensive overview: *Meessen*, *Völkerrechtliche Grundsätze des Internationalen Kartellrechts*, 121 f.

regardless of the Supreme Court's substantiation, formulations as the following could still be found in court decisions ruling on extraterritorial antitrust jurisdiction:

*"Comity is...more a matter of grace than a matter of obligation. [W]e see no tenable reason why principles of comity should shield [Nippon Paper] from prosecution. We live in an age of international commerce where decisions reached in one corner of the world can reverberate around the globe in less time than it takes to tell the tale."*²⁰⁴⁵

In order to further clarify the extraterritorial reach of the Sherman Act, Congress therefore passed the Foreign Trade Antitrust Improvements Act (**FTAIA**) in the year 1982. In this law the elements of a 'direct, substantial, and reasonably foreseeable effect' were integrated into substantive law. Although the FTAIA was introduced to clarify the issue of subject matter jurisdiction, its partly unclear formulation led to diverting interpretations causing conflicts between different federal courts of appeal.

In *Hartford Fire Insurance v. California*,²⁰⁴⁶ the Supreme Court was therefore called upon to decide on a controversy between different federal courts of appeal. In this case, the Court reconfirmed the 'effects'-doctrine, but allowed for an *interest balancing* in antitrust law only on narrow confines.²⁰⁴⁷ A consideration of other states' interests (*comity*) was hereby not already considered essential where the norms are applicable to the facts of the legal issue. Rather, comity balancing was ascertained to necessarily be taken into account only where a '*true conflict*' arises between the different jurisdictions in the case of their concurrent application.²⁰⁴⁸ This could be regarded as given where it would be impossible for the concerned undertaking to act lawfully under both legal orders. Thus, it was not sufficient for the Court that the illicit conduct was considered lawful under foreign law. Only in case that the foreign corporation was to breach *mandatory rules* of its own domestic law, American courts were to step back from or modify the application of U.S. antitrust law.²⁰⁴⁹

4.2.2. The Extraterritorial Application of European Competition Law

The question whether the international jurisdiction of European antitrust law is to be judged on the basis of the (pure or qualified) 'effects'-doctrine, or whether one is to draw on the additional element of an 'implementation' of anticompetitive conduct on the territory of the common market is still assessed controversially.²⁰⁵⁰

In its previous case-law, the ECJ has not delivered a clear opinion on this matter and avoided any statement in the direction of an apparent approval of the 'effects'- doctrine. While the Court did consider the latter principle in its assessment of the extraterritorial facts of a case, it regularly complemented the analysis by the prerequisite of an '*implementation*' of the

²⁰⁴⁵ *United States vs. Nippon Paper Industries Co*, 109 F. 3d 1 (1st Cir. 1997), cert. denied 118 S.Ct. 685 (1998) id. 8, as cited by *Schwarze*, supra note 51, 1192. See also: *Laker Airways Ltd. v. Sabena*, 731 F 2d 909, 937 (D.C. Cir. 1984).

²⁰⁴⁶ 509 U.S. 764 (1993).

²⁰⁴⁷ *Mestmäcker/Schweitzer*, Europäisches Wettbewerbsrecht, § 6, para. 19.

²⁰⁴⁸ *Mestmäcker/Schweitzer*, *ibid.*

²⁰⁴⁹ *Mestmäcker/Schweitzer*, *ibid.*

²⁰⁵⁰ *Rehbinder* in: Immenga/Mestmäcker, Kommentar zum EG-Wettbewerbsrecht, IntWbR, para. 6.

respective conduct on the territory of the Common Market.²⁰⁵¹ While the Commission had already quite early taken recourse to the 'effects'-doctrine in order to establish its competence,²⁰⁵² the ECJ's attitude could rather be described as one of non-committal.

4.2.2.1. The ECJ's Wood Pulp Decision

For this reason, the **Woodpulp-Judgment** of the ECJ had eagerly been awaited as one hoped for decisive clarification in this regard.²⁰⁵³ In this case, the ECJ was called to decide on a price-cartel between third-country producers of wood pulp in regard to its implications on the area of the Common Market.²⁰⁵⁴ Even though the producers were partly present in the Union's territory by branch offices, agencies and subsidiaries, the concrete case concerned direct deliveries.²⁰⁵⁵ In their appeal to nullify the decision under Art 230 ECT [now Art 263 TFEU], the concerned undertakings asserted the Commission's decision to be void due to its lacking regulative authority on third-country undertakings. In contrast to its original decision, in which the Commission had justified its interference solely on the basis of the 'effects' of the conspiracies on the Common Market, additionally holding that these effects had also been *intended* by the respective undertakings,²⁰⁵⁶ the Commission established its competence in the procedure before the ECJ on the (objective) principle of territoriality. It hereby explicitly stated that the concerned undertakings could be accused of an illicit conduct in the *territory* of the Common Market, and merely alternatively referred to the 'effects'-doctrine, which it considered to be generally accepted.²⁰⁵⁷

In his Opinion of the case, General Advocate *Darmon* outlined the international and supranational foundations of extraterritorial jurisdiction by openly referring to the 'effects'-doctrine as exercised under U.S. antitrust-law.²⁰⁵⁸ Hereby he came to the conclusion that under customary international law, no prohibition could be observed to apply subject matter jurisdiction in the case of a 'direct, substantial, and foreseeable effect' on the domestic market, thus taking recourse to the formula of the 'qualified effects'-doctrine as applied under U.S. antitrust law.²⁰⁵⁹

The ECJ confirmed the Commission's subject matter jurisdiction, however, without relying on the Commission's original justification as picked up and discussed by the Advocate General. Thereby the Court distinguished between the *creation* of the cartel and its *implementation*.²⁰⁶⁰ In referring to the generally accepted principle of 'territoriality' under international law, it concluded that the cartel had been implemented on the territory of the Common Market. Despite explaining that the place of the cartel's creation was to play no role

²⁰⁵¹ Cf. *Rehbinder*, *ibid.*

²⁰⁵² Cf. *Fiebig*, *International Law Limits on the Extraterritorial Application of the European Merger Control Regulation and Suggestions for Reform*, ECLR 1998, 323 (324); *Weiß* in: C. Callies, *Kommentar des Vertrages über die Europäische Union und des Vertrages zur Gründung der Europäischen Gemeinschaft: EUV, EGV*, Neuwied 1999, Art 81, para. 8, as cited by *Schwarze*, WuW 12/2001, 1193.

²⁰⁵³ *Schwarze*, *Die extraterritoriale Anwendbarkeit des EG-Rechts*, WuW 12/2001, 1193.

²⁰⁵⁴ Commission Decision IV/29.275 of 19.12.1984 OJ 1985 L 85, 1; WuW/E EV 1088.

²⁰⁵⁵ *Rehbinder* in: Immenga/Mestmäcker, *Kommentar zum EG-Wettbewerbsrecht*, IntWbR, para. 8.

²⁰⁵⁶ Cf. the prerequisite under *Alcoa*, (*US v. Aluminum Co. of America*, 148 F. 2d 416 (2d Cir. 1945)).

²⁰⁵⁷ *Schwarze*, *Die extraterritoriale Anwendbarkeit des EG-Rechts*, WuW 12/2001, 1194.

²⁰⁵⁸ Advisory Opinion *GA M. Darmon*, [1988] ECR- 5214 (5220 ff), paras. 32 ff.

²⁰⁵⁹ *Schwarze*, *ibid.*

²⁰⁶⁰ *Mestmäcker/Schweitzer*, *Europäisches Wettbewerbsrecht*, § 6, para. 39.

because undertakings could easily circumvent this criterion by colluding abroad, the criterion of an 'implementation' was not further substantiated by the Court. Due to the obvious character of the first criterion, the judgment was considered a 'terminological evasion maneuver' that was seen to be essentially 'politically motivated.'²⁰⁶¹

4.2.2.2. The Position of the CFI and the Commission and the Aspect of Positive Comity

For this reason, further Court decisions clarifying the matter were eagerly awaited. In two subsequent rulings, which nevertheless concerned cases of merger control, the **Court of First Instance** at least partly refined the EU's approach to extraterritoriality.

In the *Cimentries* case, the Court still seemed to follow the ECJ's terminology in justifying the Commission's competence upon the fact that the third-country undertakings had 'implemented' the restraint of competition agreed upon within the territory of the Common Market.²⁰⁶² In the case of *Gencor* however, the CFI relied on the qualified version of the 'effects'-doctrine by emphasizing the nature and intensity of the merger's consequences on the area of the Common Market.²⁰⁶³

The latter case concerned a merger between a South-African-based company and a British subsidiary located in this market, which consolidated their production of platinum. In the proceedings, the Commission primarily referred to the principle of 'nationality', as the British firm of *Lonrho* was said to be founded under the law of an EC member state.²⁰⁶⁴ In regard to the fact that the undertakings exercised a considerable part of their business activity in the European Union, the Commission furthermore held that the merger affected the worldwide market of platinum. In a second step it therefore drew on the principle of 'territoriality' to establish its regulative authority.²⁰⁶⁵ To round up the decision, the Commission finally referred to the 'effects'-doctrine, interpreting it similar to the ECJ's statement in '*wood pulp*' as a principle point of reference for extraterritorial jurisdiction under the precondition of an 'implementation' of the respective conduct within the area of the Common Market.²⁰⁶⁶

The Court of First Instance, choosing a two-tiered approach, consequently held that it was primarily to be assessed whether the merger fell under the subject matter of EC merger control, and only in a second step whether principles of international law were affected.²⁰⁶⁷

For the justification of the extraterritorial application of the EC Merger Regulation, the Court drew of the wording of Art 1 ECMR, ultimately referring to the qualified 'effects' of the merger on the domestic market by adhering to the standard applied under U.S. antitrust law. It went on to state that:

²⁰⁶¹ Beck, Extraterritoriale Anwendung des EG-Kartellrechts, RIW 1990, 91 (92); Schrödermeier, Die vermiedene Auswirkung, WuW 1989, 21 (24); Vedder, A Survey of Principal Decisions of the European Court of Justice Pertaining to International Law, EJIL 1990, 365 (370 f).

²⁰⁶² Cf. CFI of 15.3.2000, joined cases T-25/95, a.o., *Cimenteries CBR SA a.o. vs. Commission of the European Community*, [2000] ECR II-491; see Schwarze, WuW 12/2001, 1196.

²⁰⁶³ CFI of 25.3.1999, T-102/96, *Gencor Ltd. vs. Commission*, [1999] ECR II-753.

²⁰⁶⁴ CFI T-102/96, [1999] ECR II-753 (779), para. 64.

²⁰⁶⁵ CFI, T-102/96, *Gencor Ltd. vs. Commission*, [1999] ECR II-753, para. 67.

²⁰⁶⁶ Differently: Schwarze, WuW 12/2001, 1197, who sees in the Commission's interpretation of the ECJ's *wood pulp* decision the view of an acknowledgement of the 'effects'-doctrine.

²⁰⁶⁷ Cf. Schwarze, WuW 12/2001, 1198.

“[90] [The] application of the Regulation is justified under public international law when it is foreseeable that a proposed concentration will have an immediate and substantial effect in the Community.

[91] In that regard, the concentration would, according to the contested decision, have led to the creation of a dominant duopoly on the part of Amplats and Implats/LPD in the platinum and rhodium markets as a result of which effective competition would have been significantly impeded in the common market within the meaning of Article 2(3) of the Regulation.

[92] It is therefore necessary to verify whether the three criteria of immediate, substantial, and foreseeable effect are satisfied in this case.”²⁰⁶⁸

These considerations illustrate that both the Commission as well as the Court of First Instance consider the application of a qualified version of the effects doctrine as the appropriate principle for judging cases of extraterritoriality under European competition law. In order to preserve consistency in European case-law, however, both institutions refer to the criterion of an ‘implementation’ of conduct within the Common Market as formulated by the ECJ, behind which they essentially deem nothing but the ‘effects’-doctrine.²⁰⁶⁹

In this regard it is interesting to note that while relying on the ‘effects’-doctrine to justify this broad application range of the ECMR, (hereby confirming the Commission’s interdiction of the merger), the CFI nevertheless examined a breach of the principle of **non-intervention** under customary international law.²⁰⁷⁰ Referring to a similar passage in the ECJ’s *wood pulp* decision, the Court nevertheless left open whether this principle attains distinct significance in the area of international competition law.²⁰⁷¹

In both cases,²⁰⁷² the CFI and the ECJ alluded to the fact that by the application of the relevant domestic law the competent foreign authorities had not established orders in the sense of ‘mandatory rules’.²⁰⁷³ This methodology strongly reminds of the statement of the U.S. Supreme Court in *Hartford Fire Insurance* where it held that international comity is only to be considered in the case of a ‘true conflict’ between the substantive laws of the respective legal systems.²⁰⁷⁴

The assessment of the ECJ’s *wood pulp* decision and the following cases have shown that the European Courts have not fully distanced themselves from the criterion of an ‘implementation’ of anticompetitive conduct when examining the extraterritorial jurisdiction of the EC competition rules.²⁰⁷⁵ In literature, however, there is mutual consent that the European Court of Justice has hereby further approached the ‘effects’-doctrine.²⁰⁷⁶ This is mostly justified under reference to the ‘spirit and purpose’ of the European competition rules, demanding the

²⁰⁶⁸ CFI of 15.3.2000, T-102/96, *Gencor Ltd. vs. Commission*, [1999] ECR II-753, para. 90 f.

²⁰⁶⁹ Cf. *Schwarze*, *ibid.*

²⁰⁷⁰ *Schwarze*, WuW 12/2001, 1198.

²⁰⁷¹ ECJ, joined cases C-89, 104, 114, 116, 117 and 125 to 129/85, *Ahlström a.o. vs. Commission*, [1988], ECR-5233, 5242, paras. 20 ff; and CFI in case T-102/96, *Gencor Ltd. vs. Commission*, [1999] ECR II-753, para. 103.

²⁰⁷² That is, in the CFI’s ruling of ‘*Gencor*’ and the ECJ’s ruling of ‘*wood-pulp*.’

²⁰⁷³ *Schwarze*, *ibid.*

²⁰⁷⁴ See *Hartford Fire Insurance v. California*, 509 U.S. 764 (1993).

²⁰⁷⁵ *Schwarze*, WuW 12/2001, 1198.

²⁰⁷⁶ *Mestmäcker/Schweitzer*, § 6, para. 43; *Basedow*, NJW 1989, 627, 634; *Schnyder*, Gemeinschaftsrechtliches Kollisionsrecht, 7; *Schrödermeier*, Die vermiedene Auswirkung WuW 1989, 21-26; *Basedow*, *RabelsZ*, 1988, 8; *Mestmäcker*, *RabelsZ*, 1988, 205; *Meng*, in: v.d. Groeben/Thiesing/Ehlermann pretext to Art 81, para. 79; *Schröter* in: *Schröter/Jakob/Mederer*, para. 64 ff, 85; *Bunte* in: *Langen/Bunte* pretext to Art 81, para. 37ff.

extension of jurisdiction to restraints of competition agreed upon abroad, but which affect competition within the Common Market.

Whereas the propagators of the ‘effects’-doctrine step in for the application of the competition principles regardless of whether the contested agreement has been implemented in the area of the Common Market, as well as of the participating parties’ ‘nationality’, other positions point to necessary restraints of the latter under the principle of ‘comity’ in international law.²⁰⁷⁷ Nevertheless, also the defenders of the ‘effects’-doctrine step in for certain restraints to extraterritoriality under aspects of ‘positive comity’.

Particularly the principle of *ne bis in idem* (double penalization), enshrined in Article 4 of Protocol No.7 to the ECHR²⁰⁷⁸ and Article 50 of the Charter of Fundamental Rights constitutes a substantive argument in favor of interpreting the competition provisions in consideration of principles of international law. In light of the international operation of antitrust agreements today, it has accordingly not been deemed surprising that undertakings involved in global cartels regularly face the risk of sanctions for the same infringement in different jurisdictions.²⁰⁷⁹ Of course this presupposes that the fine imposed in one jurisdiction also takes into account the effects of the cartel on the market of other jurisdictions in order to meet the requirement of such an ‘identity of facts’.²⁰⁸⁰

All the same, the ECJ has ruled the principle of *ne bis in idem* to be principally inapplicable for ascertaining jurisdiction in antitrust matters, particularly holding there to be “no other principle of law obliging the Commission to take account of proceedings and penalties to which the appellant has been subjected in non-member states”.²⁰⁸¹ Due to the fact that this assertion strikes as contrary to the feeling of ‘natural justice’, it was seen to constitute a further illustration of judicial activism in interpreting a fundamental right in reference to an alleged ‘efficient antitrust enforcement’.²⁰⁸²

4.2.2.3. The Extension of Extraterritorial Jurisdiction by Means of a ‘Single Economic Entity’

In this regard, it is important to note the European Court of Justice had, already before its decisive judgment in the case of ‘*wood-pulp*’, ruled on the extraterritorial application of European competition law by drawing on the concept of a ‘single economic entity’.²⁰⁸³ By means of this theory, the ECJ could attribute the illicit conduct of European subsidiaries to their foreign parent companies by assuming the affiliated undertakings to constitute an ‘economic entity’ as a

²⁰⁷⁷ *Rehbinder* in: Immenga/Mestmäcker, IntWbR, para. 12.

²⁰⁷⁸ Protocol No. 7 to the Convention of the Protection of Human Rights and Fundamental Freedom, as amended by Protocol No. 11, Strasbourg, 22.11.1984.

²⁰⁷⁹ See *Scordamaglia*, Cartel Proof, Imputation and Sanctioning in European Competition Law, (2010) *CompLRev* 7 (1), 49.

²⁰⁸⁰ Cf. *Scordamaglia*, *ibid.*

²⁰⁸¹ ECJ of 29.6.2006, C-289/04 P, *Showa Denko vs. Commission*, [2006] ECR I-5859, para. 57, and Case C-308/04 P, *SGL Carbon vs. Commission* [2006] ECR I-5977, para. 32.

²⁰⁸² Cf. *Scordamaglia*, *ibid.*

²⁰⁸³ ECJ of 14.7.1972, ICI, [1972] ECR-619 (665), WuW/E EWG/MUV 269; furthermore: Case 52/69, *Geigy vs. Commission*, [1972] ECR- 837, WuW/E EWG/MUV 287; Case 53/69, *Sandoz vs. Commission*, ECR-1972, 845; ECJ of 22.1.1974, joined cases 6, 7/73, *Commercial Solvents vs. Commission*, [1974], ECR 225, para. 36 et seq.

result of their economic affiliation.²⁰⁸⁴ Hereby the Court was in effect able to avoid the determination of a specific principle of international law for the justification of the Commission's jurisdiction.

As indicated above, the increased economic interrelation of states - and with it the expansion of international corporate groups - has led to the question of how to consider these corporate affiliations when ruling on international antitrust cases.

General base of reference for assessing corporate affiliations is the above-mentioned **notion of 'corporate control'**, namely whether a parent company is able to exercise 'decisive influence' on its subsidiaries' market conduct. The above analysis has shown, however, that complexities of intra-enterprise control relationships are not always entirely transparent.²⁰⁸⁵ The current inconsistency of assessing 'decisive influence' between economically affiliated companies for attributing conduct and responsibility between them has therefore led to the criticism of the Court's application of the 'single economic entity'-doctrine outlined above.²⁰⁸⁶

The Court has effectively applied this approach of considering 'economic entities' for assessing the EU's jurisdictional reach since its ruling on the Commission's *Dye-stuffs* decision.²⁰⁸⁷ In this case it formulated, for the first time, certain principles for attributing conduct within a corporate group. On the undertakings' objection to the Commission's jurisdiction the ECJ held that:

"[126] In a case of concerted practice, it is first necessary to ascertain whether the behavior of the applicant manifested itself in the Common Market.

*[127] It follows from what has been said that the increases in question took effect in the common market and concerned competition between manufacturers operating therein."*²⁰⁸⁸

From this the ECJ deduced the actions for which the fines had been imposed to 'constitute practices carried on directly within the common market'.²⁰⁸⁹ According to the Court, this was due to the fact that the parent company of *ICI* had made use of its power of direction over its subsidiaries in order to ensure the application of its own decision, namely to raise prices on the European market.²⁰⁹⁰

In its assessment of the case, the Court avoided a concrete statement on the debate of the application of the principle of 'territoriality' or the 'effects'-doctrine for extending the Commission's jurisdiction to undertakings incorporated in third countries.²⁰⁹¹ Though the Court's wording seems similar to its approach in the subsequent case of '*wood pulp*', the Court essentially determined the effectuated conduct in the territory of the Common Market simply by treating the European subsidiary and its foreign parent company as a 'single entity', allegedly

²⁰⁸⁴ Cf. Lane, EC Competition Law, (2000), 284; Reh binder, in: Immenga/Mestmäcker, Kommentar zum EG-Wettbewerbsrecht, Vol. 1, (1997), 72, para. 58; Riesen kampff, Haftung der Muttergesellschaft für kartellrechtswidriges Verhalten der Tochtergesellschaft, WuW 1/2001, 357.

²⁰⁸⁵ Wallace, *ibid.*

²⁰⁸⁶ See essentially 2.2.2., § 2.4. above.

²⁰⁸⁷ IV/26.267, *Dyestuffs*, OJ [1969] Nr. L 195/11. In detail, see 2.2.1 above.

²⁰⁸⁸ ECJ of 14.7.1972, Case 48/69, *Imperial Chemical Industries Ltd. vs. Commission of the European Community*, ECR [1972], ECR 619.

²⁰⁸⁹ ECJ of 14.7.1972, Case 48/69, *Imperial Chemical Industries Ltd. vs. Commission of the European Community*, ECR [1972], ECR 619.

²⁰⁹⁰ Under a precise assessment of the aspect of an 'attribution' of conduct between legally independent companies this instance nevertheless amounts to an actual involvement of the parent company in the cartel 'by means of its subsidiary company.' On the question whether this was really the fact in the precise case, see right below.

²⁰⁹¹ Cf. Reh binder in: Immenga/Mestmäcker, Einleitung, E. Geltungs-und Anwendungsbereich, para. 56.

addressed by Art 101 TFEU. The aspect of an ‘implementation’ or - in the concrete case - ‘enforcement’ of the foreign parent company’s decision was therefore assessed upon the latter’s exertion of ‘control’, constituting the essential requirement of the existence of a ‘single economic entity’.

Owing to what is regarded as an inadequate handling of the *Dyestuffs-case*, the assessment of an attribution of liability was seen to be left ill-defined, prompting the critique that the reasoning of the Court essentially fell below the standard that national courts are obliged to consider.²⁰⁹² In this regard it is important to point out once more that from the existence of mere ownership criteria, essentially conferring upon the parent company of *ICI* the possibility to control its subsidiary’s conduct,²⁰⁹³ the Court assumed that initial instructions of the latter were equally mandatory in regard to consequent illicit price increases without verifying whether such instructions actually existed.²⁰⁹⁴ It has thus been observed that, “*in addition to the failure to respect the independent legal personalities of the companies concerned, parental control over subsidiaries was found on remarkably little evidence.*”²⁰⁹⁵

By clarifying that the conduct had directly taken place in the Community however, the Court seemed to disregard the ‘effects’-doctrine (at least for these constellations) and to instead rely on the exertion of ‘control’ by the foreign parent companies.

In minimizing the requirements for the assumption of ‘decisive influence’ in its further decisions, the Court furthermore susceptibly extended the Community’s scope of jurisdiction.²⁰⁹⁶ In the *Chiquita* case, for instance²⁰⁹⁷ the Commission was not even required to prove the existence of ‘actual influence’. The mere existence of a relationship of corporate dependence was rather deemed sufficient to affirm the latter’s competence. It has been outlined in the previous analysis that this is also the approach currently endorsed by the ECJ for attributing conduct between affiliated undertakings.

4.2.3. The Consideration of Compliance Measures under the Aspect of ‘Positive Comity’

The European approach to assessing the attribution of liability under the notion of ‘corporate control’ has been criticized to essentially disregard the concept of ‘limited liability’ under corporate law, applying all too often the ‘two-as-one’ assumption to wholly owned subsidiaries without sufficient evidence of collusion’.²⁰⁹⁸ By analogy to the traditional doctrine of corporate

²⁰⁹² *Mann*, The Dyestuffs Case in the Court of Justice of the European Community, 22 International and Comparative Law Quarterly (1973), 35, 48 as cited in: *Griffin*, The Power of Host State Countries over the Multinational: Lifting the Veil in the European Economic Community and the United States, 6 Law and Policy in International Business (1974), 404.

²⁰⁹³ For the view that the mere capacity to control is sufficient (and an actual exertion of control on the part of the parent company not prerequisite) for the applicability of the ‘concern-privilege’, see: *Gleiss/Hirsch*, EG-Kartellrecht, Art 85, para. 196; *Schroeder* in: Wiedemann, Handbuch, § 8, para. 5; *Roth/Ackermann*, in: Frankfurter Kommentar, Grundfragen Art 81 Abs.1 EG-Vertrag, para. 217; *Ebel*, Kartellrecht, Art 85, para. 30.

²⁰⁹⁴ Cf. *Wallace*, The Multinational Enterprise, 644.

²⁰⁹⁵ *Alford*, The Extraterritorial Application of Antitrust Laws: The United States and European Community Approaches, 33 Virginia Journal of International Law (1992), 31; as cited by *Wallace*, *ibid.*

²⁰⁹⁶ Cf. *Schwarze*, WuW 12/2001, 1194.

²⁰⁹⁷ ECJ of 14.2.1978, C-27/76, *United Brands vs. Commission of the European Community*, [1978], ECR-207.

²⁰⁹⁸ See e.g. *Griffin*, The Power of Host Countries over the Multinational: Lifting the Veil E.C./U.S., 6 Law and Policy in International Business (1974), 395. For this necessity, see already page 185 f above.

law, commentators on the European institution's use of the 'economic entity theory' have even described its effects as "*piercing the corporate veil, Community style*".²⁰⁹⁹

As indicated above, however, under the concept of corporate '**enterprise law**,' denoting an appropriate assessment of the factual realities of international corporate affiliations, the mere ownership of a subsidiary is not sufficient to subject a parent company to liability and, as a consequence, foreign jurisdiction. The principles of enterprise law are the necessary correlate to the standard of 'legal separation' under the traditional principle of corporate 'entity law' according to which a disregard of the corporate form is legitimate only in 'exceptional circumstances'.²¹⁰⁰

Thus, 'enterprise principles' building on statutory ownership, strengthened by the functional standard of an 'integrated enterprise,' and thus focusing on the realities of the control-structure within the corporation²¹⁰¹ are assertive for an appropriate assessment of responsibility in antitrust law.²¹⁰² Because the principles of international law, to date, are developed according to entity law,²¹⁰³ it is essentially left to domestic law to clarify the underlying legal problem of attributing liability confronting multinational enterprises today.

The problem hereby is that undertakings possessing international subsidiary companies will find themselves exposed to substantially different antitrust liability regimes. This can neither be in the sense of harmonizing national competition law regimes in order to foster an concerted antitrust enforcement on an international level, nor in favor of positive comity required for such an efficient coordination of antitrust policy of the various national enforcement agencies. As observed by Professor *Blumberg*, "*the problem of assuring the effectiveness of national policy creates an enormous pressure for the assertion of extraterritorial jurisdiction over foreign subsidiaries and affiliates of domestic multinational groups*".²¹⁰⁴

To round up the assessment of the problem inherent to the European practice of holding foreign parent companies liable, a brief analysis of U.S. antitrust practice on the 'single entity doctrine' and an attribution of corporate liability is instructive.

4.2.3.1. Different Substantive Approaches to Parental Liability: Comparison to U.S. Practice

²⁰⁹⁹ See *Filgar/Helling*, Enforcement of the European Community's Antitrust Laws: The Single Enterprise Theory, in: *The Law of Transnational Business Transactions*, Nanda (ed.), (1986), 11-21; *Oliver*, Approaches to Doing Business in: ABA N'l Inst., Current Legal Aspects of Doing Business in the EEC (1978), 22, as cited by *Schenck*, Lifting the Veil on the Economic Entity Theory, U. Pa. J. Int'l Bus. L., [1989], 509, who even asserts that the ECJ accordingly essentially understands the 'economic entity theory' simply as an instance of 'veil-piercing', whereby the separate legal personality of the 'Community subsidiary' is ignored in order to reach its corporate shareholders.

²¹⁰⁰ For an assessment of the areas where this may be possible in the area of European competition law, see 3.2.2.2. above.

²¹⁰¹ Cf. *Blumberg*, Conn. L. Rev (1995-1996), 306/307.

²¹⁰² For a detailed analysis of the necessity of the Commission and the ECJ to therefore undertake a detailed inquiry into the anti-competitive economic effects manifested in the Common Market as a result of the the foreign parent company's extent of exerting 'control' on the European subsidiary, see already: *Mann*, The Dyestuffs Case in the Court of Justice of the European Community, 22 Int'l & Comp.L.Q (1973), 48-50; and *Allen*, The Development of European Economic Community Antitrust Jurisdiction over Alien Undertakings, in 35 Legal Issues of European Integration (1974), 60, as cited by *Schenck*, U. Pa. J. Int'l Bus. L., [1989], 515.

²¹⁰³ See *Blumberg*, The Multinational Challenge, 170.

²¹⁰⁴ *Blumberg*, The Multinational Challenge, 172.

For U.S. antitrust law, the case of *Copperweld Corporation vs. Independence Tube Corporation* constitutes the correlate to the Commission's decision in *Christiani and Nielsen*.²¹⁰⁵ In this case, the U.S. Supreme Court ruled that a parent company could not engage in agreements restricting competition with its wholly-owned subsidiaries, because they constitute a 'single economic unit' for the purpose of antitrust law.²¹⁰⁶ Even if this assessment of intra-group agreements constituted the well anticipated abrogation of the 'intra-enterprise conspiracy doctrine'²¹⁰⁷ previously pertinent to U.S. antitrust law, it has been pointed out that the assessment inherent to this decision is reserved for the specific issue of intra-group agreements.²¹⁰⁸

In contrast to the current approach endorsed by the ECJ, U.S. courts have therefore objected to holding parent companies liable for antitrust breaches of their subsidiaries on the basis of the *Copperweld*-decision.²¹⁰⁹ As indicated above, 'piercing the veil'²¹¹⁰ jurisprudence dominates common law cases involving the imposition of liability on one affiliate of a corporate group for acts of another.²¹¹¹

One of the earliest pronouncements on 'lifting the corporate veil'-jurisprudence comes from the 1897 English House of Lords decision in *Salomon vs. Salomon*,²¹¹² establishing the theory of 'legal separation' in English law. According to this approach, a parent and subsidiary company are not to be regarded as a 'single entity', implying the parent company's liability for the acts of its subsidiaries even in cases of 100% ownership due to their separate incorporation.²¹¹³

Two broad qualifications have nevertheless been accepted as an exemption to the principle of 'legal separation'. The rule is not to be applied in case it can be established, that

- the controlled company was employed solely as an 'agent' of the parent company, or
- where there has been an abuse of the corporate form.²¹¹⁴

The concept of 'legal separation', fundamentally meaning that mere ownership of a subsidiary does not subject the parent company to jurisdiction or liability as long as the formalities of

²¹⁰⁵ *Copperweld vs. Independence Tube Corp.*, 104 S. Ct. 2731 (1984). Interestingly, this judgment was contrary to previous U.S. case-law and the Supreme Court followed the more appropriate practice endorsed under EC law. For the analysis of the Commission's decision see 2.1.1.1. above.

²¹⁰⁶ *Copperweld vs. Independence Tube Corp.*, 104 S. Ct. 2731 (1984).

²¹⁰⁷ For the history and development of this doctrine, see e.g. *Potrafke*, Kartellrechtswidrigkeit konzerninterner Vereinbarungen, 23 ff.

²¹⁰⁸ See *Wallace*, The Multinational Enterprise, 632 and *Calkins*, cited below.

²¹⁰⁹ *Calkins*, Antitrust L.J. 63 (1995), 345, 376 f; see e.g. *Bell I Bus. Sys. Services v. Hitachi Da Sys. Corp.*, 849 F. Supp. 702, 707 (N.D. Cal.1994); *Kacprzycki v. A.C.& S., Inc.*, No 88-34-JRR, 1990 WL 605604, S. *4 (D.Del.Ocr. 31, 1990); *United N'l Records, Inc. v. MCA, Inc.*, 616 F. Supp. 1429, 1433 (N.D. Ill.1985): "The Plaintiff's reliance upon *Copperweld* [...] is misplaced [...]. The *Copperweld* decision [...] did not overrule state corporate law which provides for limited liability of a parent corporation", as cited by *Menz*, Wirtschaftliche Einheit und Kartellverbot, 141.

²¹¹⁰ This doctrine is also discussed under the terms of 'alter ego', 'adjunct', or 'mere agency or instrumentality'-doctrine.

²¹¹¹ Cf. *Blumberg*, The Law of Corporate Groups, (1987), Vol III (Substantive Law), 105.

²¹¹² *Salomon vs. A. Salomon & Co., Ltd.* [1987] A.C. 22.

²¹¹³ Cf. *Wallace*, The Multinational Enterprise, 632.

²¹¹⁴ *Wallace*, ibid.

separate incorporation and identity are maintained,²¹¹⁵ essentially still persists as a cornerstone of company law in common law today.²¹¹⁶

This concept has also been relied on by those Courts that have rejected to apply the ‘Copperweld-principle’ to cases of attributing liability for antitrust infringements.²¹¹⁷ Nevertheless, regarding the current trends in ‘veil lifting’, it has been assessed that

*“[t]he occasions for the exceptional disregard of entity [legal separation] typically have been determined on a case-by-case basis, yielding the hundreds of irreconcilable decisions [that constitute] the much criticized jurisprudence of ‘piercing the corporate veil.’”*²¹¹⁸

Today’s cases are, however, essentially departing from the ‘fraud requirement’ as an essential prerequisite for the original dogma of ‘veil-lifting’ in favor of a more realistic evaluation of the factors pointing to an actual exertion of ‘control’ and therefore increasingly take into account the ‘economic realities’ behind the formal facts.²¹¹⁹

This conclusion leads back to the question of the **international implications** resulting from the diverging standards of assessing corporate group liability under substantive antitrust law. In this regard it has been asserted that because *“the principles of international law developed thus far are grounded on entity law [legal separation][...] they [...] utterly fail to address the underlying legal problems presented by multinational corporate groups.”*²¹²⁰ The consequential vacuum this creates was seen to leave the international business world *“in urgent need of [...] commonly acceptable, newer principles reflecting more accurately, and responding more adequately to the underlying economic realities.”*²¹²¹

Although the whole area of corporate groups has resulted in similar but essentially different - sometimes only insufficient - considerations of enterprise principles, ‘enterprise law’ has not yet attained the status of general acceptance under international law.²¹²² This has substantial consequences not only for jurisdictional conflicts over antitrust matters but also for the effectiveness of national or supranational legal principles.

The rationale of granting treble damages to foreign plaintiffs under § 6a FTAIA, for instance, is to ensure that the offender is not only deprived of the financial gain of the committed infringement, but also that consumers (worldwide) enjoy the special deterring effect resulting

²¹¹⁵ See *Blumberg*, The Law of Corporate Groups, 1.01, 1.

²¹¹⁶ See *Schmitthoff*, Group Liability of Multinationals, in: Simmonds, (ed.), Legal Problems of Multinational Corporations, British Institute of International and Comparative Law, London (1977), 79; and the lecture by *Templeman*, of Nov 15, 1989: Company Law Lecture – Forty Years on Company Law (1990), 10 as cited by *Wallace*, *ibid.*

²¹¹⁷ For example, in *Hargrave vs. Fireboard Corp.* (170 F. 2d 1154 (5th Cir. 1983), 1159), the court reverted to the traditional rule holding that *“the mere existence of parent-subsidiary relationship is not sufficient to warrant the assertion of jurisdiction.”* See *Aronofsky*, Piercing the Transnational Corporate Veil: Trends, Development, and the Need for Widespread Adoption of Enterprise Analysis, 10 North Carolina Journal of International Law & Commercial Regulation (1985), 59, as cited by *Wallace*, The Multinational Enterprise, 646.

²¹¹⁸ *Blumberg*, The Law of Corporate Groups, xxxvi, as cited by *Wallace*, 647; Cf. also *Meyers*, Partial Ownership of Subsidiaries, Unity of Purpose, and Antitrust Liability, 68 U. Chi.L.Rev. 1401, 2001; arguing for the necessity of a ‘modified control approach’; and *Calkins*, Copperweld in the Courts: The Road to Caribe, Antitrust L.J. 63 (1995), 345, 376.

²¹¹⁹ See *Blumberg*, The Multinational Challenge, 96 and 102.

²¹²⁰ *Blumberg*, The Multinational Challenge, 170. See already 4.2.2.3.

²¹²¹ *Idem*, as cited by *Wallace*, The Multinational Enterprise, 656.

²¹²² *Wallace*, The Multinational Enterprise, 657.

from the threat of the substantial cost of private damage claims. Hence, this provision allows for a claim for damages of foreign parties in case they have verifiably been hurt by the illicit conduct of U.S. based companies. Courts interpreting the FTAIA have accordingly held that a U.S.-based subsidiary's participation in an anticompetitive agreement does not trigger U.S. antitrust jurisdiction in case there is not sufficient evidence pointing to a 'direct, substantial, and reasonably foreseeable effect' on the U.S. market.²¹²³ Regarding these constraints for allowing litigation to foreign parties in U.S. courts²¹²⁴ and the distinct standard of assessing group-internal attribution of antitrust liability, it seems doubtful whether the preconditions of § 6a FTAIA will be considered fulfilled in case that an American company is convicted under the current approach of holding parent companies liable in EU case-law.²¹²⁵ Regardless of whether one may share the view of a positive deterring effect of private damage claims,²¹²⁶ this situation may negatively bias the underlying principle of 'deterrence', essentially coining both American and European antitrust law.

Even if it is clear that the ownership/management issue never ceases to play a key role for attributing liability between companies of a corporate group, it is not always evident which standard will dominate in cases of 'veil-lifting'.²¹²⁷ In most instances, management 'control' - including the assessment of 'decisive influence' - has been more determinative than ownership, even if it cannot be denied that ownership has continued to play an important role for the purpose of 'veil-lifting'.²¹²⁸ This situation will doubtlessly persist until a more internationally consistent approach is adopted.

4.2.3.2. The Reference of 'Best-Practice-Compliance' for Internationally Active Corporate Groups

As explained above, according to the Commission and the European Courts' understanding, the key function of fines imposed for cartel infringement is 'deterrence'.²¹²⁹ In disregarding compliance measures, the Commission nevertheless deprives itself of a feasible and successful approach to fighting international cartels given this objective.²¹³⁰

Antitrust compliance is even seen as one of the burdens of international corporate groups participating on the European market.²¹³¹ The need for compliance is not only highlighted by the increasing convergence of U.S. and E.U. antitrust law,²¹³² but also by the global movement

²¹²³ Cf. *Beckler and Kirtland*, Extraterritorial Application of U.S. Antitrust Law, 38 Tex. Int'l L.J. 11 (2003), 20.

²¹²⁴ Despite the fact that this aspect is not deemed particularly relevant in practice (see e.g. *Schenck*, U. Pa. J. Int'l Bus. L., [1989], 510), it is illustrative for the possible negative effects that a substantially different approach to attributing corporate liability may have.

²¹²⁵ This especially holds true for a possible conviction of a foreign parent company under the 'rebuttable' presumption for wholly owned subsidiaries, created by the recent case of *Akzo Nobel* (C-97/08 P, [2009] ECR I-0823).

²¹²⁶ Against this view, see e.g. *Wils*, The Optimal Enforcement of EC Antitrust Law, 188 ff.

²¹²⁷ *Wallace*, The Multinational Enterprise, 658.

²¹²⁸ Cf. *Wallace*, *ibid*, 659.

²¹²⁹ See also *Schwarze/Bechtold/Bosch*, Deficiencies, *Gleiss/Lutz* (2008), 64.

²¹³⁰ See 4.1.2. above.

²¹³¹ Cf. *Wegener*, Antitrust for Companies Operating in Europe, available at: http://www.fredlaw.com/articles/marketing/mark_0505_rjw.html.

²¹³² *Wegener*, *ibid*.

towards holding individuals accountable for antitrust infringements.²¹³³ Modern compliance programs, carefully instructed and consciously applied, have been found to greatly reduce antitrust exposure while educating business men and women in adopting flexible decisions, essentially necessary for successfully competing on international markets.²¹³⁴

In various jurisdictions, public authorities therefore reward the existence of such programs by classifying them as mitigating circumstances when setting fines.²¹³⁵ According to the U.S. sentencing guidelines, for instance, ²¹³⁶ convicted organizations are able to reduce the amount of fines by demonstrating that

- they fully cooperate with the investigation,
- affirmatively accept responsibility for the criminal conduct,
- reported the offense to the appropriate governmental authorities prior to an imminent threat of disclosure, and within a reasonably prompt time after becoming aware of the illegal activity, and
- had in place at the time of the offense *an 'effective compliance and ethics program'*.²¹³⁷

While chapter eight of the guidelines deals with fining organizations, chapter two contains a detailed assessment of the circumstances to consider when calculating culpability despite an effective compliance and effects program and accordingly the amount of a fine in case that an infringement has been committed anyhow. The sentencing guidelines therefore provide for a 'best-practices' standard by which an antitrust compliance program can and will be judged.

Even if the guidelines are not mandatory, many courts follow their rules regarding the fact that they constitute a reasonable and efficient instrument for setting fines given the objective of deterring companies from future misconduct.²¹³⁸

The practical relevance for companies to implement an effective compliance program had previously been confined by the fact that such measures were not considered a mitigating circumstance²¹³⁹ by the antitrust division of the Department of Justice in case that 'high-level officials' were involved in the infringement.²¹⁴⁰ After a public hearing issued by the DOJ in January 2010 on the matter, this situation has been changed. The recently amended sentencing guidelines make antitrust compliance programs more valuable than ever as a 'compliance credit'

²¹³³ See *Hammond*, Deputy Assistant Attorney General for Criminal Enforcement at the Antitrust Division of the DOJ, Charting New Waters in International Cartel Prosecutions, (2006), available at: <http://www.justice.gov/r/public/speeches/214861.htm>.

²¹³⁴ See *Fleet*, Compliance Manuals for the New Antitrust Era, (1990) American Bar Association, Introduction, viii.

²¹³⁵ *Schwarze/Bechtold/Bosch*, Deficiencies, *ibid*.

²¹³⁶ On the history and binding effect of the guidelines, see *Kathleen Beasley*, Application of the Federal Sentencing Guidelines to Organizations in Antitrust Cases, for: The International Cartel Workshop, February 10-12 (2010), Paris, available at: <http://www.haynesboone.com/files/Publication/3ab4ca46-30a3-4f9a-9fe2-2529c8925573/Presentation/PublicationAttachment/8e2d88d9-999e-4c04-864a-2ddbc33354a4/ICW%20Guidelines%20paper.pdf>.

²¹³⁷ USSG § 8.C. 2.5 (f) & (g), as cited by *Howell*, Sentencing of Antitrust Offenders: What does the Data Show?, available at: [http://www.uscc.gov/About the Commission/About the Commissioners/Selected Articles/Howell Review of Antitrust Sentencing Da.pdf](http://www.uscc.gov/About%20the%20Commission/About%20the%20Commissioners/Selected%20Articles/Howell%20Review%20of%20Antitrust%20Sentencing%20Da.pdf).

²¹³⁸ See *Beasley*, Application of the Federal Sentencing Guidelines to Organizations in Antitrust Cases, 1.

²¹³⁹ Arg. a *minor ad maius*, they were could also not be assumed as a possibility for avoiding liability.

²¹⁴⁰ See e.g. *Banks*, Is there a Secret Antitrust Division Policy Regarding Corporate Compliance Programs?, available at: <http://antitrustconnect.com/2011/09/13/is-there-a-secret-antitrust-division-policy-regarding-compliance-programs/>.

is now available to a company even if its most senior management is involved in misconduct.²¹⁴¹ The credit is nevertheless available only upon two strict conditions: first, the day-to-day compliance manager must be provided 'express authority to communicate personally' to the board or its audit committee 'promptly on any matter involving criminal conduct or potential criminal conduct'.²¹⁴² And second, this manager should report 'no less than annually' about the program.²¹⁴³ Currently, many compliance measures do not meet these two criteria. The new regulation is therefore deemed to substantially influence the practical relevance of 'best-practices' compliance in the light of an antitrust infringement.

Because the European Commission currently does not allow for a consideration of compliance measures when assessing intra-group liability, internationally active companies see themselves confronted with an ambiguous standard of law-abiding conduct. As mentioned above, this cannot be beneficial for prosecuting international cartel offences.

Under the aspect of international comity, which must be regarded in case companies active on two distinct markets are not able to comply with the standard of fault under both jurisdictions, the Commission is well advised to change its current position towards compliance measures. To date, particularly foreign parent companies operating subsidiaries on the European market are deprived of any means to positively influence their subsidiaries' conduct in order to avoid responsibility. Particularly with respect to the diverging standards of attributing liability within corporate groups, a coordinated, that is, internationally consistent method for assessing compliance efforts could constitute a feasible instrument to overcome the current incongruity of attributing liability between corporate group companies located in different states.

Taking into account the prevalent importance of this topic under aspects of general and special prevention and the procedural means antitrust enforcement bodies possess, this approach also seems the most feasible from an 'international law' perspective. In considering a company's compliance measures, the European Commission could support deterring international corporations from engaging in anticompetitive conduct and hereby contribute to a harmonization of international standards in the area of antitrust law.

4.2.4. Résumé

Regarding the current difficulty of a coherent substantive approach to attributing liability within international corporate groups, a simple demand for courts to comply with the standards of comity and non-intervention under international law is not enough. The concept of positive comity is no longer helpful when mandatory domestic (economic) law exists.²¹⁴⁴ In this regard a **political decision**, deviating from binding rules of economic law, cannot be expected from the enforcing authority.²¹⁴⁵ It is important therefore to engage in efforts of attaining more convergence in procedural and, even more important, substantive law for assessing international antitrust cases. For this reason, the assessment of attributing antitrust infringements within a corporate group is merely one, however one of the most prominent and urgent cases in which structural differences should be overcome in order to mitigate and avoid

²¹⁴¹ See *Bono/Chippendale*, Antitrust Compliance Managers Need Direct Board Access to Satisfy New U.S. Sentencing Guidelines, available at: <http://www.mckennalong.com/publications-advisories-2527.html>.

²¹⁴² Changes to § 8 C.2.5 (f).

²¹⁴³ *Bono/Chippendale*, *ibid.*

²¹⁴⁴ *Schwarze*, WuW 12/2001, 1202.

²¹⁴⁵ *Mestmäcker*, Staatliche Souveränität und offene Märkte, *RabelsZ* 52 (1988), 205, 250.

jurisdictional conflict.²¹⁴⁶ An appropriately coordinated approach towards corporate compliance would therefore constitute an important first step in the direction of harmonizing the various economic concepts and interests that come into play in this regard.

Conclusion

The analysis of the Commission's and the ECJ's practice has shown that the concept of a 'single economic entity' is by no means a consistent concept in European competition law. Rather, the term is drawn on in order to comprehend the economic affiliation of several legally independent companies of a corporate group in order to assess specific legal consequences of their level of corporate integration.²¹⁴⁷

As may be derived from the discussion of case-law above, the Commission and the ECJ have at no point in time applied the cartel ban in an unconfined manner for agreements between companies of a corporate group.²¹⁴⁸ Upon the recognition that agreements between such companies must be exempted from Art 101 (1) TFEU in order to duly consider the purpose of the said provision, namely to protect a company's competitive corporate autonomy, the 'single economic entity'-doctrine was originally used to justify the fact that no distortion to competition existed between affiliated group companies. While the term of a 'single economic entity' was principally used to denote the necessary teleologic reduction of Art 101 (1) TFEU for agreements between group undertakings, this concept was transferred to the practice of attributing liability between such companies in an undifferentiated manner.²¹⁴⁹ Despite the fact that this ignores the distinct objectives of these two legal issues for the applying Art 101 (1) TFEU to a corporate group companies, the danger of this approach may particularly appear given the alienated use of the term of an 'undertaking' in European antitrust law.²¹⁵⁰

While the previous analysis has demonstrated that the fact of a 'distortion to competition' is the appropriate reference for assessing the exemption of certain group-internal agreements from Art 101 (1) TFEU in a dogmatically coherent way,²¹⁵¹ attributing liability between companies of a corporate group is crucial to address the factual economic strength behind anticompetitive behavior. The latter practice constitutes the necessary correlate to the doctrine of 'legal separation', constituting a generally recognized standard in all industrial states today.²¹⁵² For this reason, the European competition authorities should be careful to respect established legal exceptions to this standard existing in its various member states, i.e. principles of 'piercing the corporate veil'. This approach is furthermore necessary to take into account the specific 'control'-relationship between legally distinct companies of a corporate group as propagated by

²¹⁴⁶ See also the comprehensive literature on conflicts on international merger cases, see e.g. Commission Decision IV/M.877 of 30.7.1997, *Boeing/McDonell Douglas*, [1997] OJ Nr. L 336.

²¹⁴⁷ Cf. *Pohlmann*, Der Unternehmensverbund, 74.

²¹⁴⁸ Cf. *Buntscheck*, Konzernprivileg, 139.

²¹⁴⁹ See *Hofstetter/Luderscher*, Der Konzern als Adressat, in: FS von Bühren (2009), 488.

²¹⁵⁰ See 3.1.1.2. above.

²¹⁵¹ This fact of Art 101 (1) TFEU is particularly apt to demonstrate the necessity of a restrictive teleologic interpretation of this norm due to its close connection to the confined purpose of the cartel ban of protecting an entity's competitive autonomy. Cf. *Buntscheck*, *ibid.*

²¹⁵² Cf. *Blumberg*, The Law of Corporate Groups, (1985), Vol. II, (Bankruptcy Law), 605 ff, as cited in this regard by *Hofstetter*, Sachgerechte Haftungsregeln, 77, see also OECD Guidelines for Multinational Enterprises, of 25.5.2011.

corporate ‘enterprise law’. Any other approach would not only contravene basic principles of ‘entity law,’²¹⁵³ but also ignore established legal principles of the European member states. It has been analyzed, that this would substantially reduce the eminence of ECJ adjudication that is nevertheless necessary to promote the European integration process on a legal level. It has furthermore been argued that Art 3 of the European Merger Regulation provides a particularly appropriate reference for assessing the concept of corporate ‘control’ in European competition law, as it provides a consistent legal basis and at the same time allows for a differentiated approach to the notion of corporate ‘control’ for the distinct legal issues of assessing the conduct of corporate group companies under Art 101 (1) TFEU.

These (teleologically) distinct purposes of applying the cartel ban on corporate groups should not be ignored by factually applying the ‘single economic entity’-doctrine in an undifferentiated manner.²¹⁵⁴ Such an approach is not only dogmatically flawed, but furthermore infringes a number of general legal principles, essentially inherent to European competition law. The use of this term must rather strictly allude to the respective purpose of assessing the economic integration of corporate group companies and should not be employed to conceal the underlying objectives of legally separate issues.

For the issue of attributing liability, the use of the ‘single economic entity’- concept must therefore effectively adhere to the standard of the fault anchored in Art 23 of Regulation No. 1/2003 according to which a corporate entity may only be held responsible for its own culpable behavior. In light of the criminal-akin character of antitrust fines, this reference to a company’s own breach of competition law is also necessary to respect pertinent principles of criminal law.²¹⁵⁵ Thus, in contrast to the application of the so-called ‘group privilege’ where the mere possibility of the parent company to exert ‘corporate control’ is sufficient, it must be demonstrated that a controlling parent company has *actually* exercised ‘decisive influence’ on its subsidiary’s market conduct.

Because the argument of ‘negligence’ or a ‘lack of awareness’ that a restrictive conduct constituted a breach of Art 101 (1) TFEU will nevertheless be rejected fairly automatically,²¹⁵⁶ the sole case in which this standard of Art 23 of Reg. No. 1/2003 may be deemed relevant is precisely the area of *attributing illicit conduct* between legally separate companies of a corporate group.²¹⁵⁷ Where a parent company is able to demonstrate that it did everything in its organizational means to prevent the (management) of a subsidiary company to engage in an anticompetitive conduct, it should, under the standard of ‘negligence’, not be held liable for an antitrust infringement committed anyhow. In this case namely, a controlling parent company cannot be blamed for ‘organizational misconduct’.

Because the sole means of a controlling company to steer and review the behavior of individuals acting within an undertaking is the implementation of compliance measures, it has been suggested that the Commission’s burden of proving that the parent company could not be blamed for negligent behavior could be reversed in the sense of such a ‘compliance defense’.²¹⁵⁸ Where a controlling parent company is hereby able to show that it has appropriately reviewed

²¹⁵³ (-constituting the basic standard of company law on an international level-).

²¹⁵⁴ For the Commission’s and the ECJ’s current approach, see however 3.1.1.2, § 3.

²¹⁵⁵ In detail, see 2.2.2.2., § 2.4. above.

²¹⁵⁶ Cf. *Faull/Nikpay*, The EC Law of Competition, (2007), 8.592.

²¹⁵⁷ This is particularly the case where the respective companies were active on (geographically) distinct (product) markets and the controlling parent company verifiably refrained from interfering with the latter’s commercial conduct in the strict sense (, that is, where it did not exert a decisive amount of influence on its subsidiary’s market conduct). In detail see 3.2.2.2.

²¹⁵⁸ Where this defense is successful, a parent company should conversely not to be held liable for illicit behavior committed within a separate legal entity of the same group.

its subsidiary's conduct under the standard of 'best practices'-compliance, it should be refrained from blaming it for an antitrust infringement of its subsidiary.²¹⁵⁹ Because corporate group companies today are essentially confronted with a substantially different recognition of corporate compliance, a consistent approach to compliance measures²¹⁶⁰ would also be constructive for a necessary harmonization of holding parent companies liable for their subsidiary's anticompetitive behavior on an international level. Even if antitrust law today essentially depends on the different legal traditions of separate jurisdictions, such a convergence of assessing corporate group liability could respect the distinct national standards and at the same time foster global antitrust enforcement by granting an increased amount of legal certainty for companies active on an international level.²¹⁶¹

²¹⁵⁹ This includes abstaining from assessing an antitrust fine on the basis of the parent company's – worldwide- turnover.

²¹⁶⁰ On the positive effects of compliance measures, see already 4.1.2. above.

²¹⁶¹ The proliferation of competition systems around the world, recognized as part of economic liberalization and as an important tool for spurring innovation and economic growth, has nevertheless resulted in frequently burdensome compliance costs for international enterprises due to the existence of conflicting rules promulgated by the various antitrust authorities (See Global Competition Forum, <http://www.globalcompetitionforum.org>).

Bibliography

I. Books

1. *Antunes, José Engracia*: Liability of Corporate Groups: Autonomy and Control in Parent-Subsidiary Relationships in US, German and EU Law, Kluwer Law and Taxation Publishers, (1994).
2. *Anweiler, Jochen*: Die Auslegungsmethoden des Gerichtshofs der Europäischen Gemeinschaften, Peter Lang Verlag, Frankfurt am Main (1997).
3. *Barbist, Johannes/ Ahammer, Michael*: Compliance in der Unternehmenspraxis, Lexis Nexis Verlag, (2009).
4. *Baron, Michael/Federle, Anne/Jürgens, Robert*: Compliance im Kartellrecht, Verlag C.H. Beck, München (2011).
5. *Bechtold, Rainer*: Kartellgesetz, 4th ed, München (2006).
6. *Blank, Josef*: Europäische Fusionskontrolle im Rahmen der Art 85 und 86 des EWG-Vertrages, Nomos: Baden-Baden (1991).
7. *Blumberg, Philipp*: The Law of Corporate Groups, Substantive Law (Vol III), Little Brown and Company, Boston and Toronto (1987).
8. *Blumberg, Philipp*: The Law of Corporate Groups, Substantive Law (Vol III), Aspen Publishers, New York (2005).
9. *Border, Douglas F.*: A Guide to US Antitrust Law, Sweet & Maxwell, London (2005).
10. *Buntscheck, Martin*: Das "Konzernprivileg" im Rahmen von Art 81 Abs. 1 EG-Vertrag, Nomos Verlagsgesellschaft, Baden-Baden (2001).
11. *Braun, Heiner*: Joint Ventures im amerikanischen und deutschen Internationalem Privatrecht, Peter Lang Verlag, Frankfurt (2000).
12. *Cseres, Katalin Judith*: Competition Law and Consumer Protection, Kluwer Law International, The Hague (2005).
13. *Connor, John M.*: Optimal Deterrence and Private International Cartels, Purdue University (2005).
14. *Dausen, Manfred*: Handbuch des EU-Wirtschaftsrechts, C.H. Beck, Munich (1999).
15. *Day Wallace, Cynthia*: The Multinational Enterprise and Legal Control: Host State Sovereignty in an Era of Economic Globalization, Martins Nijhoff Publishers (2002).
16. *Druey, Jean Nicolas; Vogel, Alexander*: Das Schweizerische Konzernrecht in der Praxis der Gerichte, Schulthess, Zürich (1999).
17. *Dyzenhaus, David*: Hard Cases in Wicked Legal Systems: Pathologies of Legality, Oxford University Press (2010).
18. *Dworkin, Ronald*: Taking Rights Seriously, Harvard University Press, Cambridge, Mass. (1977).
19. *Emmerich, Volker*: Kartellrecht, (2008), C.H. Beck, München (2008).
20. *Emmerich, Volker/Habersack, Mathias*: Konzernrecht, C.H. Beck, München (2010).
21. *Emmerich, Volker/Habersack, Mathias*: Aktien und GmbH-Konzernrecht, C.H. Beck, München (2010).
22. *Everling, Ulrich*: Das Europäische Gemeinschaftsrecht im Spannungsfeld von Politik und Wirtschaft, Baden-Baden (1985).
23. *Faull, Jonathan/ Nikpay, Ali*: EC Competition Law, Oxford University Press, New York, 2nd ed. (2007).
24. *Fischer, Klaus*: Wettbewerbliche Einheit und Fusionskontrolle, Dunker & Humblot, Berlin (1986).
25. *Fikentscher, Wolfgang*: Wirtschaftsrecht, Band I, C.H. Beck, München (1983).
26. *Franzen, Martin*: Privatrechtsangleichung durch die Europäische Gemeinschaft, De Gruyter: Berlin, New York (1999).
27. *Frese, Michael*, Sanctions in EU Competition Law: Principles and Practice, Dissertation

- (2012).
28. *Fuller, Lon*: The Morality of Law, Yale University Press, New Haven (1994).
 29. *Funck, Gerhard*: Konzerneinheit und Kartellverbot: Die kartellrechtliche Beurteilung von konzerninternen Verträgen, Heidelberg (1964).
 30. *Gansweid, Wolfgang*: Gemeinsame Tochtergesellschaften im deutschen Konzern- und Wettbewerbsrecht, Nomos-Verlagsgesellschaft, Baden-Baden (1976).
 31. *Gerber, David*: Law and Competition in Twentieth Century Europe – Protecting Prometheus, Clarendon Press, Oxford (1998).
 32. *Gifis, Steven H.*: Barron's Law Dictionary, New York (2003).
 33. *Goyder, D.G.*: EC Competition Law, Oxford (1998).
 34. *Hamann, H.*: Das Unternehmen als Täter im europäischen Wettbewerbsrecht, Studien zum Wirtschaftsstrafrecht,, Bd 2 (1992).
 35. *Harms, Wolfgang*: Konzerne im Recht der Wettbewerbsbeschränkungen, Köln (1968).
 36. *Hauschka, Christoph* : Corporate Compliance: Handbuch zu Haftungsvermeidung im Unternehmen, Verlag C.H. Beck, München (2010).
 37. *Hauschka, Christoph* : Corporate Compliance: Handbuch zu Haftungsvermeidung im Unternehmen, Verlag C.H. Beck, München (2010).
 38. *Heinichen, Christian*: Unternehmensbegriff und Haftungsnachfolge im europäischen Kartellrecht, Nomos Verlag, Baden-Baden (2011).
 39. *Herdzina, Klaus*: Wettbewerbspolitik, Stuttgart (1999).
 40. *Doris Hildebrand*: The Role of Economic Analysis in the EC Competition Rules, Kluwer Law International, The Netherlands, (2009).
 41. *Holubeck, Michael/ Potacs, Michael* (eds.): Öffentliches Wirtschaftsrecht, Springer Verlag, (2007).
 42. *Hofstetter, Karl*: Sachgerechte Haftungsregeln für Multinationale Konzerne: Zur zivilrechtlichen Verantwortlichkeit von Muttergesellschaften im Kontext internationaler Märkte, J.C.B. Mohr (Paul Siebeck), Tübingen (1995).
 43. *Hoppmann, Erich*: Wirtschaftsordnung und Wettbewerb, Baden-Baden (1988).
 44. *Jones, Allison/ Sufrin, Brenda*: EC Competition Law, Oxford University Press, 3rd edition, Oxford (2007).
 45. *Kling, Michael/Thomas Stefan*: Kartellrecht, (2007), Verlag Vahlen, München (2007).
 46. *Krimphove, Dieter*: Europäische Fusionskontrolle, Köln/Berlin/Bonn/München (1992).
 47. *Kurz, Stefan*: Das Verhältnis der EG-Fusionskontrollverordnung zu Artikel 85 und 86 des EWG-Vertrages, Peter Lang Verlag, Frankfurt (1993).
 48. *Lipowsky, Ursula*: Die Zurechnung von Wettbewerbsverstößen zwischen verbunden Unternehmen im EWG-Wettbewerbsrecht: eine Untersuchung der Spruchpraxis von Kommission und Gerichtshof der Europäischen Gemeinschaften von 1971, München (1987).
 49. *Legrand, Pierre*: Legal Traditions in Western Europe: The Limits of Commonality, in: Jagtenberg/Örücü/deRoom, Transfrontier Mobility of Law, London (1995).
 50. *Lutter, Marcus*: Konzernrecht im Ausland, Zeitschrift für Gesellschafts – und Unternehmensrecht, Walter de Gruyter, Berlin, New York (1994).
 51. *Lutter, Marcus/Hommelhoff Peter*: GmbH-Gesetz, Köln (2000).
 52. *Meessen, Karl*: Antitrust Jurisdiction Under Customary International Law, AJIL 78, (1984).
 53. *Meessen, Karl*: (ed.), Extraterritorial Jurisdiction in Theory and Practice, Kluwer Law International Ltd, The Hague (1996).
 54. *Meessen, Karl*: Völkerrechtliche Grundsätze des internationalen Kartellrechts, Nomos-Verlagsgesellschaft, Baden-Baden (1975).
 55. *Menz, Michael*: Wirtschaftliche Einheit und Kartellverbot: Die Stellung des Konzerns im Rahmen des Kartellverbots nach deutschem, europäischem und US-amerikanischem Recht, Duncker & Humblot, Berlin (2004).
 56. *Mestmäcker Ernst-Joachim/Schweitzer, Heike*: Europäisches Wettbewerbsrecht, Verlag C.H. Beck, München (2004).
 57. *Minchinton, A.*: Chartered Companies and Limited Liability, in: Limited Liability and the

- Corporation, T. Onhial ed., Croom Helm, London (1982).
58. *Oppermann, Thomas*: Europarecht, Verlag, C. H.Beck Verlag, München (2005).
 59. *Papakiriakou, Theodoros*: Das Europäische Unternehmensstrafrecht in Kartellsachen, Centaurus, (2002).
 60. *Pohlmann, Petra*: Der Unternehmensverbund im Europäischen Kartellrecht, Duncker & Humblot, Berlin (1999).
 61. *Potrafke, Christian*: Kartellrechtswidrigkeit konzerninterner Vereinbarungen und darauf beruhender Verhaltensweisen: nach § 1 Sherman Act, Art 85 EWGV und §§ 25,1 GWB, Nomos Verl.-Ges., Baden-Baden (1991).
 62. *Rittner, Fritz/ Dreher, Meinrad*: Europäisches und deutsches Wirtschaftsrecht, C.F. Müller Verlag, Heidelberg (2008).
 63. *Roberto/Petrin*, Organisationsverschulden aus zivilrechtlicher Sicht, in: M.A. Niggli/Marc Amstutz (ed.), Verantwortlichkeit im Unternehmen: Zivil- und strafrechtliche Perspektiven, Basel (2007).
 64. *Sandrock, Otto*: Grundbegriffe des Gesetzes gegen Wettbewerbsbeschränkungen, München (1968).
 65. *Shavell, Steve*: Foundations of an Economic Analysis of Law, Harvard University Press, Cambridge Massachusetts (2004).
 66. *Schmidt, Ingo*: Wettbewerbsrecht und Kartellrecht, Lucius & Lucius, Stuttgart (2005).
 67. *Schmitt, Carl*: Der Nomos der Erde im Völkerrecht des Ius Publicum Europaeum, Dunker & Humblot, Berlin (1960).
 68. *Schmidt, Karsten*: Gesellschaftsrecht, Verlag Schmidt, Köln/Berlin/Bonn/München (1997).
 69. *Schulze, Reiner/Zuleeg, Manfred* (eds.): Europarecht, Nomos-Verlag, Baden-Baden (2006)
 70. *Schweitzer, Michael/Hummer, Waldemar*: Europarecht, Luchterhand, Neuwied/Kriftel/Berlin (1996).
 71. *Shapiro, Scott J.*: Legality, Harvard University Press, Cambridge Massachusetts (2011), 197
 72. *Shue, Henry*: Basic Rights, Princeton University Press, New Jersey (1996).
 73. *Streinz, Rudolph*: Europarecht, Müller Verlag, Heidelberg (1995).
 74. *Thomas, Stefan*: Unternehmensverantwortlichekeit und -umstrukturierungen nach EG-Kartellrecht, Verlag C.H.Beck, München (2005).
 75. *Wallace, Cynthia Day*: The Multinational Enterprise and Legal Control: Host State Sovereignty in an Era of Economic Globalization, Martinus Nijhoff Publishers, Kluwer Law International, The Hague (2002).
 76. *Wiedemann, Gerhard*: Gemeinschaftsunternehmen im deutschen Kartellrecht, Dissertation, Heidelberg (1991).
 77. *Wils, Wouter P.J.*: The Optimal Enforcement of EC Antitrust Law: Essays in Law & Economics, Kluwer Law International, The Hague (2002).
 78. *Wils, Wouter P. J.*: Optimal Antitrust Fines: Theory and Practice, World Competition, (2006).
 79. *Wils, Wouter P. J.*: Efficiency and Justice in European Antitrust Enforcement, Hart Publishing, Portland USA (2008).
 80. *Wißmann, Helmut*: Die Anwendung von Art 85 des EWG-Vertrages auf Gemeinschaftsunternehmen, Köln/Bonn/München (1995).
 81. *Versteegn, Peter / Heymanns, Carl*: Konzernverantwortlichkeit und Haftungsprivileg, Verlag KG, Köln (1992).
 82. *Zäch, Roger*: Wettbewerbsrecht der Europäischen Union, Praxis von Kommission und Gerichtshof, München (1994).

II. Commentaries

83. *Immenga, Ulrich/Mestmäcker, Ernst-Joachim*: Kommentar zum Gesetz gegen Wettbewerbsbeschränkungen, Wettbewerbsrecht, Verlag H.C.Beck, München (2007).
84. *Immenga, Ulrich/Mestmäcker, Ernst-Joachim*, EG-Wettbewerbsrecht, Verlag C.H.Beck, München (2001).
85. *Immenga, Ulrich/Mestmäcker, Ernst-Joachim*, Kommentar zum Europäischen Kartellrecht,

- Verlag CH..Beck, München (2007).
86. *Gleiss, Alfred/ Hirsch, Martin*: Kommentar zum EG-Kartellrecht, Vol I, Heidelberg (1993).
 87. *Grabitz, Eberhard/Hilf, Meinhard*, Kommentar zur Europäischen Union , C.H. Beck, München (2009).
 88. *Groeben, Hans von der/Thiesingen, Jochen/ Ehlermann, Claus-Dieter* (eds.): Kommentar zum EU-/EG-Vertrag, Vol I, Baden-Baden (1999).
 89. *Koppensteiner, Hans-Georg*: Österreichisches und Europäisches Wettbewerbsrecht, 3rd ed, Verlag LexisNexis, Wien (2007).
 90. *Langen, Eugen/Bunte, Hermann-Josef*: Kommentar zum deutschen und Europäischen Kartellrecht, Neuwied/Kriftel/Berlin (1998).
 91. *Miersch, Michael*: Kommentar zur EG-Verordnung Nr. 4064/89 über die Kontrolle von Unternehmenszusammenschlüssen, Neuwied, Frankfurt am Main (1991).
 92. *Roth, Wulf-Henning/Ackermann, Thomas*: Frankfurter Kommentar zum Kartellrecht, Grundfragen Art 81 Abs 1 EG-Vertrag, (1999).
 93. *Schröter, Jakob/Mederer, Klotz* (Hrsg.), Kommentar zum Europäischen Wettbewerbsrecht, Nomos Verlag, Baden-Baden (2003).
 94. *Schwarze Jürgen* (ed.), EU-Kommentar, Nomos Verlagsgesellschaft, Baden-Baden (2009).
 95. *Streinz, Rudolph* (Hrsg.): EUV/EGV, C.H. Beck, München (2003).
 96. *Streinz, Rudolph* (Hrsg.): EUV/AEUV: Vertrag über die Europäische Union und Vertrag über die Arbeitsweise der Europäischen Union, C.H. Beck, München (2012).
 97. *Wiedemann, Gerhard* : Handbuch des Kartellrechts, C.H. Beck, München (1999).
 98. *Wiedemann, Gerhard* : Handbuch des Kartellrechts, C.H. Beck ,2. Auflage, München (2008).

III. Articles

99. *Alter, Karen*: Judicial Politics in the European Community: European Integration and the Pathbreaking Cassis de Dijon Decision, Comparative Political Studies, (1994,) vol. 26 no. 4, 535.
100. *Antunes, José Engracia*: The Liability of Polycorpore Enterprise, 13 Conn.J.Int'l L. (1999), 197.
101. *Aronofsky, David*: Piercing the Transnational Corporate Veil: Trends, Development, and the Need for Widespread Adoption of Enterprise Analysis, 10 North Carolina Journal of International Law & Commercial Regulation (1985).
102. *Basedow, Jürgen*: Wirtschaftskollisionsrecht: Theoretischer Versuch über die ordnungspolitischen Normen des Forumstaates, RabelsZ 52, 1988, 9.
103. *Basedow, Jürgen*: Entwicklungslinien des internationalen Kartellrechts, NJW 1989, 627.
104. *Bauer, Günter/ Reisner, Nina*: Erweiterte Zurechnung des Verhaltens Dritter bei der Festsetzung von Geldbußen im EG-Kartellrecht?, WuW 7 u 8/2007, 737.
105. *Beck, Ullrich*: Extraterritoriale Anwendung des EG-Kartellrechts, RIW 1990, 91 (92).
106. *Berchtold, Rainer*: Zum Ermessen der Kommission in Bußgeldverfahren, Kommentar in WuW 10/2009, 1115.
107. *Berle, Adolf A.*: The Theory of Enterprise Entity, 47 Colum. L. Rev. 343.
108. *Berndt, Thomas/Hoppler, Ivo*: Whistleblowing - ein integraler Bestandteil effektiver Corporate Governance, BB 2005, 2623.
109. *Bleckmann, Albert*: Die Rolle der richterlichen Rechtsschöpfung im EG-Recht, in: GS für Constantinesco, (1983).
110. *Blumberg, Phillip I.*: Enterprise Principles, Conn. L. Rev (1995-1996), 295.
111. *Blumberg & Kurt A. Strasser*: Corporate Groups and Enterprise Liability: Contracts and Torts, 706, PLI/Corp. 7, (1990), p. 17- 23.

112. *Bosch, Wolfgang/ Colbus, Birgit/ Harbusch, Antonia*: Berücksichtigung von Compliance-Programmen in Kartellbußgeldverfahren, WuW 7 u 8/2009, 740.
113. *Bottemann, Yves/ Atlee Laura*: An Update on Parent Liability for Antitrust Violations of Subsidiaries, Steptoe's EU Competition Practice (http://www.steptoe.com/assets/htmldocuments/EU%20Comp%20Briefing_%20Dec%202009.pdf).
114. *Brettel, Hauke/Thomas, Stefan*: Unternehmensbußgeld, Bestimmtheitsgrundsatz und Schuldprinzip im novellierten deutschen Kartellrecht, ZWeR 1/2009, 25.
115. *Brugger, Walter*: Die Geldbussenbemessung nach § 30 KartG 2005, OZK 2009, 172.
116. *Buckley, Peter/Casson, Mark*: An Economic Model of International Joint Venture Strategy, in: Journal of International Business Studies, Vol. 27, No. 5, Global Perspectives on Cooperative Strategies, (1996), 849.
117. *Buntscheck, Martin*: Die „überschießende Umsetzung“ des europäischen Kartellordnungswidrigkeitenrechts, Kommentar in WuW 7 u 8/2009, 990.
118. *Buntscheck, Martin*: § 81 Abs 4 GWB n.F.- die geänderte Obergrenze für Unternehmensgeldbußen, WuW 9/2008, 940.
119. *Buntscheck, Martin*: Der 'verunglückte Abschied' von der Mehrerlösgeldbuße für schwere Kartellverstöße", in: FS Bechtold (2006), 81.
120. *Calisti, Daniele/ Kubik, Filip/ Vollrath, Christian*: Taking compensation seriously as part of an effective antitrust enforcement: The White Paper and beyond, OZK 2008, 203.
121. *Chandler, Adam*: Successor Liability for Competition Law Infringements and How to Avoid It, Competition Law Journal 2006, issue 5, 63.
122. *Dau-Schmidt, Kenneth G.*: An Economic Analysis of the Criminal Law as a Preference-Shaping Policy, Duke Law Journal 1, (1990).
123. *de Waele, Henri*: The Role of the European Court of Justice in the Integration Process: A Contemporary and Normative Assessment, European Law [2010], Vol 6 No (1), p. 3, available at: <http://www.hanselawreview.org/pdf9/Vol6No01Art01.pdf>.
124. *Dearborn, Meredith*: Enterprise Liability: Reviewing and Revitalizing Liability for Corporate Groups, California Law Review (2009), Vol. 97: 196.
125. *Deselaers, Wolfgang*: Uferlose Geldbußen bei Kartellverstößen nach der neuen 10% Umsatzregel des § 81 Abs 4 GWB?, WuW 2006, 118.
126. *Dodd, E. Merrick*: The Evolution of Limited Liability in American Industry, 61 Harv. L. Rev. 1351 (1948).
127. *Dreher, Meinrad*: Kartellrechtscompliance, ZWeR 1/2004.
128. *Dreher, Meinrad*: Kartellrechtliche Kronzeugenprogramme und Gesellschaftsrecht, ZWeR 4/2009, 397.
129. *Eilmansberger, Thomas*: Die Lombard-Club-Entscheidung der Kommission, ecolex 2002, 560.
130. *Eilmansberger, Thomas*: How to Distinguish Good from Bad Competition Under Art 82 EC: In Search for Clearer and More Coherent Standards for Anticompetitive Abuses, in: Common Market Law Review 41:129-177 (2005), at 129.
131. *Everling, Ulrich*: Rechtsvereinheitlichung durch Richterrecht in der Europäischen Gemeinschaft, RabelsZ 50 (1986), 193.
132. *Fiebig, André*: International Law Limits on the Extraterritorial Application of the European Merger Control Regulation and Suggestions for Reform, E.C.L.R. 1998, 323.
133. *Fischer, Kerstin*: Gesamtschuldnerische Haftung von Unternehmen für die Zahlung von Geldbußen bei Kartellverstößen, OZK 2011/3, 99 (100).

134. *Fleischer, Holger*: Konzerninterne Wettbewerbsbeschränkungen und Kartellverbot, in: Die Aktiengesellschaft (AG) 1997, 491-502.
135. *Fleischer, Holger/ Körber, Torsten*: Der Einfluss des US-amerikanischen Antitrustrechts auf das Europäische Wettbewerbsrecht, WuW 1/2001, 6.
136. *Freund, Heinz Joachim*: Verteidigungsrechte im kartellrechtlichen Bußgeldverfahren, EuZW, Heft 23/2009, 839 ff.
137. *Fussenegger, Gerhard*: USA- Land der unbegrenzten Möglichkeiten- Die Durchsetzung extraterritorialer Schadenersatzansprüche im Kartellrecht, ecolex 2006, 125.
138. *Garzaniti, Laurent and Cassellati-Sforzolini, Guiseppe*: Liability of Successor Undertakings for Infringements of EC Competition Law Committed Prior to Corporate Reorganizations, 16 E.C.L.R., 1995, 348.
139. *Griffin, Joseph E.*: The Power of Host Countries over the Multinational: Lifting the Veil E.C./U.S., 6 Law and Policy in International Business (1974).
140. *Gruber, Johannes, Peter*: Rechtsprechungsübersicht, ÖZK 2012, 26.
141. *Gruber, Johannes, Peter*: Strengere Strafen im europäischen Kartellrecht, ecolex 2006, 211.
142. *Hack, Christoph*: Handlungsmöglichkeiten Einzelner bei Kartellrechtsverletzungen, ecolex 2003, 311.
143. *Harms, Wolfgang*: Die Entwicklung des Wettbewerbsrecht der Konzerne und Gemeinschaftsunternehmen in der EWG, in: Wettbewerbsordnung im Spannungsfeld von Wirtschafts- und Rechtswissenschaft, FS für Gunther Hartmann, FIW-Schriftenreihe, Heft 75, Köln/Berlin/Bonn/München (1968).
144. *Harms, Wolfgang*: Konzerne im Recht der Wettbewerbsbeschränkungen, FIW-Schriftenreihe, Heft 45, Köln/Berlin/Bonn/München, (1968).
145. *Hemmholz, Richard H.*: Continental Law and Common Law: Historical Strangers or Companions?, Duke Law Journal (1990), 1207.
146. *Hintersteininger, Margit*: Gemeinschaftsrechtliche Schadenersatzpflicht bei Verstoß gegen Art. 81 EG, wbl 2001, 554.
147. *Hopt, Klaus*: Modern Company Law Problems: A European Perspective, published by the Max Planck Institute for Foreign Private and Private International Law, Stockholm (2000), available at: <http://www.oecd.org/daoecd/21/28/1857275.pdf>
148. *Hommelhoff, Peter*: Zum revidierten Vorschlag einer Europäischen Konzernrichtlinie, in: FS Fleck (1984), 125.
149. *Hummer, Christina*: Kartellrechtliche Haftung von Muttergesellschaften, ecolex 2010, 64.
150. *Kahan, Dan*: Social Influence, Social Meaning and Deterrence, (1997) 83 Virginia Law Review, 349; and, Social Meaning and the Economic Analysis of Crime, (1998) 27 Journal of Legal Studies 609.
151. *Kapp, Thomas*: EG-Kartellrechtliche Fehlentwicklung bei Handelsvertreterverträgen?, WuW 10/1990, 814.
152. *Karollus, Margit*: Schadenersatz wegen EG-Kartellrechtverstoßes auch für Verbraucher, ecolex 2006, 797.
153. *Karst, Alexander*: Kartellrechtscompliance im Konzern, WuW 02/2012, 150-156.
154. *Katyal, Neal*: Deterrence's Difficulty, (1997) 95 Michigan Law Review 2385.
155. *Kittelbeger, Ralf*: External Reporting als Pflicht zum Whistleblowing, ÖBA 2007, 90.
156. *Kling, Michael*: Die Haftung der Konzernmutter für Kartellverstöße ihrer Tochterunternehmen, WRP, 2010, 506.

157. *Koch, Jens*: Compliance-Pflichten im Unternehmensverbund?, WM 22 (2009), 1013-1060.
158. *Koch, Jens*: Kartellrechtlicher Sanktionsdurchgriff im Unternehmensverbund, ZHR 171 (2007), 566.
159. *Koppensteiner, Georg*: Missbrauchsverbot und Unternehmensverbund, Wbl 2007, 465.
160. *Krejci, Heinz*: Partnerschaft, Verein, Konzern, GA 10. ÖJT (1988), I/1, 241.
161. *Kühnert, Heinrich/Xeniadis, Anastasios*: Die wettbewerbsrechtliche Kontrolle von Minderheitsbeteiligungen, ÖZK 2011/4, 123.
162. *Kuilwijk, Kees Jan/Phelan, Diarmuid Ross*: On the deductibility of fines for EC competition infringements, European Competition Law Review, Issue 3 2010, 131.
163. *Lehofer, Hans Peter*: Alte Clubs und neue Architektur, ÖJZ 2009/90.
164. *Leo, Hans Christoph*: Konzerninterne Marktregelungen im Lichte des EWG-Kartellrechts, in: Kartellrundschau, Heft 8, 1966, 12.
165. *Lopatka, John/Godek, Paul*: Another Look at Alcoa: Raising Rivals' Cost Does Not Improve the View, 35 Journal of Law and Economics (1992), at 311, 327.
166. *Lübbig, Thomas*: Einseitige Maßnahmen nach Art 85 (1), WuW 7 u. 8/1991, 568.
167. *Lutter, Marcus*: Die Auslegung angeglichenen Rechts, JZ No.12 1992, 593.
168. *Near, Janet P./Miceli, Marcia P.*: Organizational Dissidence: The Case of Whistleblowing, Journal of Business Ethics 1985, Vol. 4: 1-16.
169. *Maritzen, Lars/Bednarczyk, Dominika*: Bußgeldfestsetzung im Lichte des Rückwirkungsverbots, OZK 2009/6, 219.
170. *Meessen, Karl M.*: Schadenersatz bei weltweiten Kartellen, WuW 11/2005, 1115.
171. *Meyer-Lindemann, Hans Jürgen*: Durchsetzung des Kartellverbots durch Bußgeld und Schadenersatz, WUW 12/2011, 1235-1247.
172. *Meyers, Ryan P.*: Partial Ownership of Subsidiaries, Unity of Purpose, and Antitrust Liability, in Chicago Law Review 2001, October 1.
173. *Mestmäcker, Ernst-Joachim*: Staatliche Souveränität und offene Märkte, Konflikte bei der extraterritorialen Anwendung von Wirtschaftsrecht, RabelsZ 1988, 205.
174. *Oder, Martin/Schoißwohl, Birgit/Tremmel, Ernst*: Rechtsprechungsübersicht Europäische Gerichte, ecolex 2008, 593.
175. *Pertin, Martin*: The Curious Case of Directors' and Officers' Liability for Supervision and Management: Exploring the Intersection of Corporate and Tort Law, American University Law Review 59, no.6, August 2010, 1661-1711.
176. *Reich-Rohrwig, Johannes*: Vermutung eines bestimmenden Einflusses der Muttergesellschaft auf wettbewerbswidrig handelnde 100%-ige Tochtergesellschaft, ecolex 2010, 126.
177. *Riesenkampff, Alexander/Krauthausen, Udo*: Liability of Parent Companies for Antitrust Violations of their Subsidiaries, E.C.L.R., issue 1 (2010).
178. *Rittner, Fritz*: Die Rechtssicherheit im Kartellrecht, WuW 2/1969, 65.
179. *Röper, Lukas*: Kartellrechtliches Auswirkungsprinzip und Hold Separate Agreements, wbl 2009, 379.
180. *Sander, Peter*: Das Konzernprivileg im Europäischen und Österreichischen Wettbewerbsrecht, OZK 2008, 20.
181. *Samuel, Geoffrey*: System und Systemdenken: Zu den Unterschieden zwischen kontinentaleuropäischem Recht und Common Law, ZEuP 3, 1995, 375.

182. *Säcker, Franz Jürgen*: Grundlagen der Wettbewerbstheorie: Materialien zum deutschen und europäischen Wettbewerbsrecht, Freie Universität Wien, available at: http://web.fu-berlin.de/iww/downloads/Skript_Wettbr2011.pdf.
183. *Schenck, Daniel*: Jurisdiction over the Foreign Multinational in the EEC: Lifting the Veil on the Economic Entity Theory, U. Pa. J. Int'l Bus. L., [1989], at 495.
184. *Schneider, Uwe*: Compliance als Aufgabe der Unternehmensleitung, ZIP 2003, 645.
185. *Schroeder, Dirk*: Die Anwendung des Kartellverbotes auf verbundene Unternehmen, WuW 4/1988, 274.
186. *Schrödermeier, Martin*: Die vermiedene Auswirkung, WuW 1989, 21.
187. *Schwarze, Jürgen*: Die extraterritoriale Anwendbarkeit des EG-Wettbewerbsrechts- Vom Durchführungsprinzip zum Prinzip der qualifizierten Auswirkung, WuW 12/2001, 1190.
188. *Schwarze, Jürgen*: Rechtsstaatliche Defizite des europäischen Kartellbußgeldverfahrens, WuW 1/2009, 6.
189. *Schwarze, Jürgen/Bechtold, Rainer/Bosch, Wolfgang*: Deficiencies in European Community Competition Law: Critical Analysis of the Current Practice and Proposals for Change, Gleiss/Lutz Rechtsanwälte (2008), available at: http://ec.europa.eu/competition/consultations/2008_regulation_1_2003/gleiss_lutz_en.pdf.
190. *Scordamaglia, Andreas*: Cartel Proof, Imputation and Sanctioning in European Competition Law, CompLRev (2010) Vol 7, Issue 1, p. 5.
191. *Sharaf, Philipp*: Die neuen Bußgeld-Leitlinien im EG-Kartellrecht vor dem Hintergrund der Entscheidungen der Kommission und der Rechtsprechung, wbl 2007, 1.
192. *Soltész, Ulrich*: Due Process, Gesetzesvorbehalt und richterliche Kontrolle im Europäischen Kartellbußgeldverfahren, Heft 02/2012, 141-150.
193. *Soltész, Ulrich/Steinle, Christian/Bielez, Holger*: Rekordgeldbußen versus Bestimmtheitsgebot, EuZW 2003, 202.
194. *Sorinas, Sergio/Buhart, Jaques/Brault, Dominique*: ECJ clarifies rules on parental liability for infringements of EU competition law committed by wholly-owned subsidiaries, available at: http://www.herbertsmith.com/NR/rdonlyres/E38578CE-24FC-492E-88D5-1DA6A1B3F66B/12317/EUCompetition_Sept09_Parentalliabilityforinfringem.html.
195. *Spormann, Kurt*: Die Entwicklung der Europäischen Wettbewerbspolitik, in: Außenwirtschaftsrecht des Betriebs-Beraters (AWD) 1970, 156.
196. *Svetlicinii, Alexandr*: Exploring the Role of Legal Presumptions under the 'Convincing Evidence Standard' in EC Merger Control, in: Global Antitrust Review, 2008, 117.
197. *Steinle, Christian*: Kartellgeldbußen gegen Konzernunternehmen nach dem ‚Aristrain‘- Urteil des EuGH, Europäisches Wirtschafts- und Steuerrecht, Vol. 15, 3/2004.
198. *Steinle, Christian*: Lassen sich Kartellverstöße ausgliedern?, in FS Bechtold, 2006, 541.
199. *Wagner-von Papp, Florian*: Kartellstrafrecht in den USA, dem Vereinten Königreich und Deutschland, WuW 12/2009, 1236.
200. *Wils, Wouter*: La Compatibilité des Procédures Communautaires en Matière de Concurrence Avec la Convention Européenne des Droits de l'Homme, (1996) 32, Cahiers de Droit Européen, 329.
201. *Lenaerts, Koen/ Vanhamme, Jan*: Procedural Rights of Private Parties in the Community Administrative Process, (1997), 34 Common Market Law Review 531, 557
202. *Thomas, Stefan*: Die kartellrechtliche Beurteilung konzerninterner Wettbewerbsbeschränkungen mit Gemeinschaftsunternehmen, ZWeR 3/2005, 236.
203. *Traugott, Andreas*: Die Rolle von Compliance-Programmen bei der Bemessung von Kartellstrafen, Compliance Praxis, 1/2012, 9.

204. *Tremmel, Ernst*: Zum kartellrechtlichen Konzernbegriff, wbl 2005, 490.
205. *Vandekerckhove, Wim/Commers, Ronald*: Whistle Blowing and Rational Loyalty, Journal of Business Ethics 2004, 225.
206. *Vedder, Christopher*: A Survey of Principal Decisions of the European Court of Justice Pertaining to International Law, EJIL 1990, 365.
207. *Zimmer, Daniel/ Paul, Thomas*: Kartellbußgeldrechtliche Haftung und Haftungsbefreiung im Konzern, WuW 10/2007, 970.
208. *Zimmermann, Reinhard*: Savignys Vermächtnis: Rechtsgeschichte, Rechtsvergleichung und die Begründung einer europäischen Rechtswissenschaft, JBl 1998, 273
209. *Zuleeg, Manfred*: Die Auslegung des Europäischen Gemeinschaftsrechts, in: EuR 1969, 97.
210. Das kartellrechtliche Konzernprivileg, Festschrift Peter Doralt-Anmerkungen zur „Postbus-Entscheidung“ des OGH, 577.
211. Dreifacher Schadenersatz weltweit, United States Court of Appeals – Empagran S.A. v.F. Hoffmann La-Roche, WuW/Entscheidungssammlung 1/2004,101.
212. Durch Gesetz modifiziertes Wirkungsprinzip, United States Court of Appeals – U.S./LSL Biotechnologies, WuW/E 6/2005,677.
213. Joint Comments of the American Bar Association’s Section of Antitrust Law and Section of International Law on the European Commission’s Consultation on the Functioning of Regulation 1/2003, October 3, 2008.
214. Konzernweite Haftung bei Kartellverstößen, BeckRS 2009, 70987.
215. Rechtsprechung, Haftung der Muttergesellschaft für Kartellverstöße ihrer Tochtergesellschaften, EuZW, Heft 22/2009, 816.
216. Rechtsprechungsübersicht, Ausgleichsanspruch eines Tankstellenpächters nach HVerG und „Handelsvertreterprivileg“ nach Art 81 EGV“, JBl 2010, 312.
217. Rechtsprechungsübersicht, Kartellrechtliche Haftung einer Muttergesellschaft, EuG, Urteil vom 30.04.2009, T- 12/03, Itochu/Kommission, WuW 6/2009, 708.
218. Rechtsprechung zum Wettbewerbs- und Kartellrecht, Vermutung des bestimmenden Einflusses der Muttergesellschaft auf wettbewerbswidrig handelnde 100%ige Tochtergesellschaft („Akzo Nobel“), ZIP 8/2010.

Zusammenfassung

„The Single Economic Entity Doctrine and Corporate Group Liability in European Antitrust Law“

Die Beurteilung von wirtschaftlich miteinander verbundenen Unternehmen gehört zu den umstrittensten Themen des europäischen Kartellrechts. Das von den europäischen Institutionen hierfür entwickelte Konzept der 'wirtschaftlichen Einheit' wirft dabei viele Fragen auf.

Nach diesem Konzept werden rechtlich selbständige Unternehmen, die einen gewissen Grad wirtschaftlicher Integration erreicht haben, für die Anwendung der Wettbewerbsbestimmungen als Einheit betrachtet. Aufgrund dieser legalen Fiktion ist es einerseits möglich, rein unternehmensinterne Vereinbarung vom generellen Kartellverbot des Art 101 (1) AEUV auszunehmen. Andererseits wird die Doktrin in zunehmendem Ausmaß von EuGH und europäischer Kommission dazu verwendet rechtswidriges Verhalten innerhalb eines Konzerns einer anderen, regelmäßig der 'beherrschenden' Muttergesellschaft, zuzurechnen.

Besonders in der jüngeren Praxis hat sich gezeigt, dass die europäischen Institutionen dabei nicht immer in konsistenter Weise vorgehen und unter dem Deckmantel einer effektiven Durchsetzung der Wettbewerbsbestimmungen nicht nur allgemeine Grundsätze des Gesellschaftsrechts, sondern auch rechtsstaatliche Garantien der betroffenen Unternehmen unberücksichtigt lassen.

Nach einem Überblick der einschlägigen Rechtsprechung zum Prinzip der wirtschaftlichen Einheit untersucht die vorliegende Arbeit daher die Praxis der europäischen Kommission sowie des Gerichtshofs aus rechtsdogmatischer Sicht. Während dies notwendigerweise auch eine Diskussion der Anwendung des sogenannten „Konzernprivilegs“, das die Ausnahme rein unternehmensinterner Vorgänge vom Anwendungsbereich des Kartellverbots kennzeichnet, miteinschließt, stellt die kritische Beurteilung der kartellrechtlichen Haftungszurechnung zwischen Konzernunternehmen den Kern der Analyse dar.

Ziel der Arbeit ist aufzuzeigen, wie die wirtschaftliche Finanzkraft hinter Kartellverstößen berücksichtigt werden kann, während den betroffenen Unternehmen unter Wahrung ihrer Verfahrensrechte gleichzeitig Anreize gegeben werden können, in Zukunft wettbewerbswidrige Verhaltensweisen hintanzuhalten. In Anbetracht der Tatsache, dass Konzerne meist mit mehreren Jurisdiktionen gleichzeitig konfrontiert sind, ist es dabei essentiell, die Auswirkung europäischer Rechtsprechung auch auf internationaler Ebene zu untersuchen.

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Law Office of Dr. Georg S. Mayer, Vienna, Austria

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- Prepared and revised briefs; conducted of client interviews and counseled; conducted legal research; assisted in updating publications on unfair competition law; assisted in the preparation of court trials; drafted legal opinions in the area of unfair competition, trademarks, and the protection of registered designs; supported applications for patents.

Pricewaterhouse Coopers, Vienna, Austria

Consultant, M&A, tax and legal services, July 2008- March 2009

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