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Parental Liability for Cartel Infringements Committed by Wholly Owned Subsidiaries

Is the Approach of the European Court of Justice in *Akzo Nobel* also Relevant in a Private-Law Context?

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Abstract: Although the European Court of Justice, in *Akzo Nobel*, expressly decided that the anti-competitive behaviour of a (wholly owned) subsidiary may be imputed to the parent company when both form part of the same economic unit, it is doubtful that this theory of identification really is at the base of the joint and several liability of the parent for the payment of a cartel fine. This article not only traces the actual basis of the competition law liability of a parent company for cartel infringements committed by a (wholly owned) subsidiary but also investigates whether that liability automatically translates into the civil liability of the parent company for damages suffered by third parties due to an infringement of competition law committed by a (wholly owned) subsidiary.

Résumé: Bien que la Cour de Justice ait explicitement affirmé, dans l'arrêt *Akzo Nobel*, que le comportement anticoncurrentiel d'une filiale dont le capital est détenu en totalité par la société mère peut être imputé à cette dernière lorsque toutes deux font partie d'une même unité économique, il est permis de douter que cette théorie de l'identification soit réellement la justification de la condamnation conjointe et solidaire de la société mère au paiement d'une amende pour cartel. Le présent article analyse non seulement le véritable fondement de la responsabilité, en droit de la concurrence, de la société mère pour les infractions en matière de cartel commises par une filiale détenue à 100 %, mais envisage également la question de savoir si cette responsabilité implique en outre, automatiquement, une responsabilité civile de la société mère pour les dommages subis par des tiers à la suite d'une infraction au droit de la concurrence commise par une filiale détenue à 100 %.

Zusammenfassung: Der Europäische Gerichtshof hat in seinem Urteil in Sachen *Akzo Nobel* zwar entschieden, dass ein Kartellverstoß einer hundertprozentigen Tochtergesellschaft der Konzernmutter zuzurechnen ist, wenn beide zur gleichen wirtschaftlichen Einheit gehören, aber es kann bezweifelt werden, ob diese Gleichsetzungstheorie tatsächlich der gesamtschuldnerischen Haftung der Muttergesellschaft für eine kartellrechtliche Geldbuße zugrunde liegt. Dieser Artikel erläutert nicht nur die tatsächliche Grundlage der wettbewerbsrechtlichen Haftung der Muttergesellschaft für kartellrechtliche Verstöße einer vollständig beherrschten Tochtergesellschaft, sondern untersucht auch, ob diese Haftung auch automatisch zu einer zivilrechtlichen Haftung der Muttergesellschaft für Schäden führt, die Dritte

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infolge eines Kartellverstoßes einer hundertprozentigen Tochtergesellschaft erlitten haben.

I. Introduction

On 1 February 2006, Arthur Hartkamp officially returned to full-time academic life as a professor of European Private Law at the Nijmegen Law Faculty. The appointment marked the birth of a research group of which he was (and still is) the *paterfamilias* and whose members share not only his enthusiasm for this young – and relatively unexplored – field of research but also his taste for the Italian *dolce vita*. Before I joined this congenial group, I already had the pleasure of participating (as a research master student) in a newly developed course by Arthur and Carla Sieburgh about the influence of EU law on national private law. Their proactive approach turned out to be an eye opener: EU law is, whether you like it or not, a fact in private law, so instead of rejecting or, even worse, ignoring this supranational influence, practitioners of private law should calculate from existing information (e.g., the case law of the European Court of Justice) how the relationship between these two fields of law might evolve in order to provide constructive guidance as to how the aims of both EU law and private law can best be reconciled. Thus, for example, rather than merely objecting that the Court of Justice's case law on the direct horizontal effect of fundamental freedoms erodes party autonomy, one should take these decisions as a given and, from there, analyse how (for example) the principle of free movement can be balanced with party autonomy, a fundamental notion of private law.[1] The process of convergence of EU law and private law requires European lawyers to broaden their perspective too. So, for instance, instead of just stressing that the passing-on defence (which allows the defendant to contend that the claimant has passed on to his customers all or a proportion of a cartel overcharge) should not be allowed because it endangers the effectiveness of competition rules, one must also take into account that, in private law, it is a very common argument: damage that has not been suffered (since it was passed on) should not attract compensation, as it would enrich the claimant.[2]

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1 See R.W.E. VAN LEUKEN, *Rechtsverhoudingen tussen particulieren en de verdragsrechtelijke verkeersvrijheden* (Deventer: Kluwer 2015), nos 5-7.

2 In ECJ 20 Sep. 2001, C-453/99 *Courage Ltd* v. *Bernard Crehan* (*Courage*), the Court of Justice indeed recognized that '[Union] law does not prevent national courts from taking steps to ensure that the protection of the rights guaranteed by [Union] law does not entail the unjust enrichment of those who enjoy them'. The passing-on defence is now codified in Art. 13 of Directive 2014/104/EU on antitrust damages actions: 'Member States shall ensure that the defendant in an action for damages can invoke as a defence against a claim for damages the fact that the claimant passed on the whole or part of the overcharge resulting from the infringement of competition law'.

What the above makes clear is that there is a need for substantive exchange between EU law and private law that enables actors (private parties, legislatures, judges, and scholars) to visualize the rules that apply to a horizontal relationship, to weigh and balance the aims of both fields of law, and to develop arguments from the results or against the results of the involvement of EU law in the private law relationship in question.[3] To illustrate this point, the present contribution debates the question whether the principles governing *antitrust* liability of parent companies for Article 101 TFEU infringements by wholly owned subsidiaries can and should also be used to assess the *civil* liability of parent companies for cartel violations committed by wholly owned subsidiaries. Answering this question first requires knowledge of the elements on which the Court of Justice's case law on parental antitrust liability is based. Therefore, section II opens with a brief introduction to the single economic unit doctrine (1.) and then illustrates how the Court pretends to apply this doctrine in its case law to establish a parent company's joint and several antitrust liability for the anti-competitive conduct of a wholly owned subsidiary (2.). In section III, the focus shifts towards private law. After a brief exploration of the principles generally governing civil liability of parent companies for their subsidiaries (1.), the essay investigates whether EU law allows for the full application of these principles to cases that concern parental civil liability for Article 101 TFEU infringements of a subsidiary (2.).

II. Antitrust Liability of a Parent Company for Article 101 TFEU Infringements Committed by a Wholly Owned Subsidiary

1. The Undertaking as an Economic Unit

Article 101 TFEU applies, inter alia, to agreements and concerted practices between *undertakings*. In the absence of a Treaty definition, the Court of Justice has interpreted the italicized term broadly to encompass 'every entity engaged in an economic activity, regardless of the legal status of the entity or the way it is financed'.[4] An important corollary of this functional approach is that the concept of 'undertaking' is not necessarily synonymous with legal (or natural) personality but 'must be understood as designating an economic unit . . . even if in law that economic unit consists of several persons, natural or legal'.[5] For the purpose of

3 C.H. Sieburgh, 'A Method to Substantively Guide the Involvement of EU Law in Private Law Matters', *ERPL* 2013, p (1165) at 1166-1167.

4 ECJ 23 Apr. 1991, C-41/90 *Klaus Höfner and Fritz Elser* v. *Macrotron GmbH*, para. 21.

5 ECJ 12 Jul. 1984, C-170/83 *Hydrotherm Gerätebau GmbH* v. *Compact del Dott. Ing. Mario Andreoli & C. Sas*, para. 11. See also, e.g., ECJ 29 Sep. 2011, C-521/09 P *Elf Aquitaine SA* v. *Commission*, para. 53; ECJ 10 Apr. 2014, C-247/11 P and C-253/11 P *Areva SA and others* v. *Commission* (*Areva*), para. 125.

applying Article 101 TFEU, the formal separation between companies resulting from their distinct legal personality is thus not conclusive, and the decisive test is the unity of their conduct on the market.[6] So, rather than with *legal* units, undertakings are to be identified with *economic* units '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 [Article 101 TFEU]'.[7] In the context of parent-subsidiary relationships, entities will constitute an economic unit (and, inherently, a single undertaking) if a subsidiary enjoys no real economic freedom to determine its course of action in the market but carries out the instructions issued by the parent company controlling it.[8] Consequently, Article 101 TFEU does not interfere with the internal organization of corporate groups (since agreements between members of the group are intra-undertaking and not between separate undertakings).[9] The single economic unit doctrine has other functions too. Most controversially, the Commission and the European Courts allegedly use it to impose fines on parent companies for infringements of Article 101 TFEU committed by their subsidiaries.[10]

2. *The Muddled Application of the Single Economic Unit Doctrine in* Akzo Nobel

Whereas Article 101 TFEU is directed at *undertakings* and applies to them directly regardless of how they are organized and regardless of their legal nature, decisions by competition authorities penalizing breaches of Article 101 TFEU can only be addressed to *persons*. For that reason, in every case in which a competition authority imposes a sanction for an antitrust offence, the question

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6 ECJ 14 Dec. 2006, C-217/05 *Confederación Española de Empresarios de Estaciones de Servicio* v. *Compañía Española de Petróleos SA*, para. 41.

7 GC 10 Mar. 1992, T-11/89 *Shell* v. *Commission*, para. 311. See also W.P.J. Wils, 'The Undertaking as Subject of E.C. Competition Law and the Imputation of Infringements to Natural or Legal Persons', *ELRev* 2000, p (99) at 101.

8 See, for example, ECJ 14 Jul. 1972, C-48/69 *Imperial Chemical Industries* v. *Commission*, paras 132–135; ECJ 21 Feb. 1973, C-6/72 *Europemballage and Continental Can* v. *Commission*, para. 15.

9 C. Barnard & S. Peers (eds), *European Union Law* (Oxford: OUP 2014), p 510. See also A. Jones & B. Suffrin, *EU Competition Law: Text, Cases and Materials* (Oxford: OUP 2014), p 138.

10 Also controversial is the (third) consequence that 'the EU may assert subject-matter and enforcement jurisdiction over legal entities domiciled outside the EU when those legal entities form part of the same economic entity as other legal entities domiciled within the EU'. See O. Odudu & D. Bailey, 'The Single Economic Entity Doctrine in EU Competition Law', *CMLR* 2014, p (1721) at 1722–1723 (with references to relevant literature and case law).

arises on which specific natural or legal person the sanction should be imposed.[11] The ambiguous role of the single economic unit doctrine in this connection is aptly illustrated by the well-known *Akzo Nobel* case.

Between 1992 and 1998, four companies belonging to the Akzo Nobel group (Akzo Nobel Nederland, Akzo Nobel Chemicals International, Akzo Nobel Chemicals, and Akzo Nobel Functional Chemicals) took part in a series of anti-competitive activities against competitors in the choline chloride sector in the European Economic Area. Despite the fact that the group parent (Akzo Nobel NV) had not itself participated in the cartel, the Commission imposed a fine on that company, as it found that the parent, together with its wholly owned subsidiaries that were involved in the antitrust violations, constituted a single economic unit. Given the severe financial consequences of treating the companies as one entity (the court can impose a fine of up to 10% of the turnover of the undertaking and not only of the infringing legal entity),[12] it is not surprising that Akzo Nobel NV – like many other parent companies that are held liable for cartel infringements committed by their wholly owned subsidiaries – contested the decision before the Court of Justice of the European Union. Akzo Nobel NV's action for annulment was, however, rejected by the General Court[13] and by the Court of Justice on appeal.[14] Hereafter, I focus primarily on the substantive part of the Court of Justice's judgment.

In its judgment, the Court of Justice began with a brief restatement of the single economic unit doctrine. After reiterating that the concept of an undertaking must be understood as designating an economic entity that may consist of several legal persons,[15] it held that '[w]hen such an entity infringes the competition rules, it falls, according to the principle of personal responsibility, to that entity to answer for that infringement'.[16] When applied to the present case,

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11 Opinion of Advocate General Kokott (23 Apr. 2009) on ECJ 10 Sep. 2009, C-97/08 P *Akzo Nobel NV and Others* v. *Commission*, paras 36-37; I.W. VerLoren van Themaat & M.C. van Heezik, 'Het toerekeningsleerstuk: de balans opgemaakt', *NtEr* 2010, p 90.

12 Article 23(2) of Regulation 1/2003 [2003] OJ L1/1.

13 GC 12 Dec. 2007, T-112/05 *Akzo Nobel NV and Others* v. *Commission* (*Akzo Nobel* (Court of First Instance)).

14 ECJ 10 Sep. 2009, C-97/08 P *Akzo Nobel NV and Others* v. *Commission* (*Akzo Nobel*).

15 *Ibid.*, para. 55.

16 *Ibid.*, para. 56. See *Akzo Nobel* (Court of First Instance), *supra* n. 13, para. 58: 'It is . . . not because of a relationship between the parent company and its subsidiary in instigating the infringement, or, *a fortiori*, because the parent company is involved in the infringement, but because they constitute a single undertaking . . . that the Commission is able to address the decision imposing fines to the parent company of a group of companies'. See also *Areva, supra* n. 5, para. 31: '[S]ince the parent company and its subsidiary form a single economic unit and therefore form a single undertaking for the purposes of Article [101 TFEU], the Commission may address a decision imposing fines to the parent company without having to establish the personal involvement of the latter in the infringement'.

the doctrine should have the effect that the anti-competitive conduct of the four subsidiaries would not only be attributed to the parent company but also to *any* other legal person forming part of the same economic unit. The Court of Justice steered away from such a general and far-reaching finding, however, and held that Akzo Nobel NV was jointly and severally liable for the payment of the antitrust fine because it actually exercised decisive influence over the commercial policy of its subsidiaries. Whereas this holding indicates (at first blush, at least) that Akzo Nobel NV's antitrust liability is based on fault,[17] the Court's flawed reasoning in paragraph 59 of the judgment still makes it appear as if it were the direct result of the fact that the parent forms an economic unit with its subsidiaries.[18] But it is obvious that a straightforward application of the single economic unit doctrine would make the 'decisive influence' criterion superfluous for establishing parental liability and would only be useful to avoid the far-reaching identification of group companies that would result from the doctrine's application. So in my opinion and notwithstanding the impression created by the Court of Justice, parental liability for cartel fines is not decisively based on the single economic unit doctrine but stems primarily from the very same fact that explains why a parent company and its subsidiary may constitute a single undertaking, namely that 'the subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material aspects, the instructions given to it by the parent company'.[19]

In the remainder of its judgment, the Court of Justice explained how it can be determined whether a parent company exercises a decisive influence over the commercial policy of its subsidiary. Until then, the case law on this question had not been consistent. While some early judgments suggested that it requires evidence that the parent company actually influenced the policy of its subsidiary in the specific area in which the antitrust infringement had occurred (narrow definition of the concept of commercial policy),[20] subsequent case law indicated

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17 O. Odudu & D. Bailey, 'The Single Economic Entity Doctrine in EU Competition Law', *CMLR* 2014, p (1721) at 1747.

18 Subsequent case law adds to this misconception. See, e.g., *Areva, supra* n. 5, para. 122: 'As the European Union concept of joint and several liability for payment of a fine is merely the manifestation of an *ipso jure* legal effect of the concept of an "undertaking", the determination of the amount of the fine in respect of which the Commission may demand payment in full by each of those held jointly and severally liable derives, in any individual case, from the application of that concept of an undertaking'. Similarly: ECJ 10 Apr. 2014, C-231/11 P to C-233/11 P *Commission* v. *Siemens AG Österreich and Others and Siemens Transmission & Distribution Ltd* v. *Commission*, para. 33.

19 *Akzo Nobel*, *supra* n. 14, para. 58.

20 See ECJ 14 Jul. 1972, C-48/69 *Imperial Chemical Industries Ltd* v. *Commission*, para. 137 ('The applicant was able to exercise decisive influence over the policy of the subsidiaries as regards selling prices in the common market and in fact used this power upon the occasion of the three

that the mere proof of a general influence on the commercial policy of the subsidiary is sufficient for attributing liability to the parent company (broad definition of the concept of commercial policy).[21] The Court of Justice, in *Akzo Nobel*, clearly championed the latter option, as it held that the exercise of decisive influence may be derived from 'all relevant factors relating to economic, organizational and legal links which tie the subsidiary to the parent company'.[22] As this approach enables the Commission to hold a parent company jointly and severally liable for the payment of a cartel fine without having to establish the personal involvement of the company in the Article 101 TFEU infringement by its subsidiary,[23] the Court introduced a regime of strict liability.[24] This becomes even more apparent when considering the specific situation of the parent company that owns 100% of the shares of a subsidiary that has violated Article 101 TFEU.

In *Akzo Nobel*, it was not disputed that the parent could, in theory, exercise a decisive influence over the conduct of its wholly owned subsidiaries. The parties strongly disagreed, however, as to how the actual use of this power should be proven. While the Commission argued that if a parent company owns

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price increases in question'.); ECJ 25 Oct. 1983, C-107/82 *Allgemeine Eletrizitäts-Gesellschaft AEG-Telefunken AG* v. *Commission*, para. 50.

21 See, e.g., ECJ 16 Nov. 2000, C-286/98 P *Stora Kopparbergs Bergslags AB* v. *Commission*, para. 27.

22 *Akzo Nobel*, *supra* n. 14, para. 74. See also *Akzo Nobel* (Court of First Instance), para. 83. Quite ironically, the fact that a parent company has introduced a code of conduct to prevent its subsidiaries from infringing competition law may be one of those factors. See ECJ 18 Jul. 2013, C-501/11 P *Schindler Holding Ltd and Others* v. *Commission* (*Schindler Holding*), para. 114, to which it added (in para. 115) that 'the fact that certain employees of its subsidiaries did not comply with the code of conduct is not sufficient to demonstrate independence of the commercial policy of the subsidiaries in question'.

23 See, e.g., GC 13 Jul. 2011, T-138/07 *Schindler Holding Ltd and Others* v. *Commission*. In answer to a parent company's claim that the Commission ought to have proved that the operational activities of its subsidiaries, including their conduct in breach of Article 101 TFEU, was actually influenced by the parent and that the latter caused or supported the infringement, the GC held that '[t]he attribution of an infringement by a subsidiary to the parent company does not require proof that the parent company influences its subsidiary's policy in the specific area in which the infringement occurs'.

24 See P. Voet van Vormizeele, 'Die EG-kartellrechtliche Haftungszurechnung im Konzern im Widerstreit zu den nationalen Gesellschaftsrechtsordnungen', *Wirtschaft und Wettbewerb* 2010, p (1008) at 1012–1013. Curiously, the Court of Justice (in para. 77 of *Akzo Nobel*, *supra* n. 14) refused to admit that its broad interpretation of the concept of commercial policy amounts to introducing a regime of strict liability: 'Even if the parent company does not participate directly in the infringement, it exercises, in such a case, a decisive influence over the subsidiaries which have participated in it. It follows that, in that context, the liability of the parent company cannot be regarded as strict liability'.

100% of the shares in a subsidiary, there should be a rebuttable presumption that the parent company exercises a decisive influence over its subsidiary; Akzo Nobel NV argued that liability can only be attributed to a parent company when, in addition to the 100% shareholding, there are specific indications that the subsidiary's conduct was actually influenced by its parent. The Court of Justice opted for the former rule, holding that 'it is sufficient for the Commission to prove that the subsidiary is wholly owned by the parent company in order to presume that the parent exercises a decisive influence over the commercial policy of the subsidiary'. As a result, a parent company that owns all the shares of its subsidiary is jointly and severally liable for the payment of the cartel fine imposed on that subsidiary, 'unless it adduces sufficient evidence to show that its subsidiary acts independently on the market'. Over the years, it has turned out that the presumption of decisive influence is difficult, if not impossible, to rebut. For that reason, this important aspect of the Court's judgment has attracted criticism not only from academic commentators[25] but also from some members of its own organization,[26] who have all argued that, in order to preserve the rights of the defence and the principle of the presumption of innocence (enshrined in Articles 47 and 48 of the Charter), the liability of a parent company should not be established solely on the basis of a presumption derived from the holding of capital. To date, the Court has nevertheless argued that the rebuttable presumption is compatible with these fundamental principles of EU law.[27]

In summary, the Court's approach in *Akzo Nobel* (and subsequent cases) is anything but vigorous. Rather than straightforwardly admitting that, to ensure the effective enforcement of EU competition law, it advocates a rule of law that parent companies are strictly responsible for the anti-competitive behaviour of their subsidiaries, the Court bends over backwards to avoid the impression that it

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25 See, e.g., K. Hofstetter & M. Ludescher, 'Fines against Parent Companies in EU Antitrust Law: Setting Incentives for "Best Practice Compliance"', *World Competition* 2010, p (55) at 60; M. Bronckers & A. Vallery, 'No Longer Presumed Guilty? The Impact of Fundamental Rights on Certain Dogmas of EU Competition Law', *World Competition* 2011, p (536) at 548–549; J. Temple Lang, 'How Can the Problem of the Liability of a Parent Company for Price Fixing by a Wholly-Owned Subsidiary Be Resolved?', *Fordham International Law Journal* 2014, pp 1481–1524.

26 See Opinion of Advocate General Bot (26 Oct. 2010) on ECJ 29 Mar. 2011, C-201/09 P and C-216/09 P *ArcelorMittal Luxembourg SA* v. *Commission and Commission* v. *ArcelorMittal Luxembourg SA and Others*, para. 204. Pre-*Akzo Nobel*, Opinion of Advocate General Mischo (18 May 2000) on ECJ 16 Nov. 2000, C-286/98 P *Stora Kopparbergs Bergslags AB* v. *Commission*, para. 40, had already expressed the view 'that a mere 100% shareholding does not in itself suffice as a ground for the parent company's liability'.

27 See, e.g., ECJ 29 Sep. 2011, C-521/09 P *Elf Aquitaine SA* v. *Commission*, para. 62; *Areva, supra* n. 5, para. 93.

has effectively introduced a regime of strict antitrust liability for parent companies.[28]

III. Civil Liability of a Parent Company for Article 101 TFEU Infringements Committed by a Wholly Owned Subsidiary

In *Courage*, the Court of Justice famously held that any individual has a right, under EU law, to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.[29] However, because Union rules on the matter were absent at the time, the Court added that it was for national law to lay down the substantive and procedural rules governing actions for safeguarding this right (provided that these rules were not less favourable than those applicable to similar domestic actions and that they did not make it impossible or excessively difficult to exercise the right to damages enshrined in

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28 Outside the field of competition law, equally convoluted reasoning can be found in ECJ 17 Sep. 2014, C-242/13 *Commerz Nederland NV* v. *Havenbedrijf Rotterdam NV*, which concerned the question whether the guarantees provided by a public undertaking (*Havenbedrijf Rotterdam*) were imputable to the public authority controlling that undertaking (the municipality of Rotterdam). As a starting point, the Court of Justice held (in para. 31 of its judgment) that, in the context of Art. 107(1) TFEU, guarantees provided by the a public undertaking may not be imputed to the State merely because the public undertaking was decisively influenced by the State; it is also necessary to examine whether the State had been involved, in one way or another, in the issuing of those guarantees. In the subsequent paragraph, however, the Court of Justice immediately mitigated this statement by holding that 'it cannot be demanded that it should be demonstrated, on the basis of a precise inquiry, that in the particular case the public authorities specifically incited the public undertaking to take the aid measures concerned. The imputability to the State of an aid measure taken by a public undertaking may be inferred from a set of indicators arising from the circumstances of the case and the context in which that measure was taken'. According to the Court (see para. 35 of its judgment), the (likely) involvement of the municipality of Rotterdam in the provision of the guarantees could, in principle, be derived from its organisational links with *Havenbedrijf Rotterdam*: the municipality held all the shares in the public undertaking, the members of the management and supervisory board had been appointed by the general meeting of shareholders (and thus by the municipality), and the statutes of *Havenbedrijf Rotterdam* allowed – albeit with the consent of the supervisory board – the grant of guarantees such as those at hand. In the present case, however, there was strong evidence that the guarantee had been provided by the sole director of *Havenbedrijf Rotterdam*, who acted arbitrarily, deliberately kept the provision of the guarantee secret, and disregarded the statutes of the public undertaking by failing to seek the approval of the supervisory board. Although these facts clearly indicated that the municipality of Rotterdam, despite its ability to exercise decisive influence over *Havenbedrijf Rotterdam*, had not been involved in the provision of the guarantees (the referring court even assumed that the municipality would have opposed the provision of those guarantees, had it been informed of it), the Court held that they cannot in themselves exclude imputability. So in the end, it appears that, in order to ensure the effectiveness of the rules on state aid, the (theoretical) possibility of exercising decisive influence *does* seem to be the decisive factor in attributing an aid measure of a public undertaking to the state.

29 *Courage*, *supra* n. 2, para. 26.

Courage).[30] Although Directive 2014/104/EU[31] now requires Member States to harmonize their rules governing actions for damages for infringements of Union competition law (such as in relation to the disclosure of evidence, limitation periods, a passing-on defence, and so on), it does not clarify whether a parent company will incur civil liability for Article 101 TFEU violations committed by a wholly owned subsidiary.[32] Accordingly, the answer to this question is still determined by national private law, subject to the principles of equivalence and effectiveness. For practical reasons, I will hereafter only explore the solution under Dutch law.

1. *National (Dutch) Company Law: The Principles of Separate Legal Personality and Limited Liability*

Like in most (if not all) European legal systems, in the Netherlands, a company is regarded as a legal person that possesses rights and obligations distinct from those of its members (usually its shareholders).[33] Related to, but not an automatic consequence of, this principle of separate legal personality is the principle of limited liability, under which a shareholder (e.g., a parent company) cannot be held liable for the debts of a (subsidiary) company beyond the amount of its capital contribution.[34] Sometimes, however, judges pierce the so-called 'corporate veil' by disregarding the separate identity of a (subsidiary) company and its (parent) shareholders. As a result, acts and liabilities of the former may be attributed to the latter. Since this doctrine of identification (*vereenzelviging*) is at odds with both the principle of separate legal personality and the principle of limited liability, it is applied as *ultimum remedium*: an appeal to the doctrine will only succeed in exceptional circumstances. In this respect, the decisive influence that a parent company/shareholder can exercise over its subsidiary merely constitutes a minimum requirement that, in combination with other factors (such

30 *Ibid.*, para. 29.

31 Directive 2014/104/EU of the European Parliament and of the Council of 26 Nov. 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349/1-19 (2014).

32 See J.S. KORTMANN, 'The Draft Directive on Antitrust Damages Actions and its Likely Effects on National Law', in A.S. Hartkamp, C.H. Sieburgh, L.A.D. Keus, J.S. Kortmann, & M.H. Wissikink (eds), *The Influence of EU Law on National Private Law* (Deventer: Kluwer 2014), p (661) at 682 and 691.

33 Article 2:5 BW (Dutch Civil Code). For a brief comparative overview, see P. VOET VAN VORMIZEELE, 'Die EG-kartellrechtliche Haftungszurechnung im Konzern im Widerstreit zu den nationalen Gesellschaftsrechtsordnungen', *Wirtschaft und Wettbewerb* 2010, p (1008) at 1014–1015.

34 Articles 2:64 and 2:175 BW.

as evasion of the law or abuse of company law), may lead to the application of the identification doctrine.[35]

Under Dutch law, the liability of a parent company/shareholder towards creditors of a subsidiary is primarily based on the general provision on tort (Art. 6:162 BW). Since this means that a parent company is liable because of its own unlawful conduct (consisting of the violation of a duty of care towards creditors), rather than because the unlawful conduct of a subsidiary is attributed to it, this legal construction is consistent with the principles of separate legal personality and limited liability. A duty of care only exists when the parent company controls the policy of its subsidiary and thus has a (presumed) insight into the latter's relationship with its creditors. As the case law of the *Hoge Raad* (the Supreme Court of the Netherlands) illustrates,[36] corporate control does not necessarily flow from 100% ownership but arises from additional factors, in particular the fact that the parent company interferes, in an intensive and insistent manner, with the subsidiary's daily business.[37] Proof of actual interference is, however, not always necessary, as the Supreme Court tends to assume that a duty of care exists in the event that the parent has the power potentially to intervene in the subsidiary's operations because of economic, organizational, and legal links between the companies.[38] Determining the moment when the parent company's duty of care arises and, subsequently, the point in time from which the parent's (in)actions must be regarded as unlawful will, to a certain extent, be arbitrary. For that reason and also because of the nature of the claim, courts should pick a date that is on the safe side (in other words, favourable to the parent company).[39]

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35 S.M. Bartmann & A.F.M. Dorresteijn, *Van het Concern* (Deventer: Kluwer 2013), p 296. See also K. Vandekerckhove, *Piercing the Corporate Veil: A Transnational Approach* (Alphen aan den Rijn: Kluwer 2007), p 37: 'Whether in a particular case several (legal) persons may be identified depends on the factual circumstances of the case. From the case law on the matter different factors may be deduced, that, mostly in combination with each other, may give rise to identification. Such factors are, among others, dominance of one corporation over another, intensive involvement in the management of a corporation, the creation of expectations *vis-à-vis* third parties, commingling of assets, close intermingling (consisting of, for instance, identity of shareholders and/or directors, identity of addresses, use of the same letterhead etc.)'.

36 See, for some references, AG Timmerman, Opinion in HR 12 Sep. 2008, *JOR* 2008/297 (Van Dusseldorp/Coutts), para. 3.8.

37 See, e.g., HR 19 Feb. 1988, NJ 1988/ 487 (Albada Jelgersma).

38 See HR 21 Dec. 2001, NJ 2005/96 (Sobi/Hurks II).

39 G. van Solinge & M.P. Nieuwe Weme, *Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. Rechtspersonenrecht. Deel II. De naamloze en besloten vennootschap* (Kluwer: Deventer 2009), No. 841. According to S.M. Bartman & A.F.M. Dorresteijn, *supra* n. 35, p 306, a judge will determine the law in four steps, namely by (1) assessing and deciding whether there is a strong group structure, as a result of which the parent company has the power to intervene in the subsidiary; (2) deducing from this power that the parent company has a duty

2. *Compatibility of the National Approach with EU Law*

The abovementioned principles of Dutch company law indicate that a mere finding of corporate control or decisive influence (whether or not assumed on the basis of a 100% shareholding) is not sufficient to hold a parent company liable for the anti-competitive behaviour of a subsidiary.[40] For a damage claim to succeed, the claimant will have to prove that the parent is liable for negligence because, as an owner and controller of the subsidiary, it owed a duty of care in circumstances in which it was aware (or should have been aware) of the anti-competitive conduct of its subsidiary. So, as parental liability under national law requires evidence of fault, it does not – at least not automatically – coincide with a parent company's joint and several liability under *competition law*.

Until now, the Court of Justice has not ruled explicitly on the question whether this private law approach to parental liability for the Article 101 TFEU infringements of its subsidiary is in conformity with the EU law principle of effectiveness. There are some signals in its case law, though, pointing to a positive answer. Perhaps the clearest indication can be found in *Schindler*, where the appellants – members of the Schindler conglomerate – contended that 'the case law of the Court of Justice and the General Court allowing joint and several liability of the parent company for the infringements committed by its subsidiary breaches national company law regimes that, in principle, do not allow an extension of the liability of legally distinct legal persons and observe the principle of limited liability of shareholders for the debts of their company'.[41] In particular, they argued that liability of a parent company existing solely because of presumed influence over its subsidiary does not exist in the legal systems of the Member States. Responding to this plea, Advocate General Kokott admitted that 'the principle of separation is a common principle in the company law of the Member

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of care towards the creditors of the subsidiary; (3) selecting the moment on which this duty is activated; and (4) deciding if the parent company has fulfilled the duty of care in a sufficient way.

40 Support for this view can be drawn from AG Keus, Opinion in HR 21 Dec. 2012, *RvdW* 2013/83 (ANVR c.s./IATA), para. 12. The doctrine of identification was also rejected in *Rechtbank Oost-Nederland* 16 Jan. 2013, *JOR* 2013/129 (TenneT/ABB c.s), para. 4.10, which concerned the (reverse) question of whether a *subsidiary* that was not implicated in a cartel investigation is liable because it followed the pricing policies set by its *parent company* (the cartel participant). For a similar approach, see *Cour de cassation (chambre commerciale)*, 15 Nov. 2011, No. 10-21701, which quashed the judgment of the *Cour d'appel d'Orléans* wherein a cartel infringement was attributed to JCB Sales and JC Bramford Excavators – two subsidiaries of JCB Services – on the basis of a Commission decision establishing a breach of Art. 101 TFEU by an undertaking that consisted of the parent and its subsidiaries: 'Attendu qu'en se déterminant ainsi, sans préciser, ainsi qu'elle y était invitée, quelle avait été la participation des sociétés JCB Sales et JC Bramford Excavators aux pratiques discriminatoires sanctionnées par les autorité et juridictions européennes de concurrence et ayant causé préjudice à la société Central Parts, la cour d'appel a privé sa décision de base légale'.

41 *Schindler Holding, supra* n. 22, para. 86.

States, whose practical importance should not be underestimated, above all in matters of civil liability in connection with trading companies, such as companies with limited liability or joint stock companies'.[42] But then, in the same paragraph, she stressed that the crucial factor in assessing an undertaking's responsibility under antitrust law is not whether there is a corporate veil between the parent company and the subsidiary. The legal constructs chosen by the natural and legal persons behind the undertaking are in fact irrelevant in determining the effect on competition of an undertaking's conduct on the market. What really matters, according to the Advocate General, is economic reality, in other words, the actual conduct of the undertaking in the market. Consequently, '[t]he question whether a parent company and its subsidiary/subsidiaries appear on the market as a single undertaking cannot . . . be assessed on the basis of a purely formal legal analysis. It likewise cannot be assessed solely on the basis of company law whether a subsidiary can determine its conduct on the market autonomously or is exposed to the decisive influence of its parent company'.[43]

The Court of Justice, in its judgment, confirmed this view by stating that while the principle of personal liability of legal persons 'is of particular importance especially as regards liability in the sphere of civil law . . . it cannot be relevant for defining the perpetrator of an infringement of competition law, which is concerned with the actual conduct of undertakings'.[44] While the quotation should be welcomed as far as it suggests that a parent company's civil liability for Article 101 TFEU infringements committed by its subsidiary should be judged on its own merits, it also raises a consistency matter that has its origin in the Court of Justice's alleged application of the single economic unit doctrine in cases such as *Akzo Nobel*: if, for the purpose of establishing antitrust liability, the Article 101 TFEU infringement of a subsidiary is attributed to the parent company, why is it that, when it comes to civil liability, the anti-competitive conduct of that subsidiary is no longer regarded as an act of the parent?[45] In the absence of a convincing answer, the Court should and can avoid this consequence by admitting that what really matters, in cases such as *Akzo Nobel*, is not that the parent and its subsidiary form a single economic unit but that the parent company has actually exercised decisive influence over the commercial policy of the subsidiary.

The difference in approach between competition law and private law would then only come down to the question whether parental liability for the

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42 Opinion of Advocate General Kokott (18 Apr. 2013) on *Schindler Holding, supra* n. 22, para. 65.

43 *Ibid.*, para. 67.

44 *Schindler Holding, supra* n. 22, para. 101.

45 Arguably, this might explain why in [2003] EWHC 961 (Comm), Justice Aikens opted to apply the single economic unit doctrine (and not the national principle of separate legal personality) in a private law context. As a result, a number of companies were liable in damages because they formed part of the same undertaking as the companies that had been found in breach of EU competition law by the Commission.

anti-competitive behaviour of the subsidiary also requires proof of negligence on the part of the parent. As the Court's case law demonstrates (see s. II.2.), antitrust liability only requires proof that the parent company has exercised decisive influence over its subsidiary, which can either be derived from the economic, organizational, and legal links between the companies or is assumed in the event that the parent holds all the shares in the subsidiary. Civil liability, on the other hand, does not automatically arise from the exercise of decisive influence but requires additional proof that the parent has acted negligently (and thus unlawfully) against the victims of the anti-competitive behaviour of the (wholly owned) subsidiary. This difference is explained by the fact that cartel fines and damages actions have distinct objectives. Cartel fines aid the effective enforcement of competition rules in order to prevent a distortion of competition.[46] Accordingly, their aim is to punish and deter anti-competitive behaviour. The concept of parental liability constitutes a powerful tool in this respect, as the regime of *de facto* strict liability allows the Commission to impose larger fines for cartel infringements committed by a company that belongs to a corporate group. In my opinion, EU law (and, in particular, the principle of effectiveness) does not require that the *Akzo Nobel* line of case law is applied analogously to cases in which the civil liability of a parent company for Article 101 TFEU infringements of a (wholly owned) subsidiary is at stake. In the absence of EU rules on the issue of parental liability, national courts will have to observe the principles of separate legal personality and limited liability, as it cannot be said that these basic principles of company law make it impossible or excessively difficult for cartel victims to exercise their EU right to damages. In any event, they can claim compensation from the subsidiary that violated Article 101 TFEU and, if there is sufficient ground, also from the parent company.

IV. Conclusion

According to conventional wisdom, the Court of Justice in *Akzo Nobel* acknowledged that it is ultimately because a parent company and its infringing subsidiary form a single economic unit that the Commission can hold the parent company liable for an Article 101 TFEU infringement of a subsidiary. However, if that really were the case, the anti-competitive conduct of the subsidiary should be attributed to *all* legal entities within the undertaking and not only to the parent company. Besides, if the subsidiary's conduct is attributed to the parent company to establish the latter's antitrust liability, it would be illogical not to do so in a private law context.

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46 See ECJ 15 Jul. 1970, C-41/69 *ACF Chemiefarma* v. *Commission*, para. 173; ECJ 7 Jun. 2007, C-76/06 P *Britannia Alloys & Chemicals Ltd* v. *Commission*, para. 22.

A closer examination of *Akzo Nobel* reveals, however, that the single economic unit doctrine plays no decisive role in determining the legal entities responsible for a competition law infringement: in reality, a parent company's antitrust liability is based on the fact that it exercises decisive influence over the subsidiary that committed the cartel infringement. As the exercise of decisive influence does not require proof of personal involvement but is rather inferred from the economic, organizational, and legal links between the parent company and its subsidiary, the Court of Justice has *de facto* created a regime of strict antitrust liability to enhance the effective public enforcement of EU competition rules.

EU law (under the principle of effectiveness) does not require an analogous application of the *Akzo Nobel* line of case law to situations in which the civil liability of a parent company for Article 101 TFEU infringements of a wholly owned subsidiary is at stake. In the absence of Union rules on the subject, it remains permitted for national courts to observe the fundamental principles of separate legal personality and limited liability.