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ARTICLE

HOW CAN THE PROBLEM OF THE LIABILITY OF A PARENT COMPANY FOR PRICE FIXING BY A WHOLLY-OWNED SUBSIDIARY BE RESOLVED?

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INTRODUCTION

When one subsidiary in a group of companies is found by the European Commission to have engaged in price fixing, contrary to Article 101 of the Treaty on the Functioning of the European Union ("TFEU"), the question arises whether the parent company of the group should also be fined. This question is important because the Commission considers that when the parent is fined, the fine can be increased for deterrence and based on the turnover of the entire group, even if only one subsidiary was involved in the infringement. The ten percent limit on the amount of the fine, imposed by Regulation 1/2003, Article 23, is applied to the group turnover, and not to the turnover of the subsidiary. The rule that fines are increased for recidivism is applied to the group, and not only to the subsidiary.

The conventional view is that the parent company can be fined (even if it was not involved in the infringement) when the two companies form part of a single economic "enterprise" or "undertaking" (so that, for example, an agreement between them would not be regarded as an intra-enterprise conspiracy and so not restricting competition). However, because the fines on parent companies are so large, this view has given rise to a large member of cases before the General Court and the European Court of Justice (the "ECJ" and collectively with the General Court, "the Courts"). These cases have arisen because in practice it is not always clear whether the companies constitute a single enterprise. There is no precise and easily used definition of an enterprise, and different tests have been applied. As a result, it is generally considered by practising lawyers that it is not clear what a parent company needs to prove in order to avoid being fined. In the case of a wholly owned subsidiary, there is a presumption that the two companies form a single enterprise. This presumption is said to be rebuttable (and to be legally permissible, it must be rebuttable), but it has almost never been rebutted. It is therefore very difficult for a parent company to know whether e.g., routine compliance with company law would involve it in liability if a subsidiary infringed Article 101. This is widely believed to be contrary to legal certainty, and to discourage parent companies from kinds of conduct that are either desirable or obligatory.[1]

So, there are two areas of uncertainty in the law: What kinds of evidence are relevant to prove or disprove a "single enterprise", and how can the presumption be rebutted? More specifically, what are the key tests of a "single enterprise"? Is it possible in practice to rebut the presumption? If it is possible to rebut it, what kind of proof is necessary?

I. *THE PRINCIPLES ACCORDING TO CASE LAW*

The judgments of the General Court and of the European Court of Justice in cases in which parent companies have been fined by the European Commission for price fixing by their 100% subsidiaries now follow a pattern.[2] The recent judgments repeatedly say:

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1. It may also create an incentive for parent companies to wholly centralize the management of their subsidiaries, losing the benefits of local management. *See* Laura La Rocca, *The Controversial Issue of the Parent Company Liability for the Violation of EC Competition Rules by the Subsidiary*, 32 EUR. COMPETITION L. REV. 68, 68–76 (2011).

2. See generally for comments on the recent caselaw, Stefan Thomas, *Guilty of a Fault that One Has not Committed: The Limits of the Group-Based Sanction Policy Carried out by the Commission and the European Courts in EU-Antitrust Law*, 3 J. EUR. COMPETITION L. & PRAC. 11 (2012); La Rocca, *supra* note 1, at 68–76; Mieke Olaerts & Caroline Cauffman, *Quimica*: *Further Developing the Rules on Parent Company Liability*, 32 EUR. COMPETITION L. REV. 431, 431–440 (2011). Citing primarily recent case-law, see Stora Kopparsberg v. Commission., Case C-286/98 P, [2000] E.C.R. I-9925, ¶ 25; Akzo Nobel and Others v. Commission., Case C-97/08 P, [2009] E.C.R. I-8237, ¶ 58 ff; Elf Aquitaine v. Commission., Case C-521/09 P, [2011] E.C.R. I-8947, ¶ 1; Arkema v. Commission., Case C-520/09 P, [2011] E.C.R. I-8901; Elf Aquitaine v. Commission., Case C-404/11 P [2012]. Other cases include General Quimica and Others v. Commission., Case C-90/09 P, [2011] E.C.R. I-00001, ¶¶ 34–35; Cases C-201/09 P; Arcelormittal Luxembourg v. Commission. and Commission. v. Arcelormittal Luxembourg, C-216/09 P, [2011] E.C.R. I-2239, ¶ 95; Joined Cases T-122/07 to T-124/07, Siemens AG Österreich and VA Tech Transmission v. Commission. [2011] E.C.R. II-0793, ¶¶ 122, 130, 135, 151; Joined Cases T-141/07 and others, General

- the conduct of a subsidiary may be imputed to the parent where, although they have separate legal personalities, the subsidiary does not decide independently on its conduct on the market, but carries out, in all material respects, the instructions given by the parent, having regard to the economic, organizational, and legal links between them.
- in this situation the two companies form a single economic unit and therefore a single enterprise, so the involvement of the parent in the infringement does not need to be proved.

Technic-Otis and Others v. Commission., [2011] E.C.R. II-4977, ¶¶ 52–90; Legris Industries v. Commission., Case C-289/11 P, [2012] E.C.R. I___ (not yet reported); ThyssenKrupp v. Commission., Case C-352/09 P, [2011] E.C.R. I- 2359; Arcelor Mittal Luxembourg v. Commission., Case C-201/09 P, [2011] E.C.R. I-2239 (a former parent company); Arkema and Others v. Commission (sodium chlorate) Case T-343/08,, [2011] E.C.R. II-2287; Arkema, Total, Elf v. Commission (methacrylates), Case T-217/06, [2011] E.C.R. II-2593; Cases T-185/06, 186/06, 196/06, Air Liquide, Edison, Solvay v. Commission. (hydrogen peroxide), [2011] E.C.R. II-2809, 2839, 2959, 3179, 3149, 3063, 3119; EI du Pont de Nemours v. Commission, Case T-76/08, [2012] E.C.R. I___ (not yet reported); UPM Kymmene v. Commission (industrial bags), Case T-53/06, [2012] E.C.R. I___ (not yet reported); Total, Elf Aquitaine v. Commission, Case C-421/11, [2012] E.C.R. I___ (not yet reported); Novácke chemické závody a.s. v. Commission (calcium Carbide), Case T-352/09, [2012] E.C.R. I___ (not yet reported); Nynäs Petroleum v. Commission, Case T-347/06, [2012] E.C.R. I___ (not yet reported); garantovaná v. Commission, Case T-392/09, [2012] E.C.R. I___ (not yet reported), ¶ 22 (a case in which the presumption was not applied); Alliance One v. Commission (Italian tobacco), Cases C-593/11, C-654/11, [2012] E.C.R. I___ (not yet reported); Tomkins v. Commission, Case C-286/11 P, [2013] E.C.R. I___ (not yet reported); ENI v. Commission (synthetic rubber), Case C-508/11 P, [2013] E.C.R. I___ (not yet reported); Parker v. Commission. (marine hoses), Case T-146/09, [2013] E.C.R. I___ (not yet reported); Elf Aquitaine v. Commission, Case T-199/08, [2011] E.C.R. II-2149; Dow Chemical, Case C-499/11 P, [2013] E.C.R. I___ (not yet reported), ¶ 47–48; Groupe Gascogne v. Commission, Case T-72/06, [2011] E.C.R. II-400; FL Smidth, Case T-65/06, [2012] E.C.R. I___ (not yet reported); Total Nederland v. Commission, Case T-348/06, [2012] E.C.R. I___ (not yet reported); Fresh Del Monte Produce v. Commission, Case T-587/08, [2013] E.C.R. I___ (not yet reported); Groupe Gascogne v. Commission, Case C-58/12 P, [2013] E.C.R. I-____.

In Arkema and Others, Case T-217/06, [2011] E.C.R. II-2593, the Court said:

> [A] parent company which holds almost all of the capital of its subsidiary is, as a general rule, in a similar situation to that of a sole owner, as regards its power to exercise a decisive influence over the conduct of its subsidiary, having regard to the economic, organizational and legal links which join it to that subsidiary. Consequently the Commission is entitled to apply to that situation the same evidential regime, namely to rely on the presumption that the parent company makes effective use of its power to exercise a decisive influence over the conduct of its subsidiary.

Id. ¶ 53.

- Where the parent has a 100% shareholding, it can exercise a decisive influence on the subsidiary's conduct, and there is a rebuttable presumption that the parent does in fact exercise a decisive influence. The Commission does not need to show evidence of the exercise of influence. It does however need to explain that it relied on the presumption.[3] Because the presumption must be rebuttable, the Commission may need to make a detailed statement of reasons for imputing the infringement to the parent company[4] and should explain why the companies' arguments are not enough to rebut the presumption.
- the parent company has the burden of proof to rebut the presumption, by producing sufficient evidence to show that the subsidiary acts independently on the market.

In fact, this presumption has never been directly rebutted.[5] Repeatedly, the Courts have said that evidence and arguments put forward by parent companies were not sufficient to rebut it. In some cases the Courts have annulled findings that it has not

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3. *Grolsch*, [2011] E.C.R. II-6169, ¶¶ 77–78.

4. *Air Liquide*, [2011] E.C.R. II-2809, ¶ 65; *Elf Aquitaine*, [2011] E.C.R. I-8947, ¶ 153.

5. In several cases the Courts have refused to apply the presumption, on procedural grounds. Procedural issues are not enough to make the presumption rebuttable as a matter of substance. *Air Liquide*, [2011] E.C.R. II-2809; Edison v. Commission, Case T-196/06, [2011] E.C.R II-3149; *Grolsch*, [2011] E.C.R. II-6169; *Elf Aquitaine*, [2011] E.C.R. I-8947; General Quimica v. Commission, Case C-90/09 P, [2011] E.C.R. I-0001, ¶¶ 60–62, 79. These cases are discussed below. The only case in which the presumption has been held to be inapplicable on substantive grounds is *Gosselin v. Commission*, Joined Cases T-208–209/08, [2011] E.C.R. II-3639. These cases are discussed below.

Since the liability of the parent is derived from the liability of the subsidiary, it cannot relate to a period longer than the period during which the subsidiary was committing the infringement. Tomkins v. Commission, Case C-286/11 P, [2013] E.C.R. I___ (not yet reported).

There have been several cases in which there has been a change in the ownership of the subsidiary which committed the infringement, but they do not seem to clarify the legal issues discussed here. *See* Thyssen Krupp Nirosta GmbH v. Commission, Case C-352/09 P, [2011] E.C.R I-2359, ¶ 143 ("In principle, it is for the natural or legal person managing the undertaking in question when the infringement was committed to answer for that infringement, even if, at the date of the decision finding the infringement, the operation of the undertaking was no longer his responsibility."); *see also* Parker v. Commission, Case T-146/09, [2013] E.C.R. I____ (not yet reported).

It seems that the Commission has discretion as to whether to fine a parent company. *See* Team Relocations v. Commission, Case C-444/11 P, [2013] E.C.R. I____ ¶¶ 159–161 (not yet reported).

been rebutted, but have done so essentially on procedural grounds. It seems clear that the Courts allow the presumption to be rebutted a little more readily than the Commission, although the Courts do not seem to have been consistent.

In theory, it is because the parent and subsidiary form a single enterprise for the purposes of Article 101 that the parent can be fined.[6] This can be proved either by evidence that the parent gives instructions, or by other evidence of various kinds showing that there is a "single enterprise" or, in the case of 100% shareholding, by the presumption that control is exercised, unless that presumption can be rebutted.

After considering some policy considerations and some specific issues, these questions are discussed below.

It is not always clear whether findings in the judgments of the General Court are specific findings of fact concerning the cases before the Court and if so, on what those findings are based, or whether they are intended to be general statements of law. The Court of Justice, in theory, does not make findings of fact in appeals from the General Court.

II. *POLICY CONSIDERATIONS*

Although the Commission has never clearly stated the policy considerations that have gradually led to the present state of the law, the arguments for making parent companies liable for price-fixing by wholly owned subsidiaries seem to be based on the following assumptions:

- the parent company and the group of companies will usually be significantly larger than the company involved in the infringement, and therefore a larger fine should be imposed, to achieve more effective deterrence.[7]
- if the parent company is liable and the result is a larger fine, the parent will be under pressure to supervise the subsidiary more strictly.
- since the parent of a wholly owned subsidiary has power to control the subsidiary, either it has done so (and

6. EI du Pont de Nemours v. Commission, Case T-76/08, [2012] E.C.R. I____(not yet reported).

7. *See* Thomas, *supra* note 2, at 17 ("[I]t is hard to see from what particular conduct or omission the parent company should be deterred.").

therefore should share the responsibility for any infringement that has occurred) or it has deliberately chosen not to do so (and so it should not be allowed to escape responsibility).

- wherever there are reasons for increasing the total amount of a fine, it should be increased.
- the concept of a single enterprise should be the same under Article 101 for fining purposes as it is under the Merger Regulation, and when dealing with the question whether an agreement between associated companies can restrict competition.

The Court has said[8] that the presumption that the parent exercises influence:

> seeks precisely to find a balance between the importance . . . of the objective of penalising conduct contrary to the competition rules, in particular Article 101 TFEU, and to prevent its repetition and . . . the requirements of certain general principles of European Union law, such as in particular the presumption of innocence, that penalties should be applied only to the offender, legal certainty and the rights of the defence, including the principle of equality of arms. It is particularly for that reason that it is rebuttable.

In the light of the case law, that statement seems unduly complacent.

The first cases involved evidence that the parent company had been involved, to a greater or lesser extent, in the operations of the subsidiary. The Commission gradually came to see that it would be simpler and easier if there were a presumption that a parent always exercises some control over a wholly-owned subsidiary, and could be fined on that basis, without any need to analyse the evidence. In other words, the development of the cases suggests that the Commission

8. *ENI*, [2013] E.C.R. I ____ (delivered May 8, 2013), ¶ 50; Schindler Holding v. Commission, Case C-501/11 P, [2013] E.C.R. I ____ (delivered July 18, 2013) (not yet reported) ¶ 108; *Elf Aquitaine*, [2011] E.C.R. I-8947, ¶ 59; *id.* ¶ 60 ("[I]t is within the sphere of operations of those entities against whom the presumption operates that evidence of the lack of actual exercise of that power to influence is generally apt to be found.").

gradually moved towards a more easily applied rule that would justify higher fines.

It is useful to set out the characteristics that would be needed for a sound and rational policy. Such a policy:

- should state a rule about parent companies that have not in fact been involved in infringements that is clear and intelligible to business people, and should avoid as far as possible being dependent on the details of the companies' arrangements and practices, because any such dependence will lead to endless litigation.
- would not penalize or discourage efforts by parent companies to prevent their subsidiaries from infringing the law, in particular competition law.[9] A policy that discouraged measures to ensure compliance would be irrational and counter-productive. So instructions given by parent companies to obey competition law ought not to make the parent liable to fines. Instructions of that kind have no economic content, and do not make separate companies into a single economic "enterprise."
- should not make it difficult for the parent company to comply with any other law applicable. Specifically, it should not make the parent liable to fines merely because it fulfils its normal obligations as a shareholder to hold meetings of shareholders in the subsidiary at intervals. A law-abiding shareholder must carry out a number of obligations under the company law applicable to the subsidiary.
- should not make it necessary for the parent to choose between potential liability to fines and breach of its own obligations under the company law and stock exchange obligations applying to the parent itself. Those obligations require the parent to consolidate the accounts of the subsidiary and to make statements about the subsidiary for the accuracy and completeness of which the parent is legally responsible, and which the parent must be able to verify as far as necessary.

9. *See* GTO, General Technic, Otis and UTC v. Commission, Joined Cases T-141-42, 145-46/07, [2011] E.C.R. II-4977, ¶ 85 (in which the Court considered that measures intended to ensure compliance proved control, and made the parent company liable); *see also Schindler Holding*, [2013] E.C.R. I____ (delivered July 18, 2013) ¶ 114.

Consolidation of accounts, and descriptive statements, do not have direct economic consequences, and do not create a single "enterprise."

- should not interfere with good management of the group by the parent. Competition law should not penalize or discourage a parent from requiring group approval for any major financial commitment by the subsidiary. Financial prudence should not be enough, in itself, to lead to liability to fines. It would not be a wise policy to discourage a parent from supervising a subsidiary in circumstances when supervision seemed desirable. Safeguard measures taken when problems arise are not equivalent to routine continuing economic instructions and control. There is nothing inherently undesirable about close relations between parents and subsidiaries.
- should not disregard the fact that some multinational groups of companies are highly decentralized, and that the ultimate parent does not try to exercise anything resembling day-to-day management and control. There is nothing inherently undesirable about decentralized management, either.

It is not clear, even in theory, what policy principles the case law is based on, or what a parent company ought to prove in order to avoid liability for an infringement by its wholly-owned subsidiary. This uncertainty has led to much litigation, and the law has not become any clearer. If it were accepted that the above tests are relevant in assessing the present state of the law, it seems clear that it would fail the tests.

It is always undesirable in any sphere of law to have a presumption that can be rebutted only by proving a negative, such as, in these cases, proving that influence was not exercised (especially as it is not clear what proof would be sufficient, or even precisely what needs to be proved). This basic criticism is not answered by saying that in many cases the parent has exercised influence and so should not be able to rebut the presumption. This is particularly undesirable when the initial findings of fact are made by a body such as the Commission for which it is convenient to rely on the presumption and to reject as insufficient any evidence intended to rebut it. Confirmation bias, which inevitably arises when the same officials draft the statement of objections and the decision, is particularly likely in these circumstances.

The need to prove a negative is not easy to reconcile with the presumption of innocence.[10] That presumption is not made inapplicable merely by saying that the two companies are, or are presumed to be, part of one group. The two presumptions seem incompatible, and one would assume that the presumption of innocence, being a fundamental right, should prevail. However, this was not accepted by the General Court in *Thyssen Krupp*[11], *GTO General Technic*,[12] or *Schindler*[13] on the formal ground that, in theory, the presumption of influence can be rebutted.

III. *ACADEMIC COMMENTS*

Lawyers commenting on this case law have almost unanimously criticized it, essentially on the grounds that the presumption cannot in practice be rebutted, and that it is no longer a presumption but, in reality, something close to a rule of law.[14]

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10. *See, e.g.*, Repsol Lubricantes y Especialidades v. Commission, Case T-496/07, [2013] E.C.R. I____ ¶¶ 180–81 (delivered Sept. 16, 2013) (not yet reported) ("La présomption d'exercice d'une influence déterminante ne saurait être renversée par la seule démonstration que c'est la filiale qui gère les aspects de sa politique commerciale sans recevoir de directives à cet égard. . . . L'absence d'ordre ou d'instruction de la société mère à la filiale en ce qui concerne sa politique d'achat ou les réunions avec les autres membres de l'entente n'est pas non plus de nature à démontrer l'autonomie du comportement de la filiale sur le marché . . . .").

11. Thyssen Krupp and Others v. Commission, Joined Cases T-144, 147–50, 154/07, [2011] E.C.R. II-5129.

12. *GTO*, [2011] E.C.R. II-4977.

13. *Schindler Holding*, [2013] E.C.R. I ____ ¶¶ 81–84 (delivered July 18, 2013) .

14. *See, e.g.*, Ingrid Vandenborre & Thorsten C. Goetz, *Rebutting the Presumption of Parental Liability – A* Probatio Diabolica*?*, *in* THE INTERNATIONAL COMPARATIVE LEGAL GUIDE TO: CARTELS & LENIENCY 2012, at 17 (Global Legal Grp. ed., 2012); Bettina Leupold, *Effective Enforcement of EU Competition Law Gone Too Far? Recent Case Law on the Presumption of Parental Liability*, 34 EUR. COMPETITION L. REV. 570, 570–82 (2013); Yves Botteman et al., *"You Can't Beat the Percentage" – The Parental Liability Presumption in EU Cartel Enforcement*, 2012 EUR. ANTITRUST REV. 3; John D. Briggs & Sarah Jordan, *Presumed Guilty: Shareholder Liability for a Subsidiary's Infringements of Article 81 EC Treaty*, 8 BUS. L. INT'L 1 (2007); Marco Bronckers & Anne Vallery, *No Longer Presumed Guilty? The Impact of Fundamental Rights on Certain Dogmas of EU Competition Law*, 34 WORLD COMPETITION L. & ECON. REV. 535, 535–70 (2011); La Rocca, *supra* note 1; Thomas, *supra* note 2.

IV. *SOME SPECIFIC ISSUES*

Before considering the main questions arising, several specific questions are worth analyzing briefly, because a variety of different phrases have been used to describe the tests to be applied.

- the Courts have used phrases about influencing the subsidiary's "conduct on the market." Presumably it is intended to refer to the fact that the infringements concern the subsidiary's pricing policy. But it seems that instructions only about e.g., investments or financial control, without any instructions concerning pricing, would not enable the parent to avoid liability. It is not clear whether there can be a single enterprise if there were proved to be no exercise of influence on the subsidiary's conduct "on the market."[15]
- what is the significance of phrases about influence "in all material respects"? The phrase seems to be repeated routinely without having any great significance.[16] At first sight, the phrase suggests that there might be exercise of influence that would be immaterial and that would not mean that the parent should be liable. It also suggests that if there had been influence only in some material respects, the conclusion would not be clear. But neither suggestion is borne out by the case law. The Commission seems to consider that instructions on any aspect of the subsidiary's affairs confirm, instead of rebutting, the

15. *See* Parker v. Commission, Case T-146/09, [2013] E.C.R. I____, ¶ 177 (delivered May 17, 2013) (not yet reported) ("[T]he conduct of the subsidiary on the market cannot be the only factor which enables the liability of the parent company to be established, but is only one of the signs of the existence of an economic unit."); *see also* Groupe Gascogne SA v. Commission, Case T-72/06, [2011] E.C.R. II-400, ¶ 74 (holding the parent company can be liable even if its influence does not concern the "commercial policy" of the subsidiary).

16. *See, e.g.*, Gosselin Group NV v. European Commission, Case C-440/11 [2013] E.C.R. I____, ¶ 38 (delivered July 11, 2013) (not yet reported) (citing Akzo Nobel NV v. European Commission, Case C-97/08, [2009] E.C.R. I-8237, ¶ 58; Alliance One International Inc. v. Commission, Joined Cases 628/10 & 14/11, [2012] E.C.R. I____, ¶ 43 (delivered July, 19, 2012) (not yet reported), and previous case-law) ("[I]t is the Court's established case-law that the conduct of a subsidiary may be imputed to the parent company in particular where, although having a separate legal personality, the subsidiary does not decide independently upon its own conduct on the market, but carries out, *in all material respects*, the instructions given to it by the parent company, having regard in particular to the economic, organisational and legal links between those two legal entities." (emphasis added)).

> presumption. The fact that there are some matters on which clearly no instructions have been given (even if those matters are "conduct on the market") does not seem to relieve the parent from liability.[17]

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17. *See, e.g.*, Keramag Keramische Werke AG v. Commission, Joined Cases 379/10 & 381/10, [2013] E.C.R. II____, ¶ 312 (delivered on Sept. 16, 2013) (not yet reported) ("It is not necessary to restrict that assessment to matters relating solely to the subsidiary's commercial policy in the strict sense, such as the distribution or pricing strategy. In particular, the presumption in question cannot be rebutted merely by showing that it is the subsidiary that manages those specific aspects of its commercial policy, without receiving instructions."). In Groupe Gascogne SA, Case C-58/12, [2013] E.C.R. I____, ¶¶ 39–43 (delivered Nov. 26, 2013) (not yet reported), the ECJ found that even though the subsidiary enjoyed "a large measure of autonomy," it was nevertheless under regular parental monitoring and this was sufficient to find the existence of a single undertaking. In *Repsol Lubricantes y Especialidades*, Case T-496/07, [2013] (not yet reported) ¶ 179, the General Court even considered that "l'application d'un modèle d'organisation fondé sur une philosophie de delegation maximale aux filiales ne constitue pas un element de pruve susceptible de démontrer l'autonomie de ces dernières. Au contraire, l'introduction et l'application d'une telle stratégie ou de toute autre stratégie de management attestent plutôt l'existence d'un pouvoir de contrôle effectrif." *See also Roca*, Case T-412/10, [2013] ¶¶ 72–77 (not yet reported); *Laufen Austria*, Case T-411/10, [2013] E.C.R. I____, ¶¶ 95–98 (not yet reported); *Roca Sanitario*, Case T-408/10, [2013] E.C.R. I____, ¶¶ 95–98 (not yet reported). In Total Raffinage Marketing v. Commission**,** Case T-566/08, [2013] E.C.R. I____, ¶¶ 501–02 (delivered on Sept 13, 2013) (not yet reported), the General Court explained its position as follows:

> [I]t should be observed that the application of the presumption that the parent company owning all or virtually all of the capital of its subsidiary does in fact exercise decisive influence over the commercial conduct of the subsidiary is justified by the fact that, where the parent company is the subsidiary's sole shareholder, it has at its disposal all the possible means of ensuring that the subsidiary's commercial conduct is aligned with its own. In particular, it is the sole shareholder that defines, in principle, the extent of the subsidiary's autonomy by establishing the latter's articles of association, chooses its management and takes or approves the subsidiary's strategic commercial decisions, if necessary by having representatives on the subsidiary's bodies. Likewise, the economic unity between the parent company and its subsidiary is normally further protected by obligations arising under the company law of the Member States, such as the obligation to keep consolidated accounts, the obligation for the subsidiary to account periodically for its activities to the parent company and also by the approval of the subsidiary's accounts in general meeting, consisting solely of the parent company, which necessary means that the parent company follows, at least in broad terms, the commercial activities of the subsidiary.
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> Next, it should be emphasised that in the case of a subsidiary which is wholly, or almost wholly, owned by a single parent company, there is in principle a single commercial interest and the members of the subsidiary's bodies are designated and appointed by the sole shareholder, which may give them at least informal instructions and impose performance criteria on them.

- from phrases about "economic, organisational and legal links" between the two companies, it seems that the Courts consider that all the relationships between the parent and subsidiary need to be taken into account, presumably because a subsidiary's conduct might be influenced in a variety of different ways.[18] That seems reasonable, but the phrase provides little useful guidance.[19] The phrase may merely describe the overall closeness, or otherwise, of the relationship between the companies. It seems clear, however, in particular from the judgments in *Air Liquide*[20] and *Elf Aquitaine*,[21] that the economic relationships are more important than the administrative, legal, or organizational ones. Sharing a legal, tax, and insurance department with the parent

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In such a case, therefore, there is necessarily a relationship of confidence between the management of the subsidiary and the management of the parent company and the management of the subsidiary necessarily act by representing and promoting the only commercial interest that exists, namely the interest of the parent company. Thus, the unity of the market conduct of the parent company and of its subsidiary is ensured in spite of any autonomy conferred on the management of the subsidiary as regards its operational direction, which comes within the definition of the parent company's commercial policy in the strict sense. As a general rule, moreover, it is the sole shareholder that defines, on its own and according to its own interests, the procedure whereby the subsidiary takes decisions and that determines the subsidiary's operational autonomy, which it may change on its own initiative by amending the rules governing the functioning of the subsidiary or in the context of a restructuring, or indeed by setting up informal decision-taking structures."

18. *See* La Rocca, *supra* note 2.

19. In the Opinon of Advocate General Kokott, *Alliance One*, [2012] E.C.R. I____, ¶¶ 146, 158, the Advocate General said that if the presumption is relied on the links must make it appear likely that the parent in fact exercised decisive influence. This would mean that the presumption, by itself, would not be sufficient. *See also* Opinion of Advocate General Kokott, *Akzo*, [2009] E.C.R. I-8237, ¶ 87, 91. Depending on the circumstances, an influence over human resources, investment, legal acts, and any strategic influence even short of operational management might be relevant. The judgment in *garantovaná a.s. v. Commission*, Case T-392/09, [2012] E.C.R. II____, ¶ 31 (delivered Dec. 12, 2012) (not yet reported), mentioned influencing pricing policy, production, distribution, sales objectives, gross margins, sales costs, cash flow, stocks, marketing, and coordinating roles. Clearly a parent which influenced such matters would be part of a single enterprise. Influence on strategic decision-making is indeed sufficient. *See* EI du Pont de Nemours & Co. v. Commission, Case C-172/12, [2013] E.C.R. I____, ¶ 52 (delivered 26 Sept, 2013) (not yet reported).

20. L'Air Liquide SA v. Commission, Case T-185/06, [2011] E.C.R. II-2809, ¶¶ 67–80.

21. Elf Aquitaine SA v. Commission, Case C-521/09, [2011] E.C.R. I-8947, ¶¶ 160–68.

company would be compatible with economic autonomy. This makes sense. The question is whether the two companies form a single economic unit, not an administrative unit.

- does the concept of a "single economic unit" or a "single enterprise" add to or clarify the position?[22] If the parent and the subsidiary are in entirely different product markets, as in *Air Liquide*, it seems meaningless to speak of them being a single economic unit. However this argument was rejected in *Eni*.[23] The concept of an "enterprise" does not seem useful either, since (unless the presumption is impossible to rebut) the fact that the parent owns the subsidiary is irrelevant. It is not clear whether the test is really behavioral, or structural.
- is the test being applied one which depends on whether the parent in fact exercised influence, or is it enough that the parent could have exercised influence? If it were enough that the parent could have exercised influence, the 100% parent would always be liable, unless there were contractual or other legal reasons (e.g., insolvency or receivership) which made any influence impossible. In *Eni,*[24] the Court said that it is "*the prerogatives of a parent company… which [enable] that parent company, except in exceptional circumstances, to exercise decisive influence over the conduct of its subsidiary.*"[25] In previous cases the Courts

22. *See* Opinion of Advocate General Kokott, *Akzo*, [2009] E.C.R. I-8237, ¶¶ 88–89, 93 ("In quite general terms, attribution of conduct as between parent and subsidiary is always possible where both form one *economic entity*, that is, where they are to be regarded as a *single undertaking*; in other words, responsibility under antitrust law is attributed to the a parent company in view of the unity of the group thus formed . . . instructions are merely a particularly clear indication of the existence of the parent company's decisive influence over its subsidiary's commercial policy. However, autonomy of the subsidiary cannot necessarily be inferred from their absence."); *id.* ¶ 65 (on "economic, organizational and legal links"); *see also EI du Pont de Nemours*, [2012] E.C.R. II-___ (following *Akzo*, but dealing with a joint venture); Dow Chemical Co. V. Commission, Case T-77/08, [2012] E.C.R. II-___ (delivered Feb. 2, 2012) (not yet reported).

23. Eni SpA v. Commission, Case C-508/11, [2013] E.C.R. I-____, ¶ 65 (delivered May 8, 2013) (not yet reported).

24. *Id.* ¶ 67.

25. Emphasis added. As shown by Leupold, *supra* note 14, the Courts have often relied on a mere power to influence in order to find parent companies liable for the infringement of their subsidiaries. For example, in HSE v. Commission, Case T-399/09, [2013] E.C.R. II-___ , ¶ 99 (delivered Dec. 13 2013) (not yet reported), the General Court considered that:

had said that it was not the power to influence, but the actual exercise of influence, which counts.[26]

It is not clear whether the "influence" criterion and the "single enterprise" criterion are equivalent, or whether both need to be complied with, or whether they are considered alternatives, so that the parent would be liable if it either exercised influence or could be shown to be part of a single enterprise. The better interpretation seems to be that the single enterprise concept is the basic concept and is the explanation for the "influence" criterion and the presumption.[27] In *Arcelor*

> It is not the content of any instructions that TDR's supervisory board – primarily controlled by the applicant's representatives – may have addressed to TDR's management that is relevant, but rather the fact that the supervisory board and the applicant had detailed knowledge of TDR's business operations and, following discussion, made comments in that respect, regardless of whether those comments should be qualified as instructions. Such a situation is sufficient (see also paragraph 93 above) to show the exercise of control and, consequently, of a decisive influence by the applicant, through TDR's supervisory board, over TDR's behaviour on the market.

See also *Laufen Austria*, Case T-411/10, [2013] E.C.R. II____, ¶¶ 92–93 (not yet reported); CEPSA v. Commission, Case T-497/07, [2013] E.C.R. II____, ¶ 178 (delivered Sept. 16, 2013) (not yet reported), where the Court considered that "le simple fait [que la société mère] dispose d'un pouvoir de révocation des administrateurs de PROAS, ce qui n'est pas contesté, est susceptible d'exercer sur eux une influence déterminante." The impossibility to rebut the presumption of decisive influence if it also entails the possibility to exert decisive influence, and thereby renders meaningless evidence of abstention, has been underlined by several commentators, including Nils Wahl, *Parent Company Liability – A Question of Facts or Presumption?*, 19 ST. GALLEN INT'L COMPETITION L. F. (June 7–8, 2012).

26. Some EU cases stated that the Commission cannot impute liability to a parent company merely because it is in a position to exercise decisive influence over its subsidiary, but must check whether that influence is actually exercised (but not that the parent exercised that influence in connection with the illegal conduct). Later judgments, however, have eroded this principle. *See Kendrion NV*, Case C-50/12 P, [2013] E.C.R. I____ (not yet reported); *see, e.g.*, Stora Kopparbergs Berslaga AB v. Commission, Case C-286/98, [2000] E.C.R. I-9925, ¶¶ 27–29; Bolloré SA v. Commission, Joined Cases 109, 118, 122, 125, 126, 128, 129, 132, & 138/02, [2007] E.C.R. II-947, ¶ 132; *contra* garantovaná a.s. v. Commission, Case T-392/09, [2012] E.C.R. II____, ¶ 29 (delivered Dec. 12, 2012) (not yet reported) (restating the principle that the Commission cannot merely show that the parent was able to exercise decisive influence, but must show either by evidence or by relying on the presumption, that it did so).

27. In the Opinion of Advocate General Kokott, Alliance One v. Commission, Joined Cases 628/10 & 14/11, [2012] E.C.R. I____, Advocate General Kokott said:

> According to settled case-law, whether a parent company can be held liable for its subsidiary's cartel offences in fact depends on a single condition only:

Mittal, the Court said "where the parent company exercises decisive influence over the conduct of its subsidiary, especially its anticompetitive conduct, it is the undertaking consisting of the parent company and the subsidiary which is liable for the infringement."[28] In short, "influence" and "single enterprise" should probably be regarded as one test, not two.

- in several cases the parent companies have argued that they are only "holding" companies that do not, and are not intended to, involve themselves in the operations of their subsidiaries. One would think that this was a question of fact in each case. But the Courts have made general statements about holding companies which would be surprising if they were intended to be universally true, either as statements of fact or of law, since the phrase "holding company" covers such a very wide variety of situations. A "holding company" may be essentially passive, and may not be liable for that reason, as explained below.[29]
- in some cases the parent company has argued that it has sought to influence the subsidiary's conduct only to ensure that the subsidiary complied with all the legal rules applying to it, including of course competition law rules. It seems that this has been treated, by the Commission and by the General Court in the *Elevators* case[30], as evidence confirming the presumption, and not rebutting it.

> The parent company must have exercised decisive influence on the conduct of the subsidiary, so that the subsidiary was unable to make independent decisions as to its conduct on the market.

Id. ¶ 144. It does not now seem correct to say that there is only a single condition.

28. ArcelorMittal Luxembourg SA v. Commission, Joined Cases 201/09 & 216/09 [2011] E.C.R. I-2239, ¶ 101.

29. In Kendrion v. Commission, Case T-54/06, [2011] E.C.R. II-393, a company described as an investment company was held liable for the actions of its 100% subsidiary, on the basis of the presumption and several items of evidence relied on by the Commission. The parent company received monthly financial reports and an annual budget. The Court said that the fact that the parent intended to sell the subsidiary might be evidence of a single enterprise, since the parent would wish to make the subsidiary more profitable. That would suggest that a conglomerate hedge fund would be liable but not a conglomerate holding company. The company appealed to the Court of Justice in Case C-50/12 P. *See also* General Technic-Otis Sárl v. Commission, Joined Cases 141, 142, 145 and 146/07, [2011] E.C.R. II-4977, ¶ 84 (repeating the factual generalization made in *Schunk*, [2008] E.C.R. II-2567).

30. *General Technic–Otis*, [2011] E.C.R. II-4977.

- in some cases the parent company has argued that it has never exercised any influence over the normal operations of the subsidiary, but that its influence has been limited to authorising major financial commitments that the subsidiary wished to make. The Courts have not so far accepted that the parent has exercised no relevant influence in such situations.[31]
- A number of factors have been held not sufficient to rebut the presumption, but it is not clear whether they never could be enough, or whether they were merely insufficient or insufficiently proved in the cases in question. The factors that have been found insufficient, apart from those already mentioned, include the absence of interlocking board members.[32] More seriously, the fact that influence was exercised only on non-operational matters was not enough to rebut the presumption.[33]

V. *THE KEY TESTS OF A "SINGLE ENTERPRISE": DEGREES OF AUTONOMY*

Agreements between companies 100% under the same control cannot infringe Article 101 TFEU, since it would be unrealistic to try to insist that they should compete with one another, and an agreement may merely be equivalent to an internal allocation of functions. They are regarded for this purpose as a single enterprise. But, that is clearly a different question from the issue of liability of a parent company, and does not necessarily seem relevant here.

The difficulty is to identify criteria for deciding whether the subsidiary has sufficient autonomy, either generally or in whatever respects may be considered relevant, for the

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31. Total and Elf Aquitaine v. Commission, Case T-190/06, [2011] E.C.R. II-5513; *ENI v. Commission*, Case C-508/11, [2013] E.C.R. I-___ ¶ 68 (delivered May 8, 2013) (not yet reported) (the subsidiary must be shown to have acted with complete autonomy not only at operational but also at financial level). *But see* L'Air liquide v. Commission, Case T-185/06, [2011] E.C.R. II-2809.

32. ThyssenKrupp Liften Ascenseurs v. Commission, Joined Cases 144/07, 147-50/07 & 154/07, [2011] E.C.R. II-5129. In *garantovaná v. Commission*, Case T-392/09, [2012] (delivered Dec. 12, 2012) (not yet reported), the fact that a majority of the directors of the subsidiary were appointed by the parent was conclusive proof of exercise of influence.

33. *Total and Elf Aquitaine*, [2011] E.C.R. II-5513.

companies not to constitute a single enterprise.[34] Since no criteria have been suggested for this purpose, except the unsatisfactory tests of "instructions" (which is clearly only one kind of evidence of a single enterprise), it seems better to ask whether certain activities should or should not be regarded as creating or suggesting a single enterprise, and this approach is used below.

Autonomy, like "full function" in merger law, is necessarily a question of degree and not of kind, and a subsidiary may be autonomous in some respects and not in others, or more autonomous at some times than at others. It is not even clear whether it is the behavior of the parent or of the subsidiary that should be looked at, or the nature of the relationship, and the test of "all the links" between the two companies is not a useful one. It would not seem natural to describe companies in entirely different product markets as forming one enterprise, but that leaves open the question of financial supervision. In *Eni*,[35] financial influence was said to be enough to make the parent liable even though the parent had never been in the subsidiary's market. If it is the closeness of the "general relationship" that matters,[36] it is not clear how that should be measured or assessed.

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34. An enterprise is a "unitary organization of personal, tangible and intangible elements which pursues a specific economic aim on a long term basis," regardless of how it is financed and of its legal form. HFB and Others v. Commission, Case T-9/99, [2002] E.C.R. II-1487, ¶¶ 54, 66. This definition does little to answer the questions discussed here. In *GTO, General Technic, Otis and UTC,* Joined Cases T-141-2/07 and 145-6/07, [2011] E.C.R. II-4977, ¶ 54, the Court said "the test is whether or not there is unity in their conduct on the market . . . whether two companies . . . . form or fall within one and the same undertaking or economic entity adopting the same course of conduct on the market." In *Aristrain v. Commission,* Case C-196/99 P, [2003] E.C.R I-11005, ¶ 99 the Court stated that:

> 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.

Id.

35. *ENI*, [2013] E.C.R. I____, ¶ 65 (delivered May 8, 2013) (not yet reported).

36. Opinion of Advocate General Kokott, *Akzo Nobel and Others v. Commission*, Case C-97/08 P, [2009] E.C.R. I-08237, ¶ 94.

When the issue is whether a joint venture is "full function" or not under the Merger Regulation, the distinction is merely procedural. But, in the case of a parent-subsidiary relationship, the question of autonomy is substantive, and may make a great deal of difference to the result. Since autonomy is such a difficult concept to apply with any degree of confidence, some guiding principles are needed. Since these necessitate some generalizations about facts as well as law, the Commission is best placed to state these principles. It has never done so.

VI. *IS IT POSSIBLE TO REBUT THE PRESUMPTION? THE PROCEDURAL STANDARD FOR REBUTTAL*

The Courts have repeatedly said that the presumption of control over a 100% subsidiary can be rebutted. But since they have not so far directly accepted that it has been, and they have never said clearly how it could be rebutted, these statements do not clarify the position.[37] The fact that it could be rebutted in theory, if that were so, would not be enough if it could not be rebutted in practice.[38]

The Courts have ruled that parent companies should not be held liable, in several cases, on procedural grounds, essentially failure to state reasons. However, as shown by B. Leupold, the Commission should be able to discharge the duty to provide reasons "with ease because the standard imposed by the Courts is very low."[39] In *General Quimica*[40] the Court of

37. The Courts have dismissed applicants' attempts to rebut the presumption in many instances, including in *Kendrion v. Commission,* Case C-50/12 P, [2013] E.C.R. I____ (delivered Nov. 26, 2013) (not yet reported); *Dow Chemical and Others v. Commission*, Case C-499/11 P, [2013] E.C.R. I____ (delivered July 18, 2013) (not yet reported); *Villeroy & Boch Austria,* Case T-373-4/10, T-382/10 and T-402/10, [2013] (delivered Sept. 16, 2013) (not yet reported). Commentators have underlined the difficulty or impossibility of rebutting the presumption of decisive influence. *See, e.g.*, Thomas, *supra* note 2; La Rocca, *supra* note 1, at 68.

38. The Commission itself has admitted that it might sometimes be appropriate not to apply the presumption. For example, in *Alliance One International v. Commission*, Case C-679/11 P, [2013] E.C.R. I____, ¶¶ 41–42 (delivered September 26, 2013) (not yet reported), the ECJ explained that the Commission had waived reliance on the presumption because it did not have enough evidence that the parent in fact exercised decisive influence over its subsidiary. *See also* Alliance One International v. Commission, Case C-668/11 P, [2013] E.C.R. I____, ¶ 42–44 (delivered September 26, 2013) (not yet reported).

39. *See* Leupold, *supra* note 14.

Justice overruled the General Court. The Court of Justice said that the lower Court had simply found that the parent company's order to the subsidiary to cease any practice which might infringe competition rules:

> was sufficient in itself to prove that [the parent] exercised a decisive influence over [the subsidiary's] policy, not only on the market but also as regards the unlawful conduct. In doing that, the General Court limited itself to merely asserting a principle, without setting out in a clear and unequivocal manner the grounds that led it to that conclusion.

The General Court had also failed to conduct a concrete examination of the evidence. The fine on the parent company was annulled.

In *Air Liquide*,[41] the General Court held that the Commission had not addressed the arguments put forward by the company, and had not set out the reasons why those arguments were inadequate to rebut the presumption. They could not be regarded as insignificant. They were concrete items of evidence. "The Commission's duty to state reasons for its decision on the issue is clearly evident from the rebuttable nature of the presumption . . . . No assessment by the Commission of the evidence at issue is apparent from the grounds of the contested decision." In *Air Liquide*, none of the subsidiary's directors were members of the parent's management board. The subsidiary's directors had very wide powers. The subsidiary had its own commercial, marketing, human resources, information technology, and accounts departments. It used the parent's legal, tax, and insurance departments, but paid for their services. It leased its offices from the parent. It managed several other companies separately from the rest of the group. Its activities were very far removed from those of the rest of the group. Only the subsidiary's employees took price decisions and initiated large commercial projects, decided on its budget, dealt with customer relations, and handled relations with the industry federation. There was no evidence that the parent gave any instructions to the subsidiary.

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40. General Química and Others v. Commission, Case C-90/09 P, [2011] E.C.R. I-0001, ¶¶ 60–62, 78.

41. *L'Air liquid*, [2011] E.C.R. II-2809, ¶¶ 68–80.

The Commission had merely said that the company's arguments did not rebut the presumption, without giving any reason, except that the parent company had power to appoint the subsidiary's directors. The Court, understandably, said this failed to say why the presumption was not rebutted, since the company's arguments *"cannot be regarded as insignificant."* The Commission should have adopted a position on the company's arguments. The failure to give reasons in the decision could not be remedied in the course of the proceedings in the General Court. In short, the Commission's decision was superficial and obviously inadequate, and there was ample evidence of the subsidiary's economic autonomy. The subsidiary had neither sought or received instructions from the parent, but ran its own business without the parent being involved. In *Edison,*[42] the General Court annulled the same decision of the Commission insofar as it found another parent company liable, again for failure to assess the company's evidence. The General Court's judgment was upheld on appeal to the Court of Justice.[43]

In *Grolsch,*[44] the General Court held that the Commission had insufficient evidence of the involvement of the company in the infringement.

In *Elf Aquitaine*,[45] the Court of Justice said that because the Commission relied on the presumption, it was obliged to explain why the company's evidence was not sufficient to rebut the presumption. The Commission is required to do this, in order to prevent the presumption from becoming irrebuttable. The Commission's series of simple statements and denials, repetitive and unsupported, was not enough. In *Elf Aquitaine*, the Court noted that[46] the parent argued that it was only a holding company without operational activities, that the subsidiary was not under its instructions, did not keep the parent informed, did not require approval before making contracts, was financially independent, and determined its

42. Edison v. Commission, Case T-196/06, [2011] E.C.R. II-3149.

43. Commission v. Edison, Case C-446/11 [2013] E.C.R. I____ (delivered Dec. 5, 2013) (not yet reported)

44. Koninklijke Grolsch v. Commission, Case T-234/07, [2011] E.C.R. II-6169.

45. Elf Aquitaine v. Commission, Case C-521/09 P, [2011] E.C.R. I-8947, ¶¶ 144–70.

46. *Id.* ¶ 160.

strategy independently. So, the Commission's series of unsupported statements were not enough to rebut the presumption. These arguments were similar to those made successfully before the General Court in *Edison* and, indeed, the Court of Justice relied heavily on *Elf Aquitaine* in dismissing the Commission's appeal.[47]

In *Parker* the Court said "the applicants are not required to adduce direct and irrefutable evidence of the subsidiary's independent conduct on the market, but, failing that, they must submit a body of precise and consistent evidence showing that the subsidiary acted independently."[48] This is the closest that the Courts have come to explaining the burden of proof, but it is not clear what the "precise and consistent" evidence needs to prove.

VII. *IF THE PRESUMPTION CAN BE REBUTTED, IN WHAT CIRCUMSTANCES?*

The judgments of the two Courts, as distinct from the Opinions of two Advocates General, have given little general indication of the nature of the circumstances in which the parent company can rebut the presumption. The question whether the presumption has been rebutted is primarily a question of fact to be decided by the General Court, against which there is normally no appeal to the Court of Justice.[49]

Almost the only recent indication is found in a footnote in the Opinion of Advocate General Kokott in *Akzo*.[50] It reads:

> The Commission correctly mentions the following examples in this regard: (a) the parent company is an investment company and behaves like a pure financial investor (b) the parent holds 100% of the shares in the subsidiary only temporarily and for a short period (c) the parent company

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47. *Edison*, [2011] E.C.R. I____, ¶¶ 24–31 (delivered Dec. 5, 2013).

48. Parker v. Commission, Case T-146/09, [2013] E.C.R. I____, ¶ 184 (delivered May 17, 2013) (not yet reported). However, the Court went on to describe the claims made by Parker as "scarcely credible." *Id.* ¶ 191.

49. Legris Indus. v. Commission, Case C-289/11 P, [2012] E.C.R. I___ (delivered May 3, 2012) (not yet reported).

50. Akzo Nobel NV & Others v. Commission, Case C-97/08 P, [2009] E.C.R I-8237, ¶ 67. This Opinion and that of Advocate General Warner were mentioned in garantovaná v. Commission, Case T-392/09, [2012] E.C.R. I____, ¶¶ 50–52 (delivered Dec. 12, 2012) (not yet reported).

> is prevented for legal reasons from fully exercising its 100% control over the subsidiary; see also the examples cited by Advocate General Warner in his Opinion in Commercial Solvents. . . .

These examples need to be analysed. It is not clear what behaving "like a pure financial investor" would mean in the case of a 100% shareholder. A minority shareholder may be entirely passive, never exercising its right to vote on any subject. But that course of action is not open to a 100% shareholder, which is required, by the company law applying to the subsidiary, e.g., to arrange and vote at an annual shareholders' meeting. Presumably a "pure financial investor" means a company that only holds the shares in the subsidiary in question and does nothing to influence the decisions of the subsidiary's directors. But in *Arkema*, the Court said that showing that the parent is "non-operational" may not be enough to rebut the presumption.[51]

A parent company that intended to hold 100% only temporarily, and did so only for a short period, might presumably succeed in being entirely passive, depending on when it became necessary to hold the shareholders' meeting.

A 100% parent company might be "prevented for legal reasons" from exercising control if, for example, it had agreed that the subsidiary should be managed entirely by another company, or if as a result of insolvency, receivership or expropriation the control over the subsidiary had been taken away from it. If, as may perhaps be true, the presumption can only be rebutted if the parent is "prevented for legal reasons" from exercising any influence, this possibility may be important in determining whether the presumption is permissible in other circumstances.

All three examples given by Advocate General Kokott seem relatively unusual, and seem to have little practical relevance. There is no record of any of them ever having been relied on successfully.

The Opinion of Advocate General Warner in *Commercial Solvents* in 1974 suggested that an insurance company, or a

51. *Arkema*, [2011] E.C.R. I____, ¶ 48 (delivered Sept. 29, 2011); *see* Kendrion, Case T-54/06, [2011] E.C.R. II-393 (not yet reported).

trustee of a pension fund, might be able to rebut the presumption.[52] However, in practice such investors hardly ever acquire 100% of the shares of a trading company. Advocate General Warner seems to have envisaged that such a company could be a purely passive investor. He also mentioned the situation in which a 100% shareholder might in reality be involved in a joint venture in which the other company would have the right to control.

In short, there may be only two kinds of situations in which it is clear that the presumption can be rebutted: if the parent was a purely passive investor for a brief period or if there was a clear legal reason why the parent was legally unable to exercise any influence. The first situation is unrealistic in the case of a 100% shareholder. The second situation is so unusual that it is not clear that the presumption could be justified by reference to it.

In these circumstances *Gosselin* is of interest, although the facts were unusual in two respects, and unlikely to be repeated.[53] On appeal from the General Court, the Court of Justice held that it was irrelevant that the parent shareholder was a foundation (and was therefore not itself an "enterprise"): it could still be fined. The Court then held that the General Court had erred in law in finding that the presumption had been rebutted. The General Court was wrong to hold that the fact that the parent had adopted no management decisions during the relevant period rebutted the presumption. All the relevant factors, not only those resulting from company law, should be taken into account. Parent and subsidiary may be a unit on an informal basis consisting inter alia of personal links. The entities against which the presumption operates are those best placed to seek the evidence to rebut it within their own sphere of activity. Instead of referring the case back to the General Court, the Court rather surprisingly concluded that, as a factual issue, the presumption had not been rebutted.

52. Istituto Chemioterapico Italiano & Commercial Solvents v. Commission, Joined Cases 6 & 7/73, [1974] E.C.R. 225, at 262; *see* Ministero dell'Economia v. Cassa di Risparmio di Firenze, Case T-386/04, [2006] E.C.R. I-289.

53. Gosselin Grp. v Commission, Joined Cases T-208/08 & T-209/08, [2011] E.C.R. I____, ¶ 40 (delivered July 11, 2013) (not yet reported); Commission v. Gosselin Grp., Case C-440/11 P, [2013] E.C.R. II-3639.

In the *Italian Banking Foundation* case the Advocate General summarised one aspect of the law concisely.[54] "Banking foundations will qualify as undertakings for the purposes of Community law in two cases: first, if they themselves carry out an 'economic activity' within the meaning of the case law and/or, second, if they are directly or indirectly involved in the management of undertakings which perform such an economic activity." The Court went on to say that being a shareholder is not enough to create a single enterprise "the mere fact of holding shares, even controlling shareholdings, is insufficient to characterise as economic an activity of the entity holding those shares, when it gives rise only to the exercise of the rights attached to the status of shareholder or member, as well as, if appropriate, the receipt of dividends, which are merely the fruits of the ownership of an asset."[55]

Alliance One was a joint venture case, and the Court held that one parent was not liable because its shareholding was "purely financial."[56] However, it does not seem that a 100% shareholding could be regarded in this way, at least not for long.

On appeal, in *Alliance One* Advocate General Kokott said that the parent company could rebut the presumption *"by showing that it exercised restraint and did not influence its subsidiary's conduct on the market."*[57] But it is not clear how a parent can prove that it *"exercised restraint"* or when the restraint shows that the two companies do not form a single enterprise.

In *Stichting Administratiekantoor Portielje* the ECJ overruled the General Court's finding that the applicant could rebut the presumption on the basis that the parent company had not

54. Ministerio dell'Economia e delle Finanze v. Cassadi Risparmio di Firenze, Case C-222/04, [2006] E.C.R. I-289, ¶¶ 73, 111–12, 117–18. This was a State aid case, but the Court in *Gosselin* considered it to be relevant.

55. *Id.* ¶ 111. *But see* ENI v. Commission, Case C-508/11, [2013] E.C.R. I___, ¶ 68 (delivered May 8, 2013) (not yet reported).

56. *Alliance One*, Case T-24/05, [2010] E.C.R. II-5329; *see* Commission Decision 236/EC, 2007 O.J. L 102/14 (adopted, however, before the law was clarified by the *Akzo* judgment in 2009).

57. Alliance One International v. Commission, Joined Cases C-628/10 P & C-14/11 P, [2012] E.C.R. I____, ¶ 171 (delivered July 19, 2012) (not yet reported). In ArcelorMittal Luxembourg SA v. Commission, Joined Cases 201/09 & 216/09, [2011] E.C.R. I-2239, the Court stated that the parent could show that "its subsidiary acts independently on the market." *Id.* ¶ 98. This suggests that it would be enough to show that the subsidiary acted regularly without instructions, as in *Air Liquide*.

adopted any formal management decision during the period for which it was held jointly and severally liable for payment of the fine.[58] The ECJ relied on the informal and personal links between the parent and the subsidiary. This extends the presumption of decisive influence to personal links between the two legal entities.[59]

In *Total SA*, the General Court said with regard to 100% subsidiaries "There is in principle a single commercial interest and the members of the organs of the subsidiary are chosen and appointed by the single shareholder which can give them at least informal instructions and impose performance criteria on them."[60] As a result, parent companies are left with the difficult task to prove that these mechanisms did not operate.[61]

It would be unreasonable to criticise the Courts for not having given a comprehensive list of situations in which the presumption can be rebutted. But the consequences of the language used so far are not clear, and it is obvious that it is giving rise to a great deal of litigation, which the Courts would certainly prefer to avoid.

The fact that it is so difficult in practice to rebut the presumption is convenient for the Commission, which finds it very easy to reject the arguments of parent companies, sometimes on unconvincing grounds. It therefore seems unlikely that the Commission will try to clarify the legal position, unless the Courts continue to insist on the Commission giving detailed reasons for its conclusions. Institutions such as the Commission have an unavoidable tendency to interpret rules to suit their own convenience.

In these circumstances it is not clear how the law might be clarified, and it may be useful to consider a new analysis, on the lines set out below, under "typical parent companies' situations."

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58. Stichting Administratiekantoor Portielje, Case C-440/11 P, [2013] E.C.R.-I___ ¶¶ 65–68.

59. In that regard, the General Court considered in HSE v. Commission, Case T-399/09, [2013] E.C.R. I____, ¶ 76 (delivered Dec. 13, 2013) (not yet reported), that it would not have made sense for the applicant to appoint the majority of the members of its subisidiary's supervisory board if they were intended to behave independently.

60. Translation provided by Author.

61. Total v. Commission, Case T-548/08, [2013] E.C.R. I____, ¶¶ 41–44 (delivered Sept. 13, 2013) (not yet reported).

VIII. *THE DUTY TO GIVE REASONS*

In the series of judgments of the Court of Justice and the General Court, the need to analyse precisely the evidence intended to rebut the presumption has been stressed. These judgments should make it necessary for the Commission to develop some criteria for measuring the extent of a subsidiary's autonomy and the weight of the evidence said to show it. The language in the judgments seems to imply that the Courts considered the companies' evidence was strong, although the character and importance of the evidence may vary depending on the specific characteristics of each individual case.[62] If the Commission does not develop some criteria, much further litigation is inevitable. "It all depends on all the circumstances" cannot be a satisfactory approach.

It seems from *Air Liquide*, *Elf Aquitaine*, and *Edison* that the Commission will be required to do a better job in future of explaining its reasons, in its decisions. It will also be obliged to give the companies an opportunity to comment on its reasons, during the administrative procedure. The question of the liability of a parent company should not be dealt with in a facile way, or as an afterthought. The Court now has made it clear that the Commission must make the presumption genuinely rebuttable, by considering the facts of each case carefully. All of the features described in *Elf Aquitaine*, *Edison*, and *Air Liquide* are commonly found in groups of companies. The judgments in these cases seem clearly to imply that many parent companies should be able to show that they only are not part of the same single economic enterprise as their subsidiaries, provided that they avoid involvement in the subsidiaries' activities. If the Commission is to avoid having further decisions against parent companies annulled, it will need to follow proper procedure, to deal thoroughly with all the companies' evidence, and to give reasons in detail for its conclusions. These judgments impose a stricter burden on the Commission than has been generally realised.

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62. Akzo Nobel NV & Others v. Commission, Case C-97/08 P, [2009] E.C.R I-8237, ¶¶ 73–74; General Quimica, Case C-90/09 P, [2011] E.C.R. I-0001, ¶ 77 (delivered Jan. 20, 2011) (not yet reported); *Elf Aquitaine*, Case C-521/09 P, [2011] E.C.R. I-8947, ¶ 58.

To make the presumption genuinely rebuttable, the Commission must carefully and objectively consider all the arguments and evidence put forward to rebut it. It is not enough for the Commission merely to point to one or two factors that suggest a single enterprise, as it did unsuccessfully in *Air Liquide*. Clear cases in which all the evidence points in one direction may be unusual, and factors pointing in different directions may often have to be weighed against one another. The companies' evidence must not be simply brushed aside. This has not always been done correctly or consistently in the past, even by the Courts.[63] The Commission should accept that in cases such as *Air Liquide* the overwhelming weight of evidence is in favor of autonomy: if the subsidiary in that case were not autonomous, it is hard to imagine a case in which any subsidiary would be. The Commission must not give excessive weight to the presumption. The Courts will apparently no longer accept superficial statements by the Commission. But it is also clear that the Court of Justice is reluctant to accept evidence as sufficient to rebut the presumption.

If a parent company can show that it has no involvement in the subsidiary's affairs, as in the cases just summarised, the position is, or ought to be, clear. There are, however, a number of common situations in which the parent has taken some action, even though the action has no economic effects, and these situations are considered below. Before doing so, however, what seem to be the far-reaching terms of a recent judgment of the Court of Justice must be considered. It is not clear whether this judgment is consistent with *Alliance*, *Elf Aquitaine*, *Edison*, and *Air Liquide*.

IX. *THE* ENI *JUDGMENT*[64]

The *ENI* case seems to have made it even more difficult to rebut the presumption. The case concerned a cartel involving synthetic rubber. The parent company put forward a number of factual arguments intended to show that its influence was not

63. *General Quimica*, [2011] E.C.R. I-0001; General Technic-Otis, Case T-141/07, 142/07, 145/07 & 146/07, [2011] E.C.R. II-4977, ¶¶ 82–90.

64. ENI v. Commissionn, Case C-508/11 P, [2013] E.C.R. I____, ¶¶ 64–68 (delivered May 8, 2013) (not yet reported).

sufficient to justify it being fined. All of these arguments were rejected. The Court of Justice held that the fact that the parent company was merely a technical and financial coordinator, providing financial assistance and exercising budgetary control, was not enough to relieve the parent of liability. It was irrelevant that the parent had never operated directly in the chemical sector in which the subsidiary was active, and that there had been no overlap in the management personnel of the two companies. It was enough, apparently, that the parent could have coordinated investments, without participating in management.[65] To rebut the presumption, Eni would have needed to show that the subsidiary "could act with complete autonomy not only at the operational level but also at the financial level."[66]

It was also irrelevant that the parent "did not have information on the strategic and commercial plans or on their implementation and was not involved in the decision-making processes to define strategic and commercial plans or annual sales volumes and prices, in so far as they relate only to the operational activities in the chemical sector."

Eni had argued that "it held only the typical prerogatives of a principal shareholder and that the fact of holding them does not in itself amount to the exercise of a decisive influence over the conduct of the subsidiary." But the Court said "that the presumption of decisive influence rests on the fact that it is precisely the prerogatives of a parent company which wholly or almost wholly owns its subsidiary which enables that parent company, except in exceptional circumstances, to exercise decisive influence over the conduct of its subsidiary." This seems to mean that a parent company is fined because it was able to exercise decisive influence, whether it did so or not. It seems to be implied that "exceptional circumstances" would be situations

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65. *HSE*, [2013] E.C.R. I____, ¶ 76 (delivered Dec. 13, 2013) (holding by the General Court, which considered in paragraph 80 that "it is not necessary that the former intervene decisively in the latter's day-to-day management and commercial policy *stricto sensu* . . . the parent company's influence over the subsidiary's strategy may suffice"); *see* Dow Chemical Company, Case C-179/12 P, [2013] E.C.R. I____, ¶ 64 (delivered Sept. 26, 2013) (not yet reported).

66. *Butadiene Rubber*, [2013] E.C.R. I____, ¶ 68 (delivered May 8, 2013).

in which the parent company had no legal power to exercise influence.

But the Court, nevertheless, went on to say, contrary to the impression given by the case law, that the presumption can be rebutted:

> Nor does that interpretation of the scope of the presumption of actual decisive influence, applied by the Commission and confirmed by the General Court, transform that presumption into an irrebuttable presumption. The fact that it is difficult to prove the opposite in order to rebut a presumption does not imply, of itself, that it is in fact irrebuttable . . . .

This judgment certainly suggests that there are very few circumstances in which a parent company might be able to show that it should not be fined. But it cannot be said that the judgment clarifies the legal position in any other respect. It may now be useful to consider a number of typical situations in the light of the *Eni* judgment.

X. *TYPICAL PARENT COMPANIES' SITUATIONS AND ACTIONS UNDER COMPANY LAW – A METHODICAL APPROACH*

The objective of a rational policy should not be to fine the parent irrespective of how it has behaved, although that is close to being the legal position today, at least in the view of the Commission. It is therefore useful to consider a number of normal situations in which parent companies find themselves.

XI. *IF THE PARENT DID NOTHING*

It must be assumed that a parent company that has never done anything cannot be fined. There are several reasons for this. A company cannot do less than nothing, so if a completely inactive parent could be fined, the presumption would be irrebuttable, and every parent company would always be liable. Two Advocates General have said that passive companies could not be fined.[67] The Court's comment in *Arkema*[68], that it is not

67. Opinion of Advocate General Kokott, *Akzo Nobel*, [2009] E.C.R. I-8237; Opinion of Advocate General Warner, *Commercial Solvents*, Joined Cases 6/73 & 7/73, [1974] E.C.R. 223.

enough to prove that the parent is "non-operational," is imprecise, and does not seem to apply to a company that has never taken any action of any kind. A completely inactive parent company cannot have a close relationship with its subsidiary.

XII. *COMPLIANCE WITH MINIMUM OBLIGATIONS OF SHAREHOLDERS*

It is not clear, in the light of the comments in *ENI* and the conclusions in *Gosselin*, whether the mere fact that the parent company complies with its minimum obligations as the shareholder in the subsidiary is enough to expose the parent to fines. If it were enough, the presumption would be impossible to rebut, unless there is some legal or contractual obstacle to the parent exercising any influence over the subsidiary. The parent must be represented at the annual shareholders' meetings, accounts must be approved, and directors and auditors must be appointed. This is merely the result of the fact that the parent must make sure that it complies with the company law applicable to the subsidiary. The parent company would certainly risk fines if it appointed an employee or director of any other company in the group as a director of the subsidiary, since that might be considered to give the parent an economic influence. But the parent would presumably be free to appoint its own auditors as the auditors of the subsidiary, since auditors cannot reasonably be said to exercise an influence on the subsidiary's conduct. In any other context, the parent's compliance with the basic requirements of the subsidiary's company law can hardly be considered as exercising an influence sufficient to make the two companies into a single enterprise.

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68. Arkema SA v. Commission, Case C-520/09 P, [2011] E.C.R. I-8901, ¶ 48. In *Kendrion v. Commission,* Case T-54/06, [2011] E.C.R. I-393, what was described as an investment company was held liable, on the basis of evidence of an annual budget, monthly financial reports, and evidence of involvement of the parent in the subsidiary's affairs.

XIII. *COMPLIANCE WITH THE COMPANY LAW OBLIGATIONS OF THE PARENT*

A third situation is where the parent company does the minimum that is required by the company legislation applying to the parent company itself. The parent may be required to consolidate the subsidiary's accounts, and to include some reference to the subsidiary in its group reports. This means that the parent must be able to verify that the statements it is required to make are correct, and so it must be free to make whatever enquiries are necessary to confirm this. It would be unreasonable, and contrary to international comity, to say that a parent company that fulfils the requirements of the company law applicable to it has exposed itself to fines. If this were enough to result in fines, the presumption would be impossible to rebut. Verifying the situation is not exercising an influence.

XIV. *OBLIGATIONS OF THE PARENT UNDER NON-COMPETITION LEGISLATION*

The fourth typical situation is where the parent company does the minimum that is required by other legislation applying to it, such as anti-bribery or anti-money-laundering legislation. The parent company cannot avoid having to comply with legislation of this kind, once it has chosen to operate in the jurisdiction in question. Again, the parent company must be able to verify that whatever statements it is required to make are correct. It would be unreasonable to say that a parent exposes itself to fines from the Commission merely because it complies with non-competition legislation in its home State.

XV. *STOCK EXCHANGE OBLIGATIONS*

The fifth situation is where the parent company's shares are listed on a stock exchange, normally, but not necessarily, in the country where it is incorporated. Being listed is voluntary: a company is not legally required to be listed. However, it would be unreasonable, to put it no more strongly, to say that a parent company has exposed itself to liability for fines if its shares are listed on a stock exchange, and it carries out its obligations under the rules applicable as a result. These obligations include, of course, both the rules of the stock exchange in question itself and the rules resulting from the legislation applicable to quoted securities, such as those applied by the US Securities and Exchange Commission. It is hard to imagine that the Commission or the European Courts would argue that merely complying with stock exchange requirements is enough to make the two companies into one enterprise, or to expose a parent company to liability.

XVI. *GENERAL INSTRUCTIONS TO COMPLY WITH THE LAW*

If, as seems essential, a parent company is free to comply with its own legal obligations without exposing itself to fines, it must also be free to ensure that its subsidiary complies with whatever legal obligations apply to it. It would be irrational to expose a parent to penalties for trying to make certain that its subsidiary complies with the law. General instructions to obey applicable laws, not involving instructions to particular subsidiaries (except insofar as they are subject to different national legislation) could hardly be regarded as creating a single enterprise or as exercising any economic influence of any kind that would justify exposing the parent to fines. The Court appears to have recognized in *General Quimica*[69] that standard instructions given to all the companies in the group cannot be regarded as exercising a relevant influence over the economic conduct of any particular subsidiary. It would be irrational and indefensible if genuine efforts to make everybody obey all applicable laws led automatically to liability. It would not only be counter-productive, it would also be unjust. But in *Schindler*, the Courts said that *"the implementation of [a] code of conduct suggests rather that the parent company did in fact supervise the commercial policy of its subsidiaries"*,[70] although instructions to obey the law would not normally be regarded as "commercial policy."

If this were accepted, it would mean that an antitrust compliance program imposed by the parent on all its subsidiaries could not be used as evidence of the parent's influence over the pricing policy of any one of them.

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69. *General Quimica*, [2011] E.C.R. I-0001, ¶ 101.

70. Schindler Holding and Others v. Commission, Case C-501/11 P, [2013] E.C.R. I____, ¶ 114 (delivered July 18, 2013) (not yet reported).

XVII. *THESE SIX PRINCIPLES*

All of these six principles seem reasonable. None of them describe situations in which there would be any reason to believe that the parent and the subsidiary necessarily constitute a single economic entity or enterprise. However, these principles have not been officially stated, it is not clear whether they are consistent with the case law (which itself does not seem consistent), and it would be very helpful if they were made clear by the Commission.

What is suggested here is that it should be stated clearly that actions or situations of these six kinds do not create liability for parent companies, since they are entirely compatible with economic autonomy. It is not, and could not be, suggested that a company that complies with these six principles cannot be fined for some other reason. To avoid liability a parent company must avoid all actions that lead to liability, not only some of them.

If the parent company is liable in all or most of these six situations, the conclusion seems inescapable: the presumption cannot be rebutted in practice. If that were so, it would be contrary to the European Convention and to the Charter, and to the repeated statements of both Courts.

There is at least one other broad question of great practical importance, which needs to be dealt with. That question concerns the parent's financial supervision over the subsidiary.

XVIII. *FINANCIAL SUPERVISION*

As already mentioned, in *Eni* the Court said it would have to be shown that the subsidiary *"could act with complete autonomy not only at the operational level but also at the financial level."*[71] Autonomy, however, does not seem to be inconsistent with financial reporting. The fact that the parent's financial supervision is limited to receiving financial reports has not so far been accepted as showing the subsidiary's autonomy.[72] Indeed

71. *Butadiene Rubber*, [2013] E.C.R. I____, ¶ 68 (delivered May 8, 2013).

72. *Akzo Nobel*, [2009] E.C.R. II-184, ¶¶ 94–95; *Arkema*, [2009] E.C.R. II-180, ¶ 53. It is not clear whether these were findings of fact in the cases before the General Court or general statements about the legal effects of financial reporting.

that might perhaps be considered evidence confirming the presumption of control, or evidence of a single enterprise.

Financial supervision may take many forms. One typical arrangement is that an investment by the subsidiary involving more than a given sum of money must be approved in advance by the parent, even if the parent is not giving any form of guarantee. The parent's approval obviously "influences" the subsidiary's conduct: the approval determines whether the investment can be made. But, neither the granting nor the refusal of the approval has any relevance to the subsidiary's pricing conduct, and there is no obvious reason why the right to approve large investments should involve the parent in a risk of fines. Nor is there any obvious reason why the power to authorise large investments, without more, should create a close economic relationship or a single enterprise.[73] A bank may need to investigate and approve a big investment that it is financing, but nobody would say that the bank becomes part of the same economic enterprise as the borrower. Financial support, without directions, does not create a single enterprise. If the threshold for approval is high, the parent is likely to be required by its own legal and stock exchange obligations to satisfy itself that the investment is appropriate. Even if the parent is not giving a guarantee, a large investment by one company in the group may significantly affect the price of the parent company's shares. The parent might reasonably decide that an investment of that size would be better made in another country, or in another product market, or at another time, or on other terms, or in another currency. Financial safeguards are not the same as economic influence on the subsidiary's behavior on the market.

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73. Advocate General Kokott, in *Akzo,* [2009] E.C.R. II-184, said the parent company's influence "as regards corporate strategy, operational policy, business plans, investment, capacity, provision of finance, human resources and legal matters" may affect market conduct. *Id.* ¶ 92. In *Groupe Gascogne v. Commission,* Case T-72/06, [2011] E.C.R. II-400, ¶ 81, the Court said that the parent had authorized investments, and approved budgets and pricing decisions, and that the fact that these actions had concerned Sectors other than the products involved in the infringement was irrelevant. The subsidiary had made monthly reports on its activity, and the Court considered that this enabled the parent company to intervene whenever it wished. *Id.* ¶¶ 83–87, 90. The exercise of control by the parent company is compatible with some organizational autonomy. *Id.* ¶ 91.

The most common form of financial supervision is regular reporting by the subsidiary to the parent. In itself this does not involve the parent company in the running of the subsidiary's business. It is true that reports may give rise to questions and requests for clarification, but these do not involve the parent in day-to-day operations either. A bank might require regular reports from a large debtor. Authorization and approval do not necessarily mean involvement.

In short, there may be obvious reasons why some degree of supervision is justified and necessary, and no clear reason why its exercise should involve the parent in the subsidiary's conduct in any way that should make the two companies into one economic enterprise, or make the parent liable to fines. Yet, it seems that the Commission has consistently argued that financial supervision, without more, is enough to make the presumption apply, and to make the parent company liable.[74] If minimum or normal financial supervision were enough to make a parent liable, it would be difficult to say that the presumption was rebuttable in practice.[75]

These questions concern the situation in which the parent is only approving investments. Different issues are raised if the parent is otherwise involved in the subsidiary's affairs. If the parent, under the guise of financial control, becomes involved in commercial affairs, it is likely to create a single enterprise. But the principles ought to be made clear.

How much difference should it make if the parent company gives a financial guarantee? A guarantee might make it more likely that the parent would supervise the subsidiary's financial position more closely, in particular if that position worsened for any reason. Closer supervision might lead to more frequent or more detailed reports, or to more elaborate forecasts or projections. But, if closer supervision (with or without a guarantee) did not lead to the appointment of a representative of the parent to the subsidiary's board, or some similar arrangement or involvement, there is no clear reason why it should necessarily lead to a risk that the parent could be fined.

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74. *See, e.g.,* Kendrion v. Commission, Case T-54/06, [2011] E.C.R. II-393.

75. *See* Leupold, *supra* note 14.

At most, it merely suggests a closer relationship between the two companies.

A variety of other situations can be imagined. If a parent company gave instructions that no subsidiary should pay a bonus of more than a stated percentage of the employee's annual salary that would be an instruction, but not one suggesting that the companies constituted a single economic enterprise. If instructions were given to ensure equal pay for men and women, or more women on the boards of subsidiaries, that would not create a single economic unit either.

In fact, there is no clear rationale for saying when a parent should be liable to fines, if it has not been exercising economic influence, or discussing or influencing the pricing conduct of the subsidiary. The single enterprise concept is a description, not a test. If influencing prices were the test, the fact that the parent could have influenced pricing conduct is irrelevant, and financial supervision, without more, would not justify fining a parent company. The uncertainty into which the law has fallen is largely due to the absence of any underlying principle or rationale to be used for distinguishing cases in which the supervision genuinely constituted evidence that the companies were a single economic unit. The fact that a shareholder may wish to be reassured that the subsidiary is not getting into financial difficulties does not mean that the companies are an economic unit in any other way. Unless the case law should merely be regarded as the Commission's efforts to justify higher fines, some basic principle is essential.[76]

The Commission may say that close supervision gives opportunities for influence, and in some circumstances that may be so. But, the suspicions of officials are not evidence, and companies ought to know what they can and cannot do without involving the parent in risk. The present legal position, in which

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76. In Opinion of Advocate General Kokott, *Akzo Nobel,* [2009] E.C.R. II-184, ¶ [87-90], Advocate General Kokott said that it is "possible" to attribute the subsidiary's conduct to the parent if both form one economic entity, or if the subsidiary has no autonomy, or the parent company exercises "decisive influence over its subsidiary's commercial policy." A single commercial policy may be inferred from "the totality of the economic and legal links between them." *Id.* ¶ 91. However, in practice the Commission relies on the presumption, and not (or not primarily) on evidence of this kind. The Court confirmed that there cannot be an exhaustive list of the "factors relating to economic, organizational and legal links." *Id.* ¶ 65.

not even the six principles set out above have been clearly accepted, is difficult to defend.

Financial supervision is relevant to the question of "holding companies." In *Schunk* the Court said that the function of a holding company is to manage the group of companies "as one."[77] That may have been true in *Schunk*, but since the concept of a holding company is imprecise and the phrase is used in many different situations, the statement is at most a factual generalization, and cannot be a rule of law. It is certainly not always correct. The question whether companies constitute a single enterprise as a matter of law cannot be answered merely by using an imprecise and ambiguous label.

A company that is financially independent is likely also to be economically independent, although financial independence is not necessary for economic independence.

XIX. *GROUP STRATEGY MEETINGS*

Another common and well recognized practice in multinational groups of companies is to bring together senior executives of all the companies to exchange views and discuss trends and strategies. The aim of such meetings is not for the parent company to give instructions, but to gather ideas. Any instructions that might be given would be given to all the subsidiaries, not to any individual subsidiary, and would be given openly. It is therefore unlikely that, if the parent wished to influence the conduct of any particular subsidiary, it would choose such an occasion to do so. There does not seem to be any clear justification for regarding any conclusions that might be reached at such a meeting as the exercise by the parent of influence sufficient to make it liable if a subsidiary is subsequently fined.

The Commission may say, of course, that it cannot know what might be said informally at such a meeting, and the parent might take the opportunity to influence a specific subsidiary's conduct. But it would be impossible for the companies to prove conclusively that this had not happened, even if it had not. The

77. *Schunk Kohlenstoff-Technik v. Commission*, Case T-69/04, [2008] E.C.R. II-2567; *see also* Eni v. Commission (Butadiene Rubber), Case C-508/11 P, [2013] E.C.R. I____, ¶¶ 64–67 (delivered May 8, 2013) (not yet reported).

Commission does not conclude that prices have been fixed at a trade association meeting, even if such a meeting would give an opportunity for price fixing. A meeting of the companies of a group which might constitute a single enterprise should not be treated with more suspicion than a meeting of competitors.

However, the Commission may say that if the companies in a group meet to discuss strategy or common problems, that suggests that the group is seeking a common approach, and is a single enterprise, even if it were clear that the parent never gives instructions. This view would seem reasonable if all the subsidiaries were in the same product market, but not if they met only to discuss e.g., climate change, or the use of information technology. The essential question seems to be whether each subsidiary is economically independent (and perhaps financially independent), not whether the subsidiaries sometimes pool ideas on technical or non-economic matters.

It is perfectly possible for some subsidiaries to be independent and others part of a single enterprise e.g., because one subsidiary is only recently established, or is in a different product market from all the others, or because the parent company has involved itself in the activities of only one of the subsidiaries.

XX. *IF THE PRESUMPTION COULD NOT IN PRACTICE BE REBUTTED, WOULD IT BE ILLEGAL?*

It seems that two broad interpretations of the case law are possible. The interpretation tentatively suggested here is that in theory it is possible to rebut the presumption, although it is not clear in what circumstances. The other interpretation is that the only circumstances in which the presumption can be rebutted are situations in which, for legal reasons, the parent company could not have exercised any influence. This second interpretation is suggested by *Eni*, and would seem to be correct if the parent company would be liable in all six typical situations described above.

The fact that the parent company cannot be fined if it could not have exercised any influence cannot legitimise the presumption. A presumption that can be "rebutted" only in circumstances in which it could not apply can hardly be described as rebuttable. But if in every case in which a parent company proves that it did not exercise influence in some respects, it is said to have influenced (or to have been able to influence) the subsidiary in another, the presumption certainly seems to be irrebuttable in practice, in spite of what the Courts have said. That is why the six typical situations seem important.

If a presumption that is justified as a rule of evidence becomes irrebuttable without a legislative basis, even if there are some exceptions to it, it is illegal because it is contrary to the rights of the defence. A company cannot protest against an absolute duty imposed by valid legislation, but if a rule is merely one of evidence, there must be a right in practice as well as in theory to defend oneself by producing contrary evidence.

So if in practice the presumption cannot be rebutted, it seems clear that it would be illegal. Advocate General Mazak in *General Quimica* said that the judgment of the ECJ in *Akzo* "underscored the rebuttable nature of the presumption . . . . To have found otherwise would, in my view, lead to a breach of fundamental rights. The rebuttable nature of the presumption is necessary in order to guarantee the rights of the defence and access to justice of the parent company."[78] The Court in *Elf Aquitaine*, *Edison*, and *Air Liquide* has said that the Commission is legally obliged to ensure that the presumption is rebuttable in practice.[79] The Court in *Groupe Gascogne* repeated that the presumption can be rebutted.[80]

78. Opinion of Advocate General Mazak, *General Quimica and Others v. Commission*, Case C-90/09 P, [2011] E.C.R. I-0001, ¶ 34. This view was confirmed by the Court in *Elf Aquitaine v. Commission*, Case C-521/09 P, [2011] E.C.R. I-8947, ¶¶ 59, 62, and in *General Quimica v. Commission*, Case C-90/09 P, [2011] E.C.R. I-0001, ¶ 52. In *Elf Aquitaine* the Court referred to the judgment of the European Court of Human Rights in *Janosevic v Sweden*, Eur. Ct. H.R. Reports 2002-VII, ¶ 101ff (July 23, 2002). *Elf Aquitaine*, [2011] E.C.R. I-8947, ¶ 62.

79. In *Elf Aquitaine*, [2011] E.C.R. I-8947, the Court said that the Commission is bound, in order to avoid making the presumption irrebuttable, to explain its reasons for saying the evidence is not enough to rebut it. *Id.* ¶ 153. In *Air Liquide v. Commission*, Case T-185/06, [2006] E.C.R. II-2809, the Court stated that "[t]he Commission's duty to state reasons for its decision on this issue is clearly evident from the rebuttable nature of the presumption." *Id.* ¶ 75. The same phrase is used in *Edison v. Commission*, Case C-446/11 P, [2013] E.C.R. I-___ (delivered Dec. 5, 2013) (not yet reported).

80. *Groupe Gascogne v. Commission*, Case C-58/12 P, [2013] E.C.R. I-____ (delivered Nov. 26, 2013) (not yet reported).

A presumption that in practice cannot be rebutted is a rule of absolute liability. A rule of absolute liability, if it would be permissible under the Charter and the European Convention on Fundamental Rights, would be legal only if it was clearly stated in legislation on the basis of sufficient reasons. It has not been stated in any EU legislation.[81]

The fact, if it were the fact, that there are a few extreme or unusual cases in which the presumption would not apply would presumably not be enough to make the presumption legal, if in most situations it could not be rebutted.

CONCLUSIONS—LEGAL CERTAINTY AND LITIGATION

It is widely believed by practising lawyers that the present position is contrary to the principle of legal certainty. Insofar as relevant, that principle says that European law rules should be clear enough for a private party, having taken legal advice if necessary, to know with some confidence what it may or may not lawfully do.[82] In the context of parent company liability, the question is whether the parent company can know whether a given relationship with its subsidiary would involve it in a risk of fines if its subsidiary were fined. Plainly, the law does not now enable a parent company to know that. It is not clear whether the principle of legal certainty requires that a private party should know whether and when it will be liable to a fine for an

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81. *See* Bronckers & Vallery, *supra* note 14.

82. *See, e.g.*, Flintan Duff and Others v. Minister for Agriculture and Food, Ireland, and the Attorney General, Case C-63/93, [1996] E.C.R. I-569, ¶ 20; Ireland v Commission, Case C-199/03, [2005] E.C.R. I-8027, ¶ 69; Thyssen Krupp Nirosta, Case C-352/09 P, [2011] E.C.R. I-2359, ("[T]he principle of legal certainty requires that such rules enable those concerned to know precisely the extent of the obligations which are imposed on them and that those persons must be able to ascertain unequivocally what their rights and obligations are and take steps accordingly."); Heinrich and Other v. Commission, Case C-345/06, [2009] E.C.R. I-1659. The European Court of Human Rights has ruled that:

> In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently the law must indicate with sufficient clarity the scope of any such discretion conferred on the competent authority and the manner of its exercise.

Gillan and Quinton v. United Kingdom, Case C-4158/05, E.C.R. I____, ¶¶ 76–77 (delivered Jan. 12, 2010) (not yet reported).

infringement committed by another legal entity. It does not even seem to ensure that a company must know how much it is itself likely to be fined for a given infringement, except within very broad limits. But it seems clear that the principle of legal certainty means that a company should be able to know what it needs to prove in order to rebut a presumption applying to it, which has serious consequences if not rebutted. Saying that the company is free to produce any evidence sufficient to rebut the presumption is not enough.

The unanswerable argument against the present state of the law is that it is generating a great deal of litigation which is occupying too much of the time of both the General Court and the Court of Justice. Adoption by the EU institutions of at least some of the principles set out above, including a clear statement on the question of financial supervision, would greatly reduce the scope for further court cases. It is true that if no specific effort is made to clarify the substantive rules, the Courts' increasing insistence on procedural requirements may gradually clarify the substantive principles. But this would be slow, cumbersome and expensive. It now also seems that it would be damaging for the reputation of the Commission. The judgments in *General Quimica*, *Air Liquide*, *Edison*, *Elf Aquitaine*, and *Eni* require a new approach.

It is particularly important that the law should be clarified because the Court of Justice, in order to save time and speed up its work, has taken to dismissing the appeals of parent companies by Orders without hearing oral argument and without giving reasons that give guidance to the General Court, to the Commission, or to companies.[83] This practice, while understandable, is clearly undesirable.

Clarification of the legal principles is also necessary to avoid one unfair anomaly that results from the case law. Because it is not clear what a parent company needs to prove, or what it would be sufficient for it to prove, a parent company can now be told that it has not made its argument precisely enough for it to be admissible procedurally.

83. *E.g.*, Total and Elf Aquitaine, Case C-495/11 P, [2012] E.C.R. I___ (delivered Sept. 13, 2012) (not yet reported); United Technologies, Case C-493/11 P, (delivered June 15, 2012) (not yet reported).

The Commission, which has created this unsatisfactory situation, should overcome the temptation to try to fine parent companies in as many circumstances as possible, and take effective steps to clarify the law and to reduce the volume of unnecessary litigation. A constructive step of this kind is now overdue. As the supposedly-rebuttable presumption is based only on case law, the Court of Justice could take such a step at any time. The Commission could, if it chose, state the principles suggested above, and commit itself to apply them. That would not be sufficient to resolve all the issues, but it would do much to avoid litigation which the Commission cannot regard as useful or productive.

The Commission is not well equipped for assessing the economic links between parent and subsidiary companies. Few Commission officials have training as judges, or experience of private industry or of the practice of law. Even if the rules that the officials should be applying were clear, they would not find it easy to apply them satisfactorily. But the Court is right to insist that the Commission should give reasons for its conclusions.

Reading all the judgments, one gets the impression that the Court is trying to restrain the Commission, by insisting that the presumption must genuinely be rebuttable, and by insisting, not yet entirely consistently, that the Commission's decisions must be fully reasoned. If the Court finds it necessary to be stricter, or if the Commission makes an effort to clarify the criteria in order to minimise litigation, the situation may yet improve.

Advocate General Nils Wahl is reported as having said at the Fordham Antitrust conference in 2013 that it is misleading to refer to a presumption, and more accurate to refer to a rule of law that parent companies are responsible for the actions of their subsidiaries. He said that the Court should resolve the conflicting judgments.

The need for clear and intelligible principles concerning the liability of parent companies is especially great because of two basic and well-known flaws in the Commission's procedure. First, the statement of objections and the decision are written by the same officials: the case is not looked at objectively. It is especially undesirable and inappropriate that the same Commission officials weigh the evidence intended to rebut the presumption. Second, the ultimate decision is adopted by the

Commissioners, none of whom have read the evidence, heard the arguments, or attended the hearing.[84] Because of the basic unfairness of the Commission's procedure, it is particularly unsatisfactory that the Commission has brought about a situation in which parent companies that nobody suggests were involved in the infringement are fined on a basis that cannot be explained satisfactorily, even after so much litigation.

Under the "Community method" of legislating, the Commission has the exclusive right to propose new measures for consideration. There are good reasons for this, but it has the disadvantage that, if a desirable reform or clarification would inconvenience the Commission, it is unlikely to be proposed.

84. *See* John Temple Lang, *Three Possibilities for Reform of the Procedure of the European Commission in Competition Cases under Regulation 1/2003*, *in* CURRENT DEVELOPMENTS IN EUROPEAN AND INTERNATIONAL COMPETITION LAW 219 (Carl Baudenbacher ed., 17th St. Gallen Int'l Competition Law Forum 2010, 2011).