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Dissertation Supervisor: David Bailey

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The Akzo presumption; rebuttable in theory, but conclusive in practice?

Abstract

How and why are parent companies held liable for the infringements of their wholly owned subsidiaries under EU competition law? The first part of this dissertation examines the jurisprudence of the EU Courts in order to illuminate the manner in which the Commission goes about choosing whom to fine and why. This examination reveals that the single economic entity doctrine lacks the capacity to determine the attribution of liability. Nonetheless, the post-Akzo jurisprudence state that the reason for parental liability is that the parent and its subsidiary form a single economic entity. The basis for this liability is the allegedly rebuttable presumption of decisive influence. The second part of this dissertation explores the most controversial aspect of the presumption: whether it is rebuttable in practice. The answer is that it is not – a fact that is deeply problematic for a variety of reasons. With this in mind, two alternative approaches are proposed that would allow the Commission and the EU Courts to adopt a more realistic approach towards the presumption. This is followed by several suggestions on how to provide more legal clarity regarding both the parental liability doctrine and the contours of the single economic entity doctrine.

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1 Introduction

In the field of European Union (hereinafter "EU") competition law, the last 20 years have seen a significant increase in the total value of fines levied at both the general and individual levels.[1] From 1990 to 1994 the Commission imposed fines worth €500 million. Two decades later, from 2010 to 2014, the fines amounted to nearly €8 billion.[2] At the heart of these increases is the single economic entity doctrine, according to which an undertaking designates an economic entity which can consist of several legal entities.[3] This doctrine enables the Commission to hold a parent company (hereinafter "the parent") liable for infringements committed by its subsidiaries and thereby impose a fine capped at 10 per cent of the turnover of the entire corporate group, as per Article 23 Regulation 1/2003.[4] Crucially, this doctrine applies even if only one legal entity within this group has infringed the competition rules.[5]

The application, interpretation and intent of the single economic entity doctrine goes to the core of this dissertation. Two key questions are explored: the basis for a parent`s liability for infringements committed by their wholly owned subsidiaries, as per Article 101 of the Treaty on the functioning of the European Union (hereinafter "TFEU"),[6] and more importantly, whether it is possible to escape this liability. These issues are of clear practical interest in light of the ever-increasing complexity of corporate groups in which many firms are owned by parent company`s.[7] The issue of parental liability based on the single economic entity doctrine is controversial, contested, and as such, a topic that merits examination.

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[1] Commissions homepage, "Cartel statistics", 21 March 2018, http://ec.europa.eu/competition/cartels/statistics/statistics.pdf, accessed 26 August 2018, p. 1
[2] Ibid
[3] Case C-97/08 P *Akzo Nobel NV and Others* v *Commission* [2009] EU:C:2009:536 para 55 and case law cited
[4] Article 23 of Council Regulation 1/2003/EC of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, p. 17); *Akzo* (n 3) paras 58-59; Thomas, Stefan "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" [2012], Journal of European Competition Law & Practice 3(1), 1-38, 4; Mayock, Chris, "Liability of Parents and Subsidiaries in EU Competition Law" (12th EU-China Competition Week, 14–18 March2016), http://www.euchinacomp.org/attachments/article/492/Day_3_Session%202_MAYOCK_Liability_of_parents_and_subsidiaries.pdf, accessed 26 August 2018, p. 8
[5] Ibid
[6] Article 101 of the Treaty on the Functioning of the European Union [TFEU], Consolidated Version (OJ 2012 C 326/88)
[7] Case C-97/08 P *Akzo Nobel NV and Others* v *Commission* [2009] EU:C:2009:536 Opinion of AG Kokott, para 42

The controversy stems from the manifold and wide-reaching consequences of the doctrine. These include the magnitude of the fines, the increased possibility to contest recidivism, and the resulting possibility that the parent and infringing subsidiary can be held jointly and severally liable for damages.[8] Controversy also derives from the fact that the approach taken by the EU is at odds with the company law of most countries. National law in most countries proceeds according to the principle of separate legal personalities, which shields shareholders from the liabilities of the companies they have invested in, and holds the companies solely responsible for liability.[9] The EU`s single economic entity doctrine, on the other hand, extends the liability of the subsidiary to its shareholder, the parent, in other words, pierces the corporate veil.[10]

The contested nature of the doctrine is evident from the fact that almost all of the appeals to the EU Courts against the Commission`s cartel decisions under Article 101 TFEU - the main area of enforcement in response to which parental liability is regular contested - include the plea that the Commission unlawfully attributed liability to the parent for their subsidiaries` infringements.[11] However, the vast majority of the attempts to contest the parent`s liability have been unsuccessful. The EU Courts consistently reject the parent company`s arguments for two reasons. Firstly, the EU Courts state that parent companies are liable for their subsidiaries because parent companies form a single economic entity with their subsidiaries.[12] Secondly, EU Courts rulings insist that the so-called "Akzo presumption" (hereinafter "the presumption"), which is the basis for the parent`s liability for wholly owned subsidiaries, is rebuttable.[13] The aim of this dissertation is to test these two arguments. This will be done by reference to primary source material, specifically case law, as well as secondary sources, including the Commission`s practice and academic commentary.[14]

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[8] Kalintiri, Andriani, "Revisiting Parental Liability in EU Competition Law" [2018] European law review, 43(2), 145-166, 147

[9] Hughes, Paul "Competition law enforcement and corporate group liability - adjusting the veil" [2014] European Competition Law Review, 35(2), 68-87, 68

[10] Kalintiri (n 8) 164

[11] Kalintiri (n 8) 151

[12] Case T-419/14 *The Goldman Sachs Group, Inc. v Commission* [2018] EU:T:2018:445, para 83 and case law cited

[13] Case C-508/11 P *Eni SpA v Commission* [2013] EU:C:2013:289 para 68

[14] There is extensive on-going debate regarding the parental liability doctrine. The following articles are representative of recent writing on this subject; Kalintiri, (n 8); Leupold, Bettina "Effective enforcement of EU competition law gone too far? Recent case law on the presumption of parental liability", [2013] European Competition Law Review, 34(11), 570-582; Bailey, David; Odudu, Okeoghene "The single economic entity doctrine in EU competition law", [2014] Common Market Law Review 51: 1721–1758; Wahl, Nils "Parent company liability – A question of facts or presumption?", [2012] 19th St.Gallen International Competition Law Forum ICF, available at www.ssrn.com; La Rocca, Laura "The controversial issue of the parent company

Chapter two will provide a brief description of the development of the law concerning the parental liability doctrine. The third chapter will analyse differences between the perceived role and the practical reality of the single economic entity doctrine in attributing liability to parent companies for infringements by their wholly owned subsidiaries.
The fourth chapter will assess the most controversial aspect of the current application of the parental liability doctrine, the presumption, and whether it is in fact rebuttable. Chapter five will test the outcome of this analysis by reference to one of the situations identified by Advocate General (hereinafter "AG") Kokott as eligible for rebutting parental liability.[15] Chapter six will set out the modifications that would be necessary in order for the Commission and the EU Courts to adopt a more realistic approach, followed by a conclusion.

The single economic entity doctrine is present in several different legal contexts, but the analysis in the following chapters will be limited to the relevance and role of this doctrine in attributing liability to a parent company for infringements by its wholly owned subsidiaries.[16] In turn, this dissertation will argue that the current application of the single economic entity doctrine, together with the essentially irrebuttable nature of the presumption practically eliminates the ability of a parent to escape liability.

2 The parental liability doctrine; the paradigm shift

2.1 The single economic entity doctrine

EU competition law regulate the actions of "undertakings" which case law defines as "an economic unit even if in law that economic unit consists of several persons, natural or legal."[17] In order to enforce the rules regarding anti-competitive conduct, the Commission has to address its decisions and penalties for infringements to an identified legal or natural entity.[18] Accordingly, the Commission must identify which legal entities constitute the undertaking and which entities can be held responsible for the conduct of the undertaking. The single economic entity doctrine allows the Commission to hold the parent and the subsidiary jointly and severally

liability for the violation of EC competition rules by the subsidiary" [2011] European Competition Law Review, 32(2), 68-76
[15] Kokott *Akzo* (n 7), n 67
[16] Thomas (n 4), 5-6
[17] Article 101 (n 6), Article 102 (n6) 326/89, *Akzo* (n 3) para 55
[18] Ibid para 57

liable for infringements committed by the subsidiary.[19] Although it follows from the case law that this sanctioning concept is based on an interpretation of the notion of an "undertaking",[20] numerous commentators have criticised the perceived role of the single economic entity doctrine in attributing liability to parent company`s.[21] Nonetheless, the EU Courts consistently rely on the history of parental liability in order to justify their current approach.[22]

The following section will explore the evolution of the case law regarding the parental liability doctrine. A closer look at the Court`s jurisprudence reveals that the impression of continuity is misleading, both in terms of the justification, and the legal test for attributing liability to a parent company for the infringements committed by their wholly owned subsidiaries. However, the EU Courts has not acknowledged this transformation.[23] This means that it has not been subject to judicial review. Moreover, this has led to a mismatch between parent company´s perception of why they are liable and the actual rationale behind their liability. The result is that parent companies consistently have attempted to contest the liability on ineffective grounds.[24]

2.2 Evolution of the law regarding the parental liability doctrine

The parental liability doctrine dates back to a 1972 Court decision in Imperial Chemical Industries (hereinafter "ICI"). The European Court of Justice (hereinafter "ECJ") ruled that "*[t]he fact that a subsidiary has separate legal personality is not sufficient to exclude the possibility of imputing its conduct to the parent company. Such may be the case in particular where the subsidiary, although having separate legal personality, 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*."[25] As such, the Court adopted a substance over form approach in which the subsidiary`s infringement can be imputed to the parent if the latter was able to, and actually exercised decisive influence over the commercial policy of the former.[26] More specifically, the Court referred to the fact that the parent in question had given

[19] Ibid para 61
[20] *Goldman Sachs* (n 12) para 83
[21] See Bailey, Odudu (n 14) 1747; Thomas (n 4) 37; Kalintiri, (n 8), 158; La Rocca (n 14) 76; Lang, John Temple "How Can the Problem of the Liability of a Parent Company for Price Fixing by a Wholly-owned Subsidiary Be Resolved?", [2014], Fordham International Law Journal, 37-5, 1481-1524, 1517
[22] Kalintiri (n 8) 147
[23] Ibid 165
[24] Ibid
[25] Case 48/69 *Imperial Chemical Industries v Commission* [1972] EU:C:1972:70, paras 132-133
[26] Ibid paras 137-140

its subsidiary orders on what prices to charge and the conditions for sale.[27] This suggest that the finding of decisive influence was based on the existence of a connection between the control exercised by the parent and the infringement of the subsidiary.[28] Naturally, if the parent employs its subsidiary as a vehicle to engage in anti-competitive coordination, it has itself contributed to the infringement in question.[29]

Accordingly, the constitution of an undertaking is characterised by the companies "unity of (…) conduct on the market".[30] This mean that in order to conclude that companies are part of the same undertaking, the Commission had first to demonstrate that the parent had the power to exercise decisive influence over its subsidiary`s commercial activity then, second, demonstrate on factual grounds that this power was actually exercised.[31] In 1983 the ECJ in the AEG-Telefunken judgement took the first step towards an approach that would later lead the Commission and the EU Courts to embrace a presumption in regard to the second criterion.[32] Now, a parent holding all of the shares in a subsidiary that infringed the competition rules would be presumed to have exercised decisive influence over the conduct of the subsidiary.[33] Unless the parent rebuts the presumption, the Commission gained the ability to regard the parent as jointly and severally liable for the payment of the fine imposed on its subsidiary.[34]

This presumption was affirmed in the landmark 2009 AKZO decision, in which the ECJ clarified that the Commission, presented with a situation of sole ownership, can rely exclusively on the presumption of exercised control without the necessity to provide evidence.[35] Equally importantly, the Court held that parental liability is justified by the fact that the parent and the subsidiary form a single economic entity.[36] As such, "in order to ascertain whether a subsidiary determines its conduct on the market independently, account must be taken (…) of all the

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[27] Ibid paras 137-138
[28] Kalintiri (n 8)148
[29] Ibid
[30] *ICI* (n 25) para 140, see also Kokott *Akzo* (n 7) para 42
[31] Case 107/82 *AEG-Telefunken v Commission* [1983] EU:C:1983:293 para 50, Case C-286/98 P *Stora v Commission* [2000] EU:C:2000:630, para 29
[32] Ibid
[33] Ibid
[34] *Akzo*, (n 3) para 61. However, Commission has discretion as to whether to fine a parent company, see Case T-146/09 *Parker ITR Srl and Parker-Hannifin Corp. v Commission* [2013] EU:T:2013:258, para 125 and case law cited
[35] *Akzo* (n 3) para 60, 62, however, there is nothing to prevent the Commission from establishing that the parent exercised control over the subsidiary based on other evidence or a combination of such evidence and the presumption, see Joined Cases C-628/10 & 14/11 P, *Alliance One International Inc* v. *Commission* [2012] EU:C:2012:479 para 59
[36] *Akzo* (n 3) para 59

relevant factors relating to economic, organisational and legal links which tie the subsidiary to the parent company, which may vary from case to case and cannot therefore be set out in an exhaustive list."[37]

Consequently, the law regarding parental liability has been subject to a paradigm shift in interpretation and application. The origin of the doctrine justified parental liability by reference to the connection established between the control exercised by the parent and the actual infringement.[38] But the single undertaking rationale for parental liability established in the Akzo case infiltrates all subsequent jurisprudence.[39] This shift clearly favours the Commission who, having shifted the evidential burden to the parent, merely needs to prove that the subsidiary is wholly-, or almost wholly owned by the parent.[40]

2.3 The rationale for the presumption

The underlying rationale regarding the use of the presumption is that except for "exceptional circumstances" parent ownership is inseparable from decisive influence over a subsidiary.[41] Additionally, it provides clear rules and, from the point of view of the Commission, it is intended to "facilitate the effective enforcement of competition law while promoting legal certainty due to the straightforward manner in which the presumption arises".[42]

2.4 The refutability of the presumption

According to the case law the parent, who bears the burden of rebutting the presumption, must submit evidence capable of demonstrating that the subsidiary acted with "complete autonomy" on the market.[43] In other words, that the parent did not exercise decisive influence over the market conduct of the subsidiary.[44] The EU Courts have gradually broadened the notion of what constitutes a parent`s "exercise [of] decisive influence" over a subsidiary. Decisive influence began life as the narrowly defined power to control the subsidiary`s commercial policy, but has

[37] Ibid para 74
[38] *ICI* (n 25) para 137-138
[39] *Akzo*, (n 3) para 59
[40] The presumption has been applied where a parent owns less than 100 % of the shares, see *Eni* (n 13) para 47 and where the parent owns all the voting rights, see *Goldman Sachs* (n 12) paras 51-53
[41] *Eni* (n 13) para 67 and case law cited
[42] Case C-90/09 P *General Química SA and Others v Commission* [2011] EU:C:2011:21 Opinion of AG Mazák, para 61
[43] *Eni* (n 13) para 68
[44] Case T-25/06 *Alliance One International Inc. v Commission* [2011] EU:T:2011:442, para 90

evolved into a de facto consequence of the group's structure.[45] Current practice is such that a parent`s exercise of decisive influence is deduced from "all the relevant factors relating to economic, organisational and legal links".[46] As AG Kokott points out, this means that a single economic entity may be "inferred *indirectly* from the totality of the economic and legal links between the parent company and its subsidiaries".[47] This leads to the question of how and whether the parent can prove the lack of decisive influence despite these links. After all, by virtue of ownership, any wholly owned subsidiary will inevitably have economic, legal and organisational links to its parent, implicit in which is the parent`s ability to control the strategic decisions of the subsidiary.[48] The question is whether the *potential* exercise of control necessitates the *actual* exercise of control.

It is well established that evidence of the *existence* of these links alone is not sufficient to impute parental liability.[49] The key factor is whether decisive influence can be *inferred* from these links or, more precisely, that the parent "by reason of the intensity of its influence, can direct the conduct of its subsidiary to such an extent that the two must be regarded as one economic unit".[50] This question is clearly addressed in AG Kokott`s opinion in the Gosselin case. Kokott highlighted the importance of exploring "the actual effects of the personal links between Portielje and Gosselin on everyday business activities and to assess purely on the basis of the facts whether Gosselin – contrary to the 100% presumption – really determined its commercial policy independently."[51] In spite of this, Leupold argue that despite not "officially overturn(ing)" the two-pronged test, the EU Courts neglects the "actual exercise" requirement "to a degree that makes it almost meaningless". [52] If true, this would mean that the mere ability to exercise decisive influence is sufficient to impose liability on the parent. In other words, in order to rebut the presumption, a parent must prove a lack of ability to control its own subsidiary. Of course, the ability to exercise control is inherent in the ownership of all the shares, which leaves the presumption de facto irrebuttable. This controversy in the academic

[45] *ICI* (n 25) paras 137-138 cf. *Akzo,* (n 3) para 74
[46] Ibid
[47] Kokott *Akzo* (n 7), para 91
[48] Leupold (n 14) 576; La Rocca (n 14) 74
[49] Ibid
[50] Kokott *Akzo* (n 7), para 93; Case T-77/08 *Dow Chemical Co v Commission* [2012] EU:T:2012:47 para 77, see also Leupold (n 14) 576
[51] Case C-440/11 P, *Stichting Administratiekantoor Portielje and Gosselin Group NV v Commission* [2013] EU:C:2013:514, Opinion of AG Kokott, para 76
[52] Leupold (n 14) 574

literature regarding whether the presumption is rebuttable in theory, but irrebuttable in practice, will be further addressed in chapter 4.[53]

3 Is the concept of an undertaking determinative for the attribution of liability?

The notion of undertaking is a legal fiction which exists in relation to natural and legal entities. This means that in order to impose penalties for infringements by an undertaking the Commission must determine which legal entity(ies) within the undertaking to hold responsible for the conduct of the undertaking.[54] Clearly the company that directly participated in the infringement can be held liable. In addition, the concept of a single economic entity as determinative for the attribution of liability asserts that each and every member of that undertaking can be held liable for the undertaking`s infringement.[55]

The analysis in this chapter will be divided into two main parts. Section 1 explores whether the single economic entity doctrine is determinative for the attribution of liability by reference to the case law and the Commission`s fining practice. Section 2 explores whether, when and why one legal entity should be held liable for another legal entity`s infringements.[56] The analysis indicates that liability for an infringement by one company within an undertaking is not attributed to any other company merely because they are members of the same undertaking as the cartelist. The single economic entity doctrine neither determines, explains nor justifies which legal entities can be held liable for the undertaking`s infringements. Rather, the quasi-criminal nature of the fines imposed on perpetrators means that the principle of personal responsibility governs the attribution of liability.[57] As such, the Commission can only impose liability on a legal entity that has participated in the infringement, either directly or indirectly.[58] Furthermore, the objective of the rules is to achieve deterrence and effective enforcement.[59] This means that it is necessary to hold liable the legal entity which through capabilities such as ownership and control has the power to prevent the violations.[60] In practice, a substance-over-

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[53] See La Rocca (n 14) 74; Thomas (n 4) 19; Leupold (n 14) 582; Briggs, John D; Jordan, Sarah, "Presumed Guilty: Shareholder Liability for a Subsidiary's Infringements of Article 81 EC Treaty" [2007], Business Law International, 8(1) 1-37, 36
[54] *Akzo* (n 3) para 57
[55] Bailey, Odudu (n 14) 1746; Kalintiri (n 8), 156
[56] Ibid 1746
[57] Kokott *Akzo* (n 7), para 39
[58] Joint Cases C-231/11P to C-233/11P, *Siemens AG Österreich v Commission* [2014] EU:C:2014:256, Opinion of AG Mengozzi, paras 80-81
[59] Kokott Akzo (n 7), para 40
[60] Ibid para 41; Kalintiri (n 8) 160

form approach taken by the Commission and the EU Courts means that the legal entity that must bear responsibility for an infringement depends on how the group is structured. Put simply, liability falls on the legal entity that wields the deciding authority, regardless of whether its legal status is that of a parent or a subsidiary.

3.1 Does the single economic entity doctrine determine attribution of liability?

3.1.1 Case law

Case law consistently asserts that "it is not … because of a relationship between the parent company and its subsidiary in instigating the infringement, or a fortiori, because the parent company is involved in the infringement, but because they constitute a single undertaking … that the Commission is able to address the decision imposing fines to the parent company of a group of companies."[61]. It would therefore follow that liability stems *ipso jure* from the notion of an "undertaking", in which the undertaking`s infringement "gives rise to the collective personal responsibility of all the principals in the group structure, regardless of whether they are the parent company or a subsidiary".[62] However, according to the Aristrain judgement "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."[63]

In English judgements there seems to be disagreement in Court decisions regarding the attribution of liability. In Provimi v Roche Products, Aikens J pointed out that it is "arguable" that "the mind and will of one legal entity is, for the purposes of [Article 101(1) TFEU], to be treated as the mind and will of the other entity". [64] This is because "the legal entities that are a part of the one undertaking, by definition of the concept, have no independence of mind or action or will".[65] By contrast, the Court in another English judgement, Cooper Tire v Dow

[61] *Goldman Sachs* (n 12) para 83 and case law cited
[62] Joined Cases C-231/11P to C-233/11P, *Siemens AG Österreich v Commission* [2014] EU:C:2014:256, para 57; Kokott *Akzo* (n 7), para 97
[63] Case C-196/99 P *Siderurgica Aristrain Madrid SL v Commission* [2003] EU:C:2003:529 para 99, Joined cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and others v. Commission* [2005] EU:C:2005:408, para 118
[64] *Provimi* v. *Roche Products* [2003] EWHC 961 (Comm), para 31
[65] Ibid

Deutschland, held that the abovementioned view in Provimi v Roche Products was arguable in the opposite direction since "it is by no means obvious (…) that a subsidiary should be liable for what its parent does, let alone for what another subsidiary does".[66]

Similarly, regarding the imputation of liability of a parent´s infringements to its wholly owned subsidiary, the General Court held in Parker that "although the subsidiary may be penalised instead of the parent company, it is to the extent that it itself participated in the infringement."[67]

In Jungbunzlauer the General Court held one subsidiary (subsidiary B) of a holding company liable for another subsidiary(subsidiary A) of the same holding company`s infringement.[68] The reason given was that the holding company had delegated the management of the group business entirely to subsidiary B, so that subsidiary A did not "decide independently its own conduct on [the relevant] market, but carried out, in all material respects, the instructions given by" subsidiary B.[69]

3.1.2 Analysis

Read in isolation, the statements of the EU Courts cited initially in section 3.1.1 suggest that, since liability is a consequence of the very notion of undertaking, all the entities forming part of this undertaking can be held liable. However, it is important to emphasize that these cases involve the issue of parental liability, and therefore do not address whether mere membership of the undertaking is sufficient to be held liable.[70] Accordingly, caution should be taken to avoid reading too much into isolated statements.

Although, the question of liability of a non-participating innocent subsidiary as part of a single undertaking has not yet, to my knowledge, received attention at EU level, the issue has, as seen above, been touched upon in a number of relatively recent cases by English Courts. The opinion in Provimi v Roche Products clearly suggests that liability for an infringement by one company within an undertaking could be attributed to any and all other companies who formed part of

[66] *Cooper Tire v Dow Deutschland* [2010] EWCA Civ 864 para 45
[67] *Parker* (n 34) paras 124, 126, Kalintiri, (n 8) 156
[68] Case T-43/02 *Jungbunzlauer AG v Commission* [2006] EU:T:2006:270. para 129, see also Case T-347/06 *Nynäs Petroleum and Nynas Belgium v. Commission* [2012] EU:T:2012:480 para 52 and Joined cases C-201/09 P and C-216/09 P ArcelorMittal Luxembourg SA v Commission [2011], EU:C:2011:190, para 104
[69] Ibid *Jungbunzlauer* paras 127-130.
[70] *Goldman Sachs (n 12) para 1, Akzo*, (n 3) para 98, *Siemens AG Österreich*, (n 62) para 6

the same undertaking, even, an innocent non-participating subsidiary.[71] But the judgement of the English Courts in Cooper Tire v Dow Deutschland, cited above, expresses a different view on the issue. This disagreement indicates that the current jurisprudence of the EU Courts does not clearly articulate the basis upon which liability is attributed for infringement in an undertaking.

Moreover, English Courts have reached different conclusions regarding the understanding of the statement in Aristrain referred to above. On one hand, the Court in Sainsbury`s v Mastercard argued that "if anything" the statement in Aristrain seems to support the point Aikens J`s held to be "arguable". [72] The reason given was that the Court in Aristrain does not explicitly limit the attribution of liability within a single undertaking to the parent-subsidiary context.[73] Yet, the Court in an obiter comment in KME Yorkshire v Toshiba Carrier argued that the Aristrain decision found *against* Aikens J`s point. [74] This disagreement reveals that it is not entirely clear in what direction ECJ`s statement in Aristrain draws regarding whether the single economic entity doctrine is determinative for attribution of liability.

It is important to bear in mind that the abovementioned statement in Aristrain is given in relation another point, in which ECJ examines whether separate legal entities *ipso facto* are to be treated as a single economic entity, so that the actions of one can be attributed to the other, merely because they are owned by the same person or family.[75] Consequently, the ECJ in Aristrain cannot be held to have taken a position on whether the single economic entity doctrine determines the attribution of liability. The Court in Sainsbury`s v Mactercard makes the logical argument that, since ECJ in the Aristrain statement discusses the attribution of liability within the undertaking in general terms, liability may be imputed to legal entities other than the direct infringer outside the parental liability context.[76] Nevertheless, this does not necessarily indicate that *mere membership* is sufficient to impute liability on a legal entity. As established in Jungbunzlauer, the parent may entrust a subsidiary with the task of managing the entire business of the group.[77] As such, the basis upon which the subsidiary may be held liable is not its mere membership of the undertaking. Rather, attribution of liability depends on the extent to which

[71]*Sainsbury's Supermarkets Ltd v MasterCard Incorporated and Others* [2016] CAT 11, para 363(10)
[72] Ibid para 363(16)
[73] Ibid
[74] *KME Yorkshire v Toshiba Carrier* [2012] EWCA Civ 1190 paras 37-39
[75] *Aristrain* (n 63) para 86 - see also *dansk rørindustri* (n 63) paras 103-105, *Sainsbury`s* (n 71) para 363(16)
[76] *Sainsbury`s* (n 71) para 363(16)
[77] *Jungbunzlauer* (n 68)

it has allowed or directed the unlawful conduct by determining another subsidiary`s market conduct.

This leads to the question of whether the case law referred to above, in which the Court considered the issue of attributing liability outside the parent-subsidiary context, contributes to the question at issue. The Jungbunzlauer judgement shows that attribution of liability between sister companies cannot be categorically rejected.[78] Still, it is important to recognize that this was because the Court, on factual grounds, concluded that subsidiary B had the equivalent of decisive influence over subsidiary A.[79] As such, the case does not amount to authority to attribute liability in the absence of “decisive influence”.[80] Indeed, recent jurisprudence has emphasised that liability for the actions of an infringing entity cannot be attributed to another entity if the latter does not wield some level of control over the infringer. In the context of sister companies, Bouderhem states: “if one of the subsidiaries is not subordinate to another subsidiary--this is the case in groups of companies with a pyramidal structure--its behaviour cannot be attributed to the other subsidiary”.[81] With regards to parent-subsidiary relationship, the Parker decision suggests that, absent participation, subsidiaries may not be held liable for their parent company`s infringements. Consequently, these judgements suggest that an additional element must attach the sanctioned legal entity to the infringement, and that mere membership of the undertaking is not sufficient.

Further conclusions about the basis for attributing liability among members of an undertaking can be drawn from the way in which the Commission imposes fines. Rather than impose a fine on all the legal entities forming part of the relevant undertaking, the Commission singles out the legal entities that are primarily responsible or their parent companies.[82] This indicates that liability does *not* “stems ipso jure from the notion of "undertaking".[83]

[78] Sister companies means corporate legal entities with common owners, see Bailey, Odudu (n 14) 1723
[79] Jungbunzlauer (n 68) paras 126-129
[80] *Sainsbury`s* (n 71) para 363(18)
[81]Bouderhem, Rabai “The position of the Member States of the European Union and the solutions of European Union law with regard to groups of companies”, [2017] international Business Law Journal, 3, 225-252, 245
[82] *Cooper Tire (n 66)* para 45
[83] *Cf. Siemens AG Österreich,* (n 62)

3.2 The basis for attribution of liability

In her opinion in the ETI judgement AG Kokott holds that "in selecting criteria for attributing offences, both the sanctionative nature of the measures imposed and their purpose must be taken into account."[84]

3.2.1 The purpose of the EU competition rules

The purpose of the rules is to provide effective enforcement of competition rules in order to prevent distortions of competition and, accordingly, to deter economic operators from committing cartel offences.[85]

A legal entity that exercises control over other legal entities is deemed to have the ability to prevent the undertaking from committing infringements.[86] Given that the pressure of the penalties imposed should lead the controlling entity to alter its conduct, imputing liability to the controlling entity is necessary to achieve deterrence and effective enforcement.[87] Since the power to exercise control is inherent in the parent`s ownership of all the shares, the parent is a natural addressee of fines if it can be factually established or presumed that the rights of control are exercised. Likewise, if a parent company has entrusted a subsidiary with the power to control its sister companies and these powers are exercised, it is consistent with the goal of achieving deterrence and effective enforcement of the rules to attribute that conduct to the subsidiary in control. This is also consistent with the need to forestall circumvention, in which categorical refusals of imposing liability between sister companies or holding a subsidiary liable for their parent`s infringements can invite manipulation.

However, in situations where a subsidiary has no controlling function, there is no logical basis for imputing liability down the corporate chain, or between sister subsidiaries.[88] The reason is that a non-controlling innocent subsidiary is unlikely to be able to stop the unlawful behaviour. Nor does it have the ability or the responsibility to make sure that its parent or its sister companies do not infringe the competition rules.[89] Thus, the practical purpose of the rules does not apply in favour of holding an entity liable simply because it is a member of the undertaking.

[84] Case C-280/06 *ETI and Others* [2007] EU:C:2007:775 Opinion of AG Kokott, para 70
[85] Ibid
[86] Kokott *Gosselin* (n 51) para 37
[87] Kokott *ETI* (n 84) para 72
[88] *Cooper Tire* (n 66) para 45
[89] Kalintiri, (n 8) 160

By contrast, such an interpretation would not have grounds in the jurisprudence and therefore represent something new.

3.2.2 The quasi-criminal nature of the Commissions fines

It is well established that the sanctionative nature of antitrust fines is "at least akin to criminal law".[90] Consequently, it is the principle of personal responsibility that is decisive for the attribution of cartel offences.[91] Personal responsibility means that a cartel offence is to be attributed to the natural or legal person operating the undertaking who participates in the cartel.[92] This is clearly expressed in AG Mengozzi`s opinion in the Siemens case where he states that the Commission may " determine the personal and collective liability of all of the legal persons who make up the economic unit and who, by acting together, have participated, directly or indirectly, in the commission of the infringement".[93] Consequently, the EU Courts has found it to be "compatible with the principle of personal responsibility – as well as with the objective of the effective implementation of the competition rules – to require the legal persons who participated in the infringement and, along with them, the person who exercised decisive influence over them" to bear joint and several liability for the infringement of the undertaking [94]As such, the basis for imputing fines to a legal entity is either direct or indirect participation in the infringement. The latter can be presumed in the presence of decisive influence. However, the presumption of participation does not arise simply because separate legal entities are subject to the levels of control that render them all part of the same undertaking.[95]After all, attributing liability absent a requirement to prove or presume that the company held liable controlled the direct perpetrator would mean that innocent parties are held liable. This in turn, due to the quasi-criminal nature of the fines, would clearly raise fairness issues and run contrary to the principle of personal responsibility.

As such, the fact that the Commission specifically singles out certain parties when imputing liability is not a limitation of a "purely practical nature" as the Court contested in the Siemens

[90] Kokott *ETI* (n 84), para 71
[91] Ibid
[92] Ibid
[93] Mengozzi, (n 58) para 80, the ECJs judgement appeared to endorse this view, see *Siemens AG Österreich*,(n 62) paras 49-51
[94] Ibid, para 81
[95] Bailey, Odudu(n 14) 1750

judgement.[96] Rather, the Commission singles out certain parties with the goal of establishing participation, either direct or indirect, in the infringement for which they wish to impose a fine.

3.3 Conclusion

The assessment above shows that the single economic entity doctrine does not determine, explain or justify the way in which the Commission chooses whom to fine and why. Rather the principle of personal responsibility and the need to achieve deterrence and effective enforcement requires participation, either directly or indirectly through the exercise of control over the direct perpetrator, in order to hold a legal entity liable for the undertaking`s infringements. Attribution of liability is thus determined not by the legal status of a member of an undertaking, whether it is the parent or merely a sister company of the cartelist, but rather according to the way in which the group is structured. This substance over form approach means that if the parent transfers power to another legal entity within the group, and the legal entity exercises this power, the Commission can impute liability on this legal entity. Holding a subsidiary liable for the unlawful, anti-competitive acts of the parent may initially seem counter-intuitive since, after all, it is unlikely that the subsidiary would control the parent given the vertical power structure that typically exists in hierarchical settings. Nevertheless, as seen above, it cannot be categorically rejected.

4 When, how and whether it is possible to separate the actions of a wholly owned subsidiary from those of its parent company?

Throughout the evolution of the parental liability doctrine, presented in chapter 2, the EU Courts have consistently repeated that the presumption that a parent exercises control over an infringing subsidiary is rebuttable.[97] Nonetheless, numerous academics, including La Rocca, Leupold, Briggs, Jordan and Thomas, have argued that the presumption is rebuttable in theory, but not in practice.[98] Despite being a respectable line of arguments, it is important to recognize that the presumption has been rebutted on material grounds.[99] But given the overwhelming

[96] *Siemens AG Österreich* (n 62) para 55
[97] *Eni* (n 13)
[98] (n 53)
[99] See Case T-24/05 *Alliance One International* v. *Commission* [2010] EU:T:2010:453, paras 195–197, appeal dismissed by ECJ in Alliance one (n 37) paras 42-67. This case is discussed further below. See also Joined cases T-208/08 and T-209/08 *Gosselin Group and Stichting Administratiekantoor Portielje* v *Commission [2011]* EU:T:2011:287, para 58 in which the General Court observed that the presumption was rebutted based on the evidence adduced by Portielje. However, this finding was overruled by *the ECJ on appeal, see* Case C-440/11 P

rarity of successful rebuttals, this chapter seeks to analyse whether the presumption, under the current state of the law, is effectively rebuttable. Put another way, whether the paradigm shift described in chapter 2 has in practice rendered the presumption irrebuttable. This analysis will be divided into two main parts. Section 1 will analyse the EU Courts and the Commission`s current application of the legal test that needs to be fulfilled in order to rebut the presumption. Section 2 will explore what evidence is required to fulfil this test.

Although it is theoretically possible for a parent to demonstrate that it did not decisively influence the infringing conduct of a subsidiary, the presumption of decisive influence is de facto irrebuttable. The EU Courts and Commission have consistently referred to the original content and definition of the legal test for determining decisive influence by a parent. But this test, presented below, has been interpreted in a way that effectively deprives it of its practical meaning. This has created a situation in which, according to the case law, the mere ability to exercise decisive influence over a subsidiary seems to be sufficient for the Commission to impose parental liability. Additionally, the presumption seems to include situations of absence of action as demonstrative of parent control. Furthermore, the Court`s precedents have created uncertainty and a lack of clarity regarding what kind of evidence is required to fulfil this test.

4.1 With decisive influence follows liability, and without it, there is no liability?[100]

4.1.1 Application of the two-part test determining parent liability in theory and in practice

In order for the Commission to hold a parent liable for the infringement of its subsidiary a test consisting of two components must be fulfilled: the parent must first have the power to exercise decisive influence and, second, have exercised this power in actuality. However, variations exist in the application of this test when determining parent liability. In Gascogne the General Court regarded the following facts as evidence of *actual* exercise of decisive influence.[101] Firstly, the parent appointed members to the subsidiary`s administrative council.[102] Secondly, that these members, as provided in German law, had access to the subsidiary`s books and were entitled to

Stichting Administratiekantoor Portielje and Gosselin Group NV v Commission [2013] EU:C:2013:514, paras 58-60
[100] Wahl (n 14) 4
[101] Case T-72/06, *Groupe Gascogne SA v Commission* [2011] EU:T:2011:671, paras 83-88, ECJ dismissed the parents appeal see Case C-58/12 P, *Groupe Gascogne SA v Commission* [2013] EU:C:2013:770 translation by Leupold (n 14) 574
[102] Ibid paras 75 and 77

request information from management.[103] And, thirdly, that the parent received information on strategic matters and monthly reports on the subsidiary`s performance in the preceding month.[104] Likewise, the Court referred to the fact that the parent of the wholly owned subsidiary "can intervene", had the "possibility of intervention", ""intended to exercise and was capable of exercising decisive influence".[105] Similarly, in FLSmidth, the General Court did not seek to assess whether the person who held positions in both the parent and the subsidiary company actually influenced the commercial policy of the subsidiary.[106] The reason given was that holding a position in the board of directors of the subsidiary led to responsibility for the company as a whole, including the market conduct, to the extent that it was "of little significance that (Mr. T) did not, in practice, deal with the undertakings commercial strategy".[107]

By contrast, AG Mengozzi`s opinion in Elf Aquitaine found that the parent company can rebut the presumption by showing that "despite the parent company's attempts to influence its subsidiary's market conduct, the latter acted independently (perhaps against the parent company's instructions)". [108] Nevertheless, the General Court in the Parker decision held the parents liable on the basis of merely attempting to exercise decisive influence.[109] This ruling was made despite the fact that the manager of the subsidiary "systematically refused to comply with (the parents) instructions and commercial policy" and thereby "successfully rebuffed (the parents) attempts to intervene" in the operation of the subsidiary`s business.[110] Crucially, the Court noted that the parent could have replaced the personnel that kept them from exercising decisive influence, and that the parent did "not adduce any evidence capable of establishing the reasons why (the parent) was legitimately prevented from exercising a decisive influence" over the subsidiary.[111]

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[103] Ibid para 76
[104] Ibid para 83
[105] Leupold (n 14) 575
[106] Case T-65/06, *FLSmidth & Co. A/S v Commission* [2012] EU:T:2012:103, para 32, the appeal was dismissed by the ECJ see Case C-238/12 P *FLSmidth & Co. A/S v Commission* [2014] EU:C:2014:284
[107] Ibid
[108] Case C-521/09 P *Elf Aquitaine SA* v *Commission* [2011] EU:C:2011:620 Opinion of AG Mengozzi, para 62, see also Case T-112/05, *Akzo Nobel and Others* v *Commission* [2007] EU:T:2007:381. para 62
[109] *Parker* (n 34) paras 187-193, In the Commissions appeal to the ECJ, the court did not address the parents complain in this regard, which means that it is still good law, see Case C-434/13 P, *Parker Hannifin Manufacturing Srl and Parker-Hannifin Corp v Commission*, [2014], EU:C:2014:2456
[110] Ibid paras 185, 187
[111] Ibid paras 191, 188

The Court`s approach in Gascogne reveals a liberal interpretation of what it means to "exercise decisive influence". In fact, the wording of the Court`s ruling suggest that the "exercise" requirement is abandoned. This understanding is reflected in the substantive assessment of the General Court as they, for instance, do not assess whether the parent actively used information received on strategic matters to influence their subsidiary`s market conduct.[112] Likewise, the FLSmidth case clearly indicates that if personal and organisational links exist between the parties, it is immaterial whether the parent actually took advantage of these by exercising control. As such, the judgements reflect the Court`s tendency not to require *actual* control being exercised. Importantly, AG Mengozzi`s opinion referred to above seems to clash with this tendency, particularly with the Court`s substantive assessment in the Parker decision, which equates the parents attempt to exercise decisive influence with the actual exercise of decisive influence.

As La Rocca states there is "no parallelism between the notions of control and a single direction of the group".[113] In other words, a single economic entity only exists if the parent exercise their power of control in a way that leads the parent and the subsidiary to behave on the market in a unitary way.[114]As such, the parent`s failed attempt to exercise decisive influence seems, by definition, to indicate that the subsidiary determined its market conduct independently.[115] Furthermore, it is difficult to see the relevance of the fact that the parent "could" have replaced the personnel who blocked them from exercising control, if such measures were not actually taken.

It is important to note that this is only an observed trend; these rulings do not constitute a basis to assert that the EU Courts never properly address the second criterion of the legal test: to demonstrate actual exercise of control by a parent over a subsidiary. Still, the judgements clearly reveal a tendency in which the mere ability to control the subsidiary`s market conduct, by virtue of the links between the parties, is sufficient for the Commission and the EU Courts to establish liability. This indicates that the current position of the law has abandoned "exercise" in favour of "ability", so that the parent company must now demonstrate that it does not have the ability to exercise control in order to rebut the presumption. It is, as Thomas states, not

[112] Leupold (n 14) 574
[113] La Rocca (n 14) 74
[114] *ICI* (n 25) para 140
[115] Leupold (n 14) 575

logical to require that the parent demonstrate that the first criterion of the test is not fulfilled in order to rebut the presumption which merely concern the second criterion.[116]

Furthermore, a case in which influence was not actually exercised might merely indicate that the parent chose a negative line of action or, more precisely, that the parent abstained from exercising power of control over a subsidiary.[117] After all, the presumption does not address whether decisive influence can be exerted passively. [118] Nonetheless, Bailey, Odudu and Wahl argue that the rebuttable nature of the presumption is only relevant in relation to positive action.[119] As such, it is necessary to assess whether non-action on behalf of the parent amounts to exercise of decisive influence.

4.1.2 Defining decisive influence

The wording of the definition and the content of the presumption, as the "exercise [of] decisive influence", indicate a requirement to establish that the parent exercised this influence over a subsidiary in a positive sense. This would mean that non-action does not amount to decisive influence.[120] This understanding is reflected in the AG Mengozzi opinion in Elf Aquitaine, where he states that the parent company can rebut the presumption, inter alia, by showing that despite having the power to exercise control "such control has not in fact been exercised".[121] Moreover, this perception is consistent with the case law in which the EU Courts consistently repeats the rebuttable nature of the presumption.[122] After all, non-action is a possibility that is inherent in the legal rights to control the subsidiary, meaning that if non-action amount to decisive influence the mere ability to exercise control leads to liability.

By contrast, AG Kokott seems to regard the links between the parent and subsidiary as being sufficient, *in themselves***,** to find a single undertaking.[123] In other words, it is not required that actual exercise of decisive influence can be inferred from these links. Similarly, the General Court in Gascogne interpreted the parent`s decision not to change the subsidiary`s management

[116] Thomas (n 4) 20-21
[117] Wahl (n 14) 7
[118] Ibid 9
[119] Bailey, Odudu (n 14) 1752, Wahl (n 14) 7
[120] Wahl (n 14) 7
[121] Mengozzi *Elf Aquitaine* (n 108), para 6, Wahl (n 14) 7, n12
[122] *Eni*(n 13) para 68
[123] Kokott, *Akzo* (n 7) para 91

personnel and not to implement changes in the subsidiary`s scope of business, as exercising decisive influence.[124] As such, the Court manifestly did not distinguish between action and non-action by the parent. On one hand, this means that the mere potential to exercise decisive influence is sufficient to impose liability on the parent company. On the other hand, it is clear that the parent, by *not* changing the management personnel or the subsidiary`s scope of business, nevertheless influences the subsidiary`s conduct.[125] This indicates that influence follows from the very fact that the subsidiary is under the potential control of the parent, in which it is immaterial whether this control is exercised.[126] Consequently, Wils argues that giving the subsidiary freedom to act as they were independent or directly getting involved in the subsidiary`s operations are "just two different ways for a parent company of using its power to determine the conduct of its subsidiary", in which "whether the one or the other is used" should not be determinative.[127] Moreover, not changing the management personnel of a subsidiary may indicate that the parent wishes the subsidiary`s actions to continue.[128] This means that unless non-action by a parent designed to grant a subsidiary independence of conduct can be distinguished from non-action by a parent that equates tacit approval of a subsidiary`s conduct, the presumption is de facto irrebuttable.[129]

There are indications that the ways in which the parent may not exercise the control, as inherent in the magnitude of their ownership, are immaterial with regards to the imputation of liability to the parent. If the current position of the law does not acknowledge in its definition of "decisive influence" the fact that decisive influence over a subsidiary is simply an option for the parent company, the result is that the parent`s choice not to exercise decisive influence will not free it from liability. As such, this trend is a step towards automatic liability for parent companies of wholly owned subsidiaries.

4.2 Uncertainty regarding evidence required to satisfy the test

[124] *Groupe Gascogne SA* (n 101) para 86 – Leupold (n 14) 574
[125] Wahl (n 14) 7
[126] ibid, 8
[127] Wils, Wouter P.J, "The undertaking as subject of EC Competition law and the imputation of infringements to natural or legal persons", [2000] European Law Review, 25(2), 99-116, 103
[128] Bailey, Odudu (n 14) 1751
[129] Ibid 1752

According to AG Kokott parent companies have all the facts and information necessary to rebut the presumption.[130] However, given that the presumption has very rarely been successfully rebutted on material grounds, the main question is *how* the presumption can be rebutted in practice. Which factors related to a subsidiary`s autonomy, management, instructions and organisational structure must the parent prove in order to rebut the presumption?

The original approach established in ICI assisted parent companies in their attempts to rebut the presumption by defining the aspects of the subsidiary`s business activities the parent had to have influenced in order to be deemed to have exercised control.[131] By contrast, the current approach states that the burden rests on the parent company to provide evidence relating to the links between its subsidiary and itself which are apt to demonstrate that they do not constitute a single economic entity".[132] In the Akzo case the ECJ stated that this approach reflects a "relatively open position". [133] Indeed, the Court seems to be of the opinion that the ability to refer to all factors relating to these links serves to widen the possibility for the parent company to rebut the presumption.[134] However, a number of factors suggest that this line of thought is not convincing when it comes to practical application.

The EU Court`s referral to the wide range of links between a parent and its subsidiary necessarily means that that the parent must disprove decisive influence based on all factors relating to these links; it is not sufficient to prove the absence of one or even several of these factors. However, requiring a parent to disprove influence in all links is unnecessary and, more importantly, almost impossible. In practice, only certain factors relating to the links between a parent and subsidiary are relevant when determining decisive influence; if the parent`s influence is limited to human resources or legal questions it is difficult to see how this would deprive the subsidiary the ability independently to determine its market behaviour.[135] In such a case, even though the parent clearly did not influence the matter at hand – the infringement – it would, by the very definition of an undertaking, find it impossible to provide evidence that it did not in any way control the subsidiary.

[130] Kokott, *Akzo* (n 7) para 75
[131] *ICI* (n 25) paras 137-138
[132] *Akzo* (n 3) para 65, meaning the evidential burden, not the burden of proof, see Bailey, David, "Presumptions in EU competition law", European Competition Law Review[2010], 31(9), 362-369, 363
[133] Ibid
[134] Leupold (n 14) 576
[135] La Rocca (n 14) 74, cf. Kokott *Akzo* (n 7) para 92

At the same time as the EU Courts have transferred the evidential burden onto the parent company and also raised the standard required to disprove decisive influence, their decisions have also created a lack of clarity. Although the case law makes consistent reference to broad, and vaguely formulated links between parent and subsidiary, the EU Courts do not elaborate on the actual content of these links, their relative material relevance to a subsidiary`s conduct, or what evidence of a subsidiary`s independence would be accepted by the Commission and the EU Courts. This lack of clarity is exacerbated by the fact that the Commission in a vast number of cases does not adequately explain why various arguments put forward by parent companies are rejected as insufficient to rebut the presumption.[136] Moreover, it is evident from the case law that the absence of the factors the Commission itself relies on in the cases where it needs to establish the existence of decisive influence based on factual evidence, is not accepted as disproving the exercise of decisive influence. If a parent is found to have instructed illegal behaviour by a subsidiary, this is a "clear indication(s)" of the parent exercising decisive influence.[137] Yet at the same time, a lack of instructions does not necessarily lead to a finding of autonomy on behalf of the subsidiary, because a "single commercial policy within the group" can be inferred from the totality of links. [138] Far from establishing how and when a parent can prove that it did not exercise decisive influence over an infringing subsidiary, as permitted in the original approach, the EU Courts have left unclear what kind of evidence, if any, the parent can put forward to rebut the presumption. Instead, parent`s must rely on their own discretion in order to flesh out the scant formulations presented by the EU Courts. This makes the possibility of rebutting the presumption merely theoretical, and practically unachievable.

4.3 Conclusion

The analysis above indicates that it is neither a given that the actual exercise of decisive influence can be inferred from the presence of the links, nor is it possible to disprove the actual exercise of decisive influence based on these links. The key point that emerges is just how hard it is for a parent to demonstrate that its subsidiary could decide upon its market conduct independently. Consequently, the function of the presumption is no longer to serve as a vehicle

[136] See for example Case C-521/09 P, *Elf Aquitaine SA v Commission* [2011] EU:C:2011:620 paras 156-171; Case T-185/06 *Air liquide* v *Commission* [2011] EU:T:2011:275 paras 66-83; Case C-90/09 P, *General Química SA and Others v Commission* [2011] EU:C:2011:21, paras 75-80. In these cases the Court annulled the contested decisions for breach of the obligation to state reasons regarding why the evidence adduced by the parent companies was not sufficient to rebut the presumption.

[137] *Dow* (n 50)

[138] Ibid

for determining accountability in a reasonable manner, but rather to provide a basis for imputing liability to parents of wholly owned subsidiaries.[139] This also results in a lack of legal clarity and certainty because there is a discrepancy between the wording of the test and its application, promoting commentators such as Briggs and Jordan to argue that "law has become not what the Commissions words say but rather what the Commission does".[140] Additionally, since the mere presence of these links is not sufficient to conclude that the parent participated indirectly in an infringement, this approach is contrary to the principle of personal responsibility.[141]

In the next chapter the arguments that sustained this conclusion will be tested by reference to one of the very few situations that has been explicitly set out as grounds for rebutting the presumption, namely the pure financial investor argument.[142]

5 In what circumstances, if any, should a financial investor be held liable for the infringements of their wholly owned subsidiaries?

It is evident from the case law that the EU Courts is not willing to doubt the refutability of the presumption.[143] Nonetheless, the only clear indication regarding how the presumption can be rebutted is provided by AG Kokott in her opinion in the Akzo case.[144] Citing the Commission, she refers to three situations which have the potential to demonstrate that the parent company "exercised restraint and did not influence the market conduct of its subsidiaries".[145] These situations are: where the parent company holds 100 % of the shares temporarily and for a short period, where the parent company is prevented for legal reasons from fully exercising 100 % control over the subsidiary and where the parent company is an investment company and behaves like a pure financial investor.[146]

This chapter aims to explore whether the pure financial investor argument, in light of the current state of the law, broadens the refutability of the presumption, or whether it confirms the findings in the previous chapter that the presumption is rebuttable only in theory. The first part of this

[139] Briggs, Jordan (n 53) 19
[140] Ibid 4
[141] Thomas (n 4) 15
[142] Kokott *Akzo* (n 7) n 67
[143]Case C-520/09 P, *Arkema SA v. Commission*, [2011] EU:C:2011:619, para 48
[144] Kokott *Akzo* (n 7) para 75, n 67
[145] Ibid, para 75
[146] Ibid n 67

chapter will set out what the law requires in order for a parent to be deemed as having pure financial interests in the subsidiary, rather than seeking actively to control the conduct of the subsidiary. Then, in order to determine whether and how a parent can fulfil these criteria, the chapter will review Court precedents and their implications for the viability of the pure financial investor argument as a basis for rebutting the presumption.

It is reasonable to question whether this argument is merely a theoretical possibility. For a start, the threshold for being considered to be an "active" investor is unrealistically low. Furthermore, cases where a parent has abstained from exercising power of control over a subsidiary seem to have had little impact on the parents attempts to rebut the presumption. And lastly, the excessively high threshold for evidence that the parent must meet to prove it refrained from exercising influence over a subsidiary is yet another burdensome and effectively insurmountable hurdle for the parent to overcome.

5.1 Glossary

The term "financial investor" will be used as a generic reference for non-industrial companies such as holding companies, and companies with investment-related interests in their wholly owned subsidiaries, such as private equity companies and funds.

5.2 Pure financial interests

The presumption is based on the idea that by owning all or almost all of the shares in a subsidiary, the parent will make use of its control to ensure that the subsidiary is as lucrative as possible. Consequently, the subsidiary cannot be considered an autonomous economic actor. However, to fulfil the conditions necessary to be regarded as a pure financial investor, the parent`s interests in the subsidiary must be limited to its financial operations.[147] The idea is that "owing to the purely financial nature of its interest" the parent is deemed not to be "in a position to exercise any decisive influence over the subsidiary".[148] Only passive investors may benefit from this argument because a "pure financial investor" is understood to be an "investor who

[147] *Goldman Sachs* (n12) para 151
[148] *Raw tobacco Spain* (Case COMP/C.38.238/B.2) Commissions decision [2004] OJ L 102/14, para 383

holds shares in a company in order to make a profit, but who refrains from any involvement in its management and in its control".[149]

In the context of holding companies, which can generally be defined "as a company which has shareholdings in one or more companies with a view to controlling them", the key issue is whether such companies merely manage their shareholdings in the capital of other companies, or whether they act as "corporate centres" for the group.[150] This means that, in order to benefit from the pure financial investor argument, the parent company must function as an investment vehicle which serves only to invest capital in companies without influencing their commercial operations or seeking to obtain a single direction of the group.[151] In this assessment the "functional role", not merely the corporate object, is determinative.[152]

5.3 Can a financial investor prove a distinction between intent to profit from a subsidiary and attempt to control or interfere with its management?[153]

5.3.1 Case law

Case law overwhelmingly demonstrates the difficulty that parent companies face in persuading the EU Courts to accept the pure financial investor argument. The most recent manifestation of the EU Courts position regarding this argument is the 2018 Goldman Sachs decision. The Commission held Goldman Sachs jointly and severally liable for a cartel infringement by Prysmian Group, a former investment made by a private investment fund, GC Partners, that had been managed by Goldman Sachs.[154] Goldman Sachs unsuccessfully invoked the pure financial investor argument.[155] The General Court held that that the flaw in the appeal was that Goldman Sachs had not provided evidence that it did not give any instructions in relation to, or have any direct control over, matters of a commercial nature relating to the Prysmian Group.[156]

In Arkema the ECJ held that the lack of an operational role on behalf of the parent was insufficient to prove a strictly limited financial interest because it did not eliminate the

[149] Case T-392/09, *Garantovaná* v *Commission* [2012] EU:T:2012:674, *para 52*
[150] Case T-69/04 *Schunk and Schunk Kohlenstoff-Technik v. Commission* [2008] EU:T:2008:415, para 60, 63
[151] *Choline Chloride* (Case COMP / E-2 / 37.533) Commission decision [2004] OJ L 190/22, para 172
[152] *Schunk (*n 150) para 62
[153] Garantovaná (n 149)
[154] Power Cables, (Case AT.39610) Commissions Decision [2014] OJ C 319/10, paras 755 and 757
[155] Goldman Sachs (n 12) para 156
[156] Ibid

possibility of exercising decisive influence by coordinating financial investments.[157] According to ECJ, even a holding company with allegedly limited financial interests is in a position to ensure its subsidiaries act in a unified manner in terms of structural changes or, budget-related affairs.

In Legris Industries, the General Court found that a parent`s implementation of an organizational model based on maximum delegation of powers to the subsidiaries, even if documented, is insufficient to rebut the presumption because it does not prove the autonomy of the subsidiaries.[158] Likewise, following Gosselin, the fact that the holding entity did not adopt any formal management decisions during the period of the infringement, had never exercised its voting rights, and had only a limited minority representation on the board, was insufficient to rebut the presumption due to the informal and personal links between the parties.[159]

In Elf Aquitaine, although the subsidiary had independently decided its own business plans, the parent failed to rebut the presumption on the grounds that it could not prove it was unable to modify or reject these business plans, or supervise their implementation.[160] The General Court went further, holding that proof of inaction, such as not issuing instruction, did not amount to proof that the parent had not intervened in its subsidiary`s business because these assertions were not supported by any documentary evidence.[161]

The EU Courts have, however, on one occasion accepted the pure financial investor argument. In the Spanish Raw Tobacco case of 2010, Trans-Continental Leaf Tobacco (hereinafter "TCLT"), a holding company that served as an intermediary between World Wide Tobacco España(hereinafter "WWTE") – a subsidiary that had infringed Article 101 TFEU - and the ultimate parent company, Alliance One, managed to escape liability based on the pure financial investor argument. [162] The General Court concluded that the evidence submitted by the Commission in their "dual basis" approach, whereby the Commission supplemented the

[157] Arkema (n 143)
[158] Case T-376/06 *Legris Industries SA v Commission*[2011] EU:T:2011:107, para 37. As ECJ did not address the parents complain in this regard it is still good law see Case C-289/11 P *Legris Industries SA v Commission*, [2012] EU:C:2012:270; Leupold (n 14) n 67, 577; Botteman, Yves; Patsa Agapi, "The construct of parental company liability", https://www.steptoe.com/images/content/5/9/v1/5919/0714-046_The_construct_of_parental_company_liability_practice_note.pdf, l accessed 26 August 2018
[159] *Gosselin Group* [2013] (n 99) paras 65-66, 62, 63, 67-68
[160] Case T-174/05 *Elf Aquitaine SA v Commission[2009]* EU:T:2009:368, para 162; Leupold (n 14)572
[161] Ibid, para 60
[162] *Alliance One* (n 99) paras 195-197

presumption with additional evidence in order to demonstrate the actual exercise of decisive influence of parent companies on the business policy of their subsidiaries, was insufficient to establish that TCLT had actually exercised control over WWTE. [163] The reason was that TCLT had not carried out any commercial activities on its own and that activities for “accounting and fiscal reasons” did not amount to decisive influence, making its interest in WWTE purely financial.[164]

5.3.2 Analysis

The General Court`s judgement in the Spanish Raw Tobacco case affirms that a distinction exists between pure financial investors and more active investors. As such, the judgement leaves the pure financial investor argument viable, but conditional. The General Court`s reasoning in Goldman Sachs shows that simply claiming to be acting as a pure financial investor is not sufficient to rebut the presumption.[165] Instead, financial investors must provide compelling evidence that their shareholding is a purely financial investment in order to convince the Commission and the EU Courts that they did not exercise decisive influence. This presents a key question; *what kind of evidence* would be sufficient to meet the EU Courts’ threshold of evidence in this regard?

Firstly, there appears to be inconsistency between the EU Court`s positions in the Spanish Raw Tobacco judgement and the Arkema decision. In the former, the Court ruled that TCLT`s lack of commercial activity meant that decisive influence could not be demonstrated. By contrast, an attempt in Arkema to use similar evidence to disprove exercise of decisive influence was rejected. Nonetheless, it is important to bear in mind that that the absence of a single commercial policy can be established only on the basis of an assessment of the totality of the links.[166] Consequently, the rejection of the various arguments might be based on a desire by the Commission and the EU Courts for a comprehensive set of evidence referencing these links, since they do not consider detached manifestations of the parent´s business operations as sufficient to rebut the presumption.[167]

[163] Ibid, para 147
[164] Ibid paras 195-197
[165] *Goldman Sachs* (n 12) para 156
[166] Kokott *Akzo* (n 7) para 91
[167] Mickonytė, Aistė, “Joint Liability of Parent Companies in EU Competition Law”, [2012] Vol 1 LSEU, 33-69, 47

AG Mengozzi indicated in his opinion in Arkema that the parent will always be able to rebut the presumption by proving that the coordinating function was not actually exercised.[168] But given that links will always be present in the parent-wholly owned subsidiary context, this is by no means an easy task. The rationale given for the rejection of the non-operational argument indicates that it is not enough for a parent to prove that it did not *actually* influence the subsidiary`s "commercial operations or [seek] to obtain a single direction of the group" in order successfully to argue the pure financial investor argument.[169] Instead, the findings in Arkema imply that *the mere possibility* of exercising decisive influence is sufficient for the Commission to impose fines on financial investors.

Similarly, both the Legris Industries and the Gosselin judgements indicate that non-action by the parent does not rule out decisive influence. As Wils states, a parent delegating management rights to the subsidiary is "just another way of exercising its power of control".[170] The fact that the parent retains the ultimate power to direct its subsidiaries operations means that "the degree of autonomy can only exist by its grace".[171]The absence of actual control – given, for instance, the parent`s role as a pure holding company – has zero impact on attempts to rebut the presumption.[172]

Even if non-intervention by the financial investor does not disprove exercise of decisive influence, the Elf Aquitaine judgement reveals an unrealistic standard regarding the evidence required to prove this. Leupold calls into question the practicality of such a high standard, pointing out that "the subsidiary will not add a statement to every business plan that "this business plan was prepared in full independence".[173] Indeed, the Elf Aquitaine decision suggests that even if the subsidiary provided documents proving that they acted independently, it might not be sufficient to demonstrate independence given the parent`s ability to intervene afterwards.[174] This indicates that it is merely the underlying existence of power and not the actual exercise of power that provides a sufficient basis upon which the Commission can impose

[168] Case C-520/09 P *Arkema SA v Commission* [2011] EU:C:2011:619, Opinion of AG Mengozzi, paras 18 and 19
[169] Choline Chloride (n 151) para 172
[170] Wils (n 127) 103
[171] Ibid
[172] Wahl (n 14) 9
[173] Leupold (n 14) 572
[174] Ibid

liability. It is also unlikely that a parent that keeps out of its subsidiary`s business, would have at its disposal documents to prove this.[175] Indeed, it is very difficult to see how the parent might be able to provide documentary evidence of their non-involvement in the subsidiary`s business decisions. Boards of directors "will not adopt a decision now and again to solemnly proclaim that the subsidiaries are independent economic actors".[176]And even if a parent formed a contract stating that it would refrain from exercising influence over the subsidiary, the control inherent in the ownership would enable the parent to break this agreement, making the possibility of decisive influence impossible to remove. As such, the excessively high threshold for evidence makes it difficult to see what kind of evidence, if any, the Commission and the EU Courts would be willing to accept as proof that a financial investor did not exercise actual decisive influence by virtue of their passive financial investment. And on the most fundamental level, the fact that any evidence revealing contact or an information flow between the parent and subsidiary will be regarded as proof of decisive influence, regardless of whether or not it sheds light on the exercise of decisive influence, casts yet more doubt on the practical applicability of the pure financial investor argument.[177]

5.4 The viability of the pure financial investor argument

The pure financial investor argument has succeeded only once. The rationale for this seems to be that it is reasonable, even for a financial investor, to be engaged in managerial activity in order to ensure an investment. This understanding is reflected in AG Sharpston`s opinion in Kendrion, where he states that since the goal of an "investment is to yield a return, it seems to me that, in order to ensure greater profitability from that investment, any parent company would have a strong incentive to exercise a decisive influence over its subsidiary's commercial policy".[178] As such, there is no reason that the responsibility should be any lesser for a financial investor if, under the guise of financial reporting or other forms of alleged pure financial activities, they exercise control over the strategic decisions of a subsidiary.[179] In such circumstances a financial investor could have demanded an account of the subsidiary`s conduct, and thereby ordered the subsidiary to change its behaviour. Likewise, from a deterrence

[175] Ibid
[176] Ibid
[177] Ibid
[178] Case C-50/12 P *Kendrion NV v Commission* [2013] EU:C:2013:771, Opinion of AG Sharpston, paras 53 and 54, see also Case T-395/09 *Gigaset AG v Commission* [2014] EU:T:2014:23, para 38
[179] Lang (n 21) 1516

perspective, not holding financial investors liable can lead to a situation in which they do not keep a watchful eye on their subsidiaries.

However, it seems that the lack of successful rebuttals is a result of the fact that requiring "complete autonomy" at the financial level in order to rebut the presumption, is at odds with the reality of financial investment.[180] As Hughes argues, the EU Court`s rationale would "require the parent to behave towards the subsidiary with such remoteness that it would undermine the benefits of possessing a controlling stake.".[181] Sole or majority shareholders are not usually entirely passive, but does this preclude the possibility of being a pure financial investor?[182] Such companies typically exercise some degree of financial supervision over their subsidiaries, which in turn leads to the presence of economic links. Since "complete autonomy" seems to suggest that the Commission would only consider "a demonstration of zero or almost zero influence" as sufficient to rebut the presumption, it is difficult to see how any wholly owned subsidiary could be deemed *completely* financially independent from its parent company.[183]

It is important to bear in mind that the Commission`s decision in Goldman Sachs indicates that the parent can exercise a purely supervisory function regarding the strategic decisions of the subsidiary through "periodical financial reports or other formal or informal reporting mechanisms".[184] Additionally, the General Court in Spanish Raw Tobacco accepted that the parent may carry out activities strictly of accounting and fiscal character and still benefit from the pure financial investor argument.[185] But it should also be accepted that a financial investor that merely approves its subsidiary`s larger investments as a safeguard against the subsidiary getting into financial difficulties, or requires regular reporting, still can be regarded as a passive investor as long as these financial safeguards do not amount to economic influence over the subsidiary`s market conduct.[186] This would create a clearer distinction between a parent that influences a subsidiary`s market conduct, and one that is simply protecting or nurturing its investment. As Lang states "financial safeguards are not the same as economic influence on the

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[180] *Eni* (n 13)
[181] Hughes (n 9)79
[182] Merlino, Pietro "*Edison*: A Glimpse of Hope for Parent Companies Seeking to Rebut the Parental Liability Presumption?" [2014], *Journal of European Competition Law & Practice*, 5(7), 463–466, 465
[183] Spinks, Steve; Meier, Anouck, "Cartel Liability in the EU- What Can Parent Companies Say in Their Defence?"[2010] available at mlex.com, 61-63, 63
[184] Power cables (n 154) para 773
[185] *Alliance One* (n 99)196
[186] Lang (n 21) 1515, cf Kokott *Akzo* (n 7) para 92,

subsidiary's behavior on the market."[187] Unless financial reporting deprives the subsidiary of autonomy it should not lead to responsibility on behalf of the parent.[188] This, in turn, would make the pure financial investor argument more feasible for parent trying to rebut the presumption of decisive influence.

5.5 Conclusion

The review of the case law indicates that the Commission and the EU Courts are taking a more aggressive approach towards financial investors. The recent Goldman Sachs judgement continues a trend of interpreting the notion of a purely financial investor more narrowly than in the past.[189] Furthermore, the current state of the law regarding this argument supports the findings in chapter 4: firstly, that the absence of the actual exercise of the power of control has little impact on a parent`s attempt to rebut the presumption; and, secondly, that there is a lack of clarity regarding how financial investors should structure and manage their investments in order to avoid being found to have exercised decisive influence. The only possible way in which the pure financial investor argument could succeed, would seem to be situations where the parent, for whatever reason, lacked the legal power to exercise decisive influence or that the shareholding was temporary and short term.[190] These, however, represent "unusual or extreme situations of little practical relevance".[191]

6 What needs to change in order to make the presumption rebuttable?

The bar for rebutting the presumption of decisive influence is presently set so high that it is nearly impossible for parent companies to escape liability for the infringements of their wholly owned subsidiaries. This is unfair because it creates a legal rule which is not in accordance with any consistent and well-defined policies and principles.[192] More importantly, the lack of clarity in the approach taken by the Commission and the EU Courts means that parent companies are kept in the dark about what the presumption means in practice. With this in mind, two alternative approaches are proposed below that would allow the Commission and the EU Courts to adopt a more realistic approach towards the presumption. These are followed by

[187] Ibid
[188] Ibid
[189] Other judgements that reflects this trend; *garantovaná* (n 149) para. 52; *Gigaset* (n 178) para 26; Case T-54/06 *Kendrion v. Commission* [2011] EU:T:2011:667
[190] Kokott Akzo (n 7) n 67
[191] Merlino, (n 182), 465
[192] Briggs, Jordan (n 53) 36; Lang (n 21) 1517

modifications that would be needed in order to provide greater legal clarity regarding the parental liability doctrine and the contours of the single economic entity doctrine.

6.1 A legal rule

If the Commission`s intention is to create a legal rule regarding parental liability, it would likely give greater legal certainty to undertakings if theory were brought into line with practice and the presumption is called what it really is; a legal rule in which parents of wholly owned subsidiaries are almost certain to be liable for anticompetitive conduct by their subsidiaries. This would make the parental liability doctrine more transparent, thereby creating legal certainty and clarity regarding the rules. If parent companies know that they will in practice always be liable for their subsidiaries' cartel participations, this would provide strong deterrence and encourage parents to introduce measures to prevent infringements, such as adopting new compliance programs and reporting procedures.

However, a legal rule necessarily leads to a degree of rigidity and inflexibility with regards to the particular facts of individual cases. This is problematic because whether or not the parent actually exerted decisive influence will inevitably depend on the specific features of the relationship between the parent and its subsidiary, which eventually will be a factual determination. As such, a legal rule is manifestly unfair, because even the most well organised corporate organisations may contain some employers that misbehave, so that a legal rule would lead to a situation where parent companies which directly, personally and intentionally used a subsidiary as a vehicle to breach competition rules is liable in exactly the same way as a parent that was neither involved in nor aware of any infringement, and which even attempted to prevent the subsidiaries violations.[193] As Thomas argues, "such ideas turn the principle of personal responsibility upside down".[194]

Furthermore, in order to achieve deterrence, it is necessary to distinguish between what is a violation and what is not. It is therefore counterproductive that simply owning all the shares or voting rights in another company means that the parent is always and necessarily liable for the latter`s misconduct. After all, by imposing fines the Commission seeks not only to deter

[193] Thomas (n 4) 17
[194] Ibid

violators, but also to reinforce respect for the law in others.[195] To achieve this it is necessary that everyone involved in the market see that the law is applied in a fair way.

6.2 The dual basis approach

The case law should oblige - rather than permit - the Commission to adopt the dual basis approach used in the Spanish Raw Tobacco decision.[196] By corroborating the presumption with additional evidence, the presumption and factual evidence work hand in hand, so that the presumption only can uphold a liability finding that is supported by accurate and convincing facts. This is a pragmatic approach that may lead to more accurate judgements by reducing the uncertainties and potential shortcoming that can arise when the presumption is applied on a standalone basis.

Furthermore, in contrast to the current state of the law, this approach does not "relieve the Commission of its normal burden of proof in connecting the addressee of a decision to the corporate policies giving rise to the infringement found".[197] Instead, the parent company will be provided with factual evidence to challenge in order to show that they did not, in fact, influence the subsidiary`s commercial policy. This approach therefore removes the disproportionality aspect of the current legal test in which parent companies must somehow disprove a presumption that has not been proven by the Commission, rather than disprove factual evidence.[198] In reality, however, this approach is very unlikely to be accepted by the EU Courts as ECJ in the Akzo case rejects this very argument.[199]

6.3 Clarify the law

The most important modification needed is to provide greater legal clarity regarding the parental liability doctrine and the contours of the single economic entity doctrine. It is important to keep in mind that total certainty and complete guidance regarding these matters is impossible. Certainty is unattainable because the key criteria of an undertaking, as evident from chapter 2, are developed on a case-by-case basis over time. Completeness is unattainable due to the

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[195] Wils, Wouter P.J, "Optimal Antitrust Fines: Theory and Practice" (2006) World Competition 29(2) 1-32, 15; Kokott *Akzo* (n 7) para 41
[196] *Alliance one* (n 99) para 147
[197] Briggs, Jordan (n 53) 36
[198] See chapter 2; section 2-2
[199] Akzo (n 3) paras 62-64

indefinite variety of possible corporate structures. Given these limitations, it is fair for companies to receive reasonable insight into how the EU Courts is likely to treat salient cases of parent liability.

6.3.1 Clarity *how* the parent has committed the infringement

If, from the parent`s perspective, it appears that sanctions can be imposed at any moment irrespective of its conduct, it becomes difficult for companies to understand what conduct or omission is being punished and deterred.[200] This thwarts a fundamental purpose of the Commission`s fines. In light of the personal responsibility principle, in which the parent *itself* is deemed to have committed the infringement, it is desirable that the Commission and the EU Courts clarify *how* the parent has committed the infringement.[201]

6.3.2 Clarify the rationale underpinning the imputation of liability to parent companies

The single economic entity doctrine as determinative for the attribution of liability is based on the fallacy that liability stems *ipso jure* from the notion of an undertaking.[202] Consequently, the EU Courts should develop a coherent theory of parental liability and use discretion in attributing liability in accordance with a consistent and well-established policy.[203] Alternatively, if the EU Courts wish to retain the single economic entity justification for parental liability it should at the very least acknowledge the transformation in their interpretation of the single economic entity doctrine, and engage in intellectual and honest debate regarding the advantages of the single economic entity justification. Either way, the EU Courts should no longer evade the questions and criticisms surrounding the use of the single economic entity doctrine as justification for parental liability.[204]

6.3.3 Bring the Commission and the EU Courts' actions into line with their wording

The formula regarding parental liability have been repeated on a multitude of occasions in the jurisprudence. Nevertheless, the preceding chapters illuminate the need for clarification regarding what must be proved in order to rebut the presumption and what kind of evidence

[200] Thomas (n 4) 15
[201] *Schunk* (n 150) para 74 and case law cited
[202] Kalintiri, (n 8) 156
[203] Briggs, Jordan (n 53) 37
[204] Kalintiri, (n 8) 156

would be sufficient in this regard. A parent company should be able to escape liability by proving that there is no meaningful connection between the parent company itself and the decision-making of the relevant subsidiary, for instance, by showing that the connection between the parent as a financial investor and the subsidiary did not extend beyond mere financial reporting. Importantly, this would represent a return to the original approach.[205] This approach provides deterrence and is consistent with the principle of personal responsibility because it enables parent companies to rebut the presumption by proving that they themselves did not in any way participate in the infringement.

7 Conclusion: the rebuttable nature of the Akzo presumption – a fiction

As it currently stands, the law regarding the parental liability doctrine is not satisfactory. Neither of the two main arguments the EU Courts put forward to defend their rejections of parent companies' repeated attempts to challenge the notion of parental liability and the irrebuttable nature of the presumption, is convincing. Instead, it is clear from the jurisprudence that the approach taken by the EU Courts is not based on a coherent rationale for parental liability, and that their approach makes it impossible for parent companies to escape this liability. These problems have generated extensive debate in academic literature.

This dissertation has sought to identify the most compelling opinions written of this issue. Kalintiri emphasizes that the Akzo judgement marked a clear departure from earlier rules governing parental liability.[206] The post-Akzo justification for parental liability is refuted not only by Kalintiri, but also by Bailey and Odudu, who demonstrate that liability for infringement by a member of an undertaking is not ascribed to all the entities making up that undertaking.[207] It therefore follows that the reason for parental liability cannot be that the parent and the subsidiary form a single economic entity. Rather, Bailey and Odudu show that responsibility for an infringement is determined by participation in that infringement, either direct or presumed.[208]

[205] *ICI* (n 25) paras 137-138
[206] Kalintiri (n 8) 154
[207] Bailey, Odudu (n 14) 1747; Kalintiri (n 8) 156
[208] Bailey, Odudu (n 14) 1757

In a similar vein, Leupold points out that, with regards to the substantive two-part test itself, the Commission and the EU Courts have more loosely interpreted the notion of decisive influence in order more liberally to ascribe responsibility to parent companies on the basis of "exercised" control.[209] This comes despite the fact that the notion of decisive influence is a relatively clear term, defined as the ability to exercise decisive influence over a company`s strategic decisions. The result is a situation in which the mere existence of links between a parent and subsidiary has replaced the "decisive influence" requirement as a basis for establishing liability. Given that links are inherent in the relationship between a parent and its wholly owned subsidiary, and that their mere existence of these links can neither prove or disprove the actual exercise of decisive influence, this is a step towards automatic liability on behalf of the parent.

As Bailey, Odudu and Wahl argue, unless the parent`s choice not to exercise its legal rights of control can free it from liability, the presumption is factually irrebuttable.[210] Consequently, other commentators, such as Jordan, Briggs, and Thomas, conclude that it is not a legal *test* at all, but instead a legal rule through which the Commission and the EU Court pursue an overarching policy designed to consistently punishing parent companies for infringements by their wholly owned subsidiaries.[211] This non-transparent process runs contrary to the principle of legal certainty, and, since the mere presence of these links is not sufficient to conclude that the parent has *participated* in the infringement, it also runs contrary to the principle of personal responsibility, thereby undermining deterrence.

By regarding the theoretical use of shareholder rights as determinative for the attribution of parental liability, the current state of the law is based on a policy aimed at shareholders, not infringers. Accordingly, I support the prevailing academic opinion. Contrary to existing jurisprudence, the notion that the parent and the subsidiary are part of a single undertaking by virtue of the links that exist between them should not be sufficient to impute liability on the parent for its subsidiary`s unlawful behaviour. Rather, the parent should be able to escape liability upon proving that its subsidiary independently determined its own market conduct. As such, a parent that simply appoints members to the board of directors of the subsidiary, which in turn determines the strategic policy of the company independently, should not be held jointly and severally liable for the subsidiary`s unlawful behaviour. Although this autonomy only

[209] Leupold (n 14) 574
[210] Bailey, Odudu (n 14) 1752; Wahl (n 14) 7
[211] Thomas (n 4) 21; Briggs, Jordan (n 53) 36

exists by grace, the parent should be free from liability when it has not actually exercised control over its subsidiary. This approach would lead to a fairer distribution of the fines between a parent company and its wholly owned subsidiary, create legal certainty, be consistent with the principle of personal responsibility and promote deterrence.

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