Jointly and severally liable

The Court of Justice of the European Union clarifies the foundations of parental liability in the *Portielje* case

by ***Fryderyk Hoffmann****

In its recent decision in the case of *European Commission v Stichting Administratiekantoor Portielje and Gosselin Group* (*Portielje*, C-440/11), the Court of Justice of the European Union (the Court of Justice) addressed several important questions relating to the issue of parental liability for infringements of competition law committed by subsidiaries. The ruling revolves around the principles of single economic entity and decisive influence.

Single economic entity

Under the classic definition going back to the cases of *Höfner and Elser v Macrotron GmbH* (C-41/90) and *Pavlov* (C-180/98), an undertaking is an entity, regardless of its legal status and the way in which it is financed, engaged in the pursuance of economic activities consisting of offering goods and/or services.

The concept of an undertaking has been shaped by the principle of single economic entity, whereby an undertaking is an economic unit and as such can consist of one or more legal or natural persons. It is not the legal status but the scope of the entity's decisional autonomy that is the factor deciding whether it constitutes an undertaking itself or belongs to an undertaking together with other entities. A subsidiary strictly controlled by its parent company is void of autonomy and therefore belongs to the same undertaking as the parent company. An undertaking often consists of entities at two levels of corporate structure (ie the parent and subsidiary), but it can equally encompass several levels (ie including further subsidiaries down the line). Of course, whether a parent's control is strong enough to allocate the subsidiary to the parent's undertaking should be considered on a case-by-case basis. The doctrine of decisive influence proves helpful here.

Decisive influence

As the Court of Justice stipulated in *Akzo Nobel* (C-98/08), when deciding on the scope of a subsidiary's decisional autonomy, account must be had of all economic, organisational and legal links with its holding company. These may vary from case to case; there is no exhaustive list of factors indicating decisive influence.

A subsidiary upon whose conduct in the market its parent company has decisive influence belongs to an undertaking of its parent. There is a single fine imposed on such an undertaking, it is addressed to both the direct perpetrator and its parent, whereas, depending on the circumstances, the parent can be jointly or severally liable for the whole amount of the fine or its part. Holding a majority stake in the share capital of a subsidiary on its own does not suffice to establish decisive influence. The European Commission (the EC) must prove that it was the parent company that was pulling the strings at the subsidiary to hold the parent company jointly and severally liable.

As established in *Akzo Nobel*, only where the parent company holds the entire or nearly the entire (eg more than 97% as in the case of *Elf Aquitaine*, T-299/08 upheld by the Court of Justice in C-404/11) share capital of its subsidiary is it presumed to exercise decisive influence over the subsidiary and no additional elements need to be proved. The presumption shifts the burden of proof to the parent company.

In order to rebut the presumption and exonerate itself of joint and several liability for wrongdoings of its subsidiary, the parent must prove that it had no decisive influence upon the subsidiary. This may prove difficult, if at all possible, in practice. To date, there have been only two cases – *Alliance One* (T-24/05 upheld by the Court of Justice in C-14/11) and *Air Liquide* (T-185/06) – in which a parent company successfully appealed against a decision of the EC presuming its decisive influence and imputing liability.

Facts of the case

The *Portielje* case arose from a cartel in the market for removal services in Belgium. Following an investigation, the EC imposed hefty fines on entities participating in the cartel (decision C(2008) 926 final of 11 March 2008). Among the fined was Gosselin Group NV (Gosselin). Jointly and severally liable for part of the fine imposed on Gosselin in relation to a period of several months was Stichting Administratiekantoor Portielje (Portielje). It was a foundation which held, only in trust on behalf of family shareholders, 92% of the share capital of Gosselin and 99.87% of shares of a company holding the remaining 8% stake in Gosselin. The aim of the foundation was to "bring together the family shareholders in order to ensure unity of management". Portielje was not directly involved in any commercial activity.

In addition to holding shares in Gosselin, three members of the board of directors of Portielje were directors of Gosselin. However, no meeting of the board of Portielje took place over the relevant period for which the foundation was held liable. Portielje did not exercise its voting shares over the relevant period either, as no shareholders' general meeting of Gosselin was held over that time. Portielje also did not alter the composition of the board of Gosselin after it acquired Gosselin's shares in trust. Applying the principles of single economic entity and decisive influence, the EC held Portielje jointly and severally liable for Gosselin's participation in the cartel.

* *Fryderyk Hoffmann is an associate at Bingham McCutchen (London) LLP*

Decision of the General Court

Following appeals brought by Portielje and Gosselin, the General Court (GC) quashed the EC's decision in relation to the liability of Portielje (decision of 16 June 2011, T-208/08 and T-209/08). Contrary to the established line of case law, the Court found that Portielje could not be imputed any liability for the participation of Gosselin in the cartel, as it was not an undertaking and could not be subject to competition law. In particular, the then article 81 EC treaty and article 23 of Regulation 1/2003 relate to undertakings and their associations only, so cannot be applied to other entities. The Court concluded that "the concept of economic unity cannot compensate for the fact that the parent company is not an undertaking" (para 41).

For the sake of completeness of its reasoning, the Court also considered whether the foundation exercised a decisive influence over Gosselin. The Court established that Portielje was not involved in the management of Gosselin over the relevant period. In particular, Portielje's only activity was exercising the voting rights of the shares that it held in trust in Gosselin at the general meeting of its shareholders, but no such meeting took place over the relevant time. There was also no meeting of the directors of Portielje at the relevant time and no use was made of the alternative written procedure. The GC concluded that Portielje had managed to rebut the presumption relating to the exercise of decisive influence and resulting liability.

Decision of the Court of Justice

The EC appealed to the Court of Justice. The Court agreed with the EC that the GC committed an error in law by concentrating on the irrelevant issue of whether Portielje is an undertaking. What the GC should have considered was whether the EC had correctly allocated Portielje to the undertaking liable for the participation in the cartel. The Court underlined that it is irrelevant what legal form the entity holding shares in a subsidiary takes, and in particular whether it is an undertaking, for the entity to be imputed liability for an infringement committed by its subsidiary. The same goes for the consideration whether the holding entity is economically active or not – it does not matter. The only relevant question when deciding on the liability of a parent company is whether it "constitutes with the entity whose direct involvement in the infringement has been established a single undertaking for the purpose of [the then] art 81 EC [treaty]" (para 44). This is established by reference to the doctrine of decisive influence.

The Court of Justice also rejected the GC's stance on the issue of the form that decisive influence can take. The Court found the requirement that formal management decisions complying with requirements of national company law must be adopted in order for influence to be exercised – as implied by the GC – to be overly formalistic and not in the spirit of the economic concept of an undertaking. There is also no case law of the European Courts that would support the GC's decision.

The Court underlined that an analysis of the links between the relevant entities should not be carried out from a company law perspective. Instead, it is the "economic reality" that matters, so that the influence of one entity over another can take any form whatsoever. There is no need for formal decisions by statutory organs for an economic unit to be formed. Quite the opposite can be the case, in that an economic unit can have an informal basis such as personal links between directors of the relevant entities. The Court pointed to the strong personal links between Portielje and Gosselin, and in particular the fact that three directors of Portielje comprised the entire board of directors of Gosselin and at the same time accounted for the majority of the votes at the board of Portielje. This, in the opinion of the Court, was sufficient to establish a link which allowed Portielje to exercise decisive influence on Gosselin. Following its review, the Court annulled the decision of the GC with respect of Portielje.

Conclusions

The Court of Justice decision in *Portielje* is in line with previous decisions of the European Courts on whether a non-operational holding company can exercise decisive influence over the conduct of its subsidiaries. Both in *Arkema* (T-168/05 upheld by the Court of Justice in C-520/09) and *Shell* (T-38/07) the GC held non-operational companies liable for wrongdoings of their subsidiaries, underlining their co-ordinative role within a corporate group. Only in *Alliance One* did the GC decide to annul such a fine imposed on a purely holding company, on the grounds that it "in fact" exercised no decisive influence over its subsidiary. The holding company in that case was, however, an intermediary between the subsidiary implicated in a cartel and the ultimate parent companies of the corporate group (which were held jointly and severally liable).

It appears that in *Portielje*, had the Court of Justice concurred with the stance of the GC, the principle of single economic entity, which the Court of Justice has developed over many years in a number of decisions, would have been undermined at its very heart. Had the Court of Justice decided that Portielje was not jointly and severally liable due to it not being involved in any economic activity and not being an undertaking, it would create a precedent that could be relied upon by a wide range of holding entities. These would include not only foundations holding shares in trust on behalf of third parties, but also a wide range of holding companies. Advocate General Kokott noted in her opinion that if it was the case that only undertakings can be held liable for infringements of competition law, "it would not be possible for Akzo Nobel, a pure holding company, to be an addressee of the decision imposing fines" (para 34).

A similar conclusion relates to the form which decisive influence can take. It appears that confining this influence to formal measures governed by national company law would result in a certain level of certainty being created in commercial practice in that directors would know what actions not to take in order to save their holding entities from joint and several liability. On the other hand, as Advocate General Kokott pointed out in paragraph 71 of her opinion, such a limitation would inevitably allow parent companies to sidestep relatively easily responsibility for infringements of competition law committed by their subsidiaries. It would also contravene the main function of the principle of single economic entity, which is to spread liability over a corporate group in order to impose higher fines, improve enforceability and, as a result, provide additional deterrence against infringing the competition rules.