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**PARENT COMPANY LIABILITY AT THE CROSSROADS OF COMPANY AND COMPETITION LAW**

*The parent company's liability for its subsidiary's obligations has been discussed in legal theory and courts' practice since the end of the 19th century, without a final solution reached. Courts exceptionally admit a parent company's liability in cases of indebtedness of its subsidiary. However, Anglosaxon and European courts apply different criteria in deciding whether to accept creditors' claims against parent companies. The issue is even more striking regarding delict liability, considering that traditionally it requires proving the alleged delict perpetrator's fault. The legal basis for parent companies' liability for competition law delicts should not differ from generally accepted legal principles concerning delict responsibility. However, the EU bodies have established a legal presumption that a parent is responsible for its subsidiary's competition infringement when the parent's total control over the subsidiary exists. The author examines legal theories and criteria supporting the parent's company liability in comparative company law and EU competition law to assess the coherence of the EU attitude with generally established legal principles.*

Keywords: parent company's liability, lifting the veil, company law, competition law

The issue of parent company liability for its subsidiary's obligations has been raising academics and practitioners' interest for a long time. It is a well-established rule in Anglosaxon law that company members are not liable for company debts beyond their capital investments, provided that the company is a legal person.[[2]](#footnote-2) This rule is generally accepted in the law of continental European countries regarding public and private companies. Still, the possibility of declaring founders responsible for the company's obligations under specific circumstances has been discussed ever since the English House of Lords solved the famous *Salomon* case.[[3]](#footnote-3) Even though the House of Lords ended the dispute by refusing to find the single owner of the company's shares liable for its debts, the lower courts' judgments left the door ajar for constituting the piercing the veil doctrine.[[4]](#footnote-4)

The omnipresence of company groups in the modern global economy has warmed up the debate over the possible exceptions to the rule of limited liability of parent companies for obligations of its subsidiaries and reasonings supporting these exceptions.[[5]](#footnote-5) The issue is relevant in contract, tort, criminal, and other branches of law.

In competition law, the relation between companies belonging to a group is vital for solving cases involving restrictive agreements and concentrations. For example, a restrictive agreement between a parent company and its subsidiary is not prohibited. A concentration is not deemed to arise when a parent company increases its majority shareholding or merge with a subsidiary. Regarding the abuse of dominant position, the existence of a parent-subsidiary relationship is relevant for assessing the defendant company's market position. This article focuses on whether a parent company can be declared liable for its subsidiary's abusive behavior.

In the first part of this article, we explain the arguments pro and contra limitation of the parent's liability. In the second part, we elaborate on different legal theories providing the rationale and present decisive factors for invoking rules on the parent company's liability. In the third part, we focus on the parent company's liability for the subsidiary's delicts. Finally, we analyze the EU competition law on the parent company liability for the subsidiary's violations of the abuse of dominant position prohibition.

1. PRO AND CONTRA LIMITED LIABILITY IN THE CONTEXT OF COMPANY GROUPS

The principal benefit of company members' limited liability for company debts is apparent: members insulate themselves from the company's debts; consequently, the need for supervising company directors decreases. Limited liability promotes the free transfer of shares since the shares' price does not depend on other shareholders' financial ability.[[6]](#footnote-6) It encourages investments and risk-taking, as well as the development of huge enterprises.[[7]](#footnote-7)

When speaking about the disadvantages, limited liability harms involuntary creditors the most. While voluntary creditors, i.e., contract creditors, can shield themselves from the risk of the company's inability to pay its debts by asking for collateral, tort creditors do not have this opportunity. Limited liability transforms the tort liability into an externality borne by third persons.[[8]](#footnote-8) Despite the inferior status of tort creditors, Anglosaxon courts are less often willing to pierce the veil in tort cases.[[9]](#footnote-9)

The above reasoning becomes meaningless in the case of company groups. Members of subsidiary companies cannot be equated with small investors merely interested in the dividend bearable by their shares. Often, a parent company is the sole or the majority owner of subsidiaries' shares. It supervises the subsidiary's operation and manages it directly or indirectly.[[10]](#footnote-10) Companies within the same group are regularly economically integrated. They conduct various economic operations constituting a single unitary enterprise. Within a company group, it is possible to diversify activities across economic sectors and (or) different jurisdictions and allocate risks between member companies to protect the rest of the group from losses incurred by one of them. In this way, the group transfers the risks of economic activity upon creditors of the indebted company. Tort creditors are particularly vulnerable to this risk for reasons already stated above. [[11]](#footnote-11)

1. LEGAL THEORIES ON THE ISSUE OF PARENT COMPANY LIABILITY

Anglosaxon law has developed the piercing (lifting) the veil theory to resolve the conflict between the companies' distinct legal personality and the need to satisfy indebted company creditors' claims. The doctrine was created by common law courts, which we consider as the principal cause of its most significant deficiency - the lack of coherent criteria for its application. Besides, the piercing of the veil issue arises in different contexts, making it impossible to apply unified standards.[[12]](#footnote-12)

For example, English courts decline to apply the piercing the veil doctrine merely because a parent exercises a high degree of control over a subsidiary.[[13]](#footnote-13) They generally refuse the argument that a subsidiary was acting as a parent's agent. The only exception would be cases where the parent authorized the subsidiary to operate in this way.[[14]](#footnote-14)

The US counterpart to the parent's agent doctrine is the *alter ego* theory. The US courts find it appropriate to declare a parent company responsible for its subsidiary's debts if the parent downgraded the subsidiary to its *alter ego*'s status.[[15]](#footnote-15) The US courts have occasionally found a subsidiary acted as a parent's agent and invoked the parent's liability relying on the parent's high equity stake in the subsidiary's capital.[[16]](#footnote-16) However, in most cases, the unity of interests between the parent and the subsidiary was insufficient for courts to lift the veil. A plaintiff needs to prove fraud or some inequitable result to succeed with his claim.[[17]](#footnote-17)

A parent company will be liable for the subsidiary's obligations if the subsidiary represents a 'mere façade' concealing the real facts or a 'sham' of the parent. However, there is no general rule in English law upon which factors the court should rely to conclude that a subsidiary acted as a 'mere façade' of a parent. In *Adams v. Cape Industries*,[[18]](#footnote-18) the court refused to lift the corporate veil, even though the subsidiary was 100% owned by the parent. Besides, the parent used the US subsidiary's name on invoices when selling its products to buyers in the US. The court noted that the right to use the corporate structure in this way is inherent to corporate law. In another case, the court admitted that using a subsidiary as a parent's façade was not the most honest business method. Nevertheless, it found that establishing the parent's liability on these grounds would represent a revolutionary doctrine.[[19]](#footnote-19) US courts take a more liberal approach. They are willing to accept the veil lifting argument where a parent uses a subsidiary company to evade existing obligations or circumvent the law.[[20]](#footnote-20)

The single enterprise theory provides yet another argument for piercing the corporate veil. The theory has its roots in economic explanations of a corporate group. Economists describe a corporate group as a fictional aggregate, a nexus of contracts, or a real enterprise with a separate identity from its constituent companies.[[21]](#footnote-21) Here again, English courts keep a conservative approach, distinguishing a layman's perception of a corporate group as a single entity from the legal concept of a juridical person.[[22]](#footnote-22) English courts will regard a corporate group as a single entity only if the wording of a statute or a contract provides a sound basis for such a conclusion.[[23]](#footnote-23) In contrast to English law, the US case law provides examples of accepting the single enterprise doctrine:

"If the plaintiff can show that there was such a unity of interests and ownership that the independence of the corporation had in effect ceased or had never begun, an adherence to the fiction of separate identity would serve only to defeat justice and equity by permitting the economic entity to escape liability arising out of an operation of one corporation for the benefit of the whole enterprise."[[24]](#footnote-24)

Arguments relying on public policy interests (i.e., interests of justice) have found little support in English case law. They are used merely to supplement other, more solemn arguments.[[25]](#footnote-25) In contrast to that, the US courts will disregard a company's legal personality to "defeat public convenience, justify wrong, protect fraud, or defend crime."[[26]](#footnote-26) Courts have relied upon a plethora of factors to invoke the public policy argument: confusion of assets or affairs, dominating the company's affairs, inadequate capitalization, etc.[[27]](#footnote-27) Commentators have observed incoherence of the US courts' practice in applying the public policy argument and the piercing the veil principle in general.[[28]](#footnote-28) For example, sometimes, a subsidiary's undercapitalization represents a decisive factor in invoking the piercing the veil rule. In other cases, even a gross undercapitalization was not sufficient to persuade the court to allow for lifting the veil.[[29]](#footnote-29)

The piercing of the veil theory has taken root also in the law of continental Europe. In Germany, in addition to *Konzernrecht* dealing specifically with public corporations groups, the Federal Supreme Court (hereinafter: FSC) has over years developed a standpoint on the issue of the liability of a parent company for subsidiary's obligations in the context of private companies (*Gesellschaft mit beschränkter Haftung - GmbH*). In the *ITT* decision,[[30]](#footnote-30) the FSC took the view that a parent company having a controlling influence over a subsidiary has a fiduciary duty towards it. The duty is proportional to the level of involvement of the parent in subsidiary's affairs. Consequently, a violation of the fiduciary duty will make the parent liable for damages caused to the subsidiary. In the subsequent *Autokran* decision, the FSC declared that a bankrupt subsidiary's creditors are entitled to require a parent company to pay for the subsidiary's debts if the parent was "permanently and extensively" involved in the subsidiary's management.[[31]](#footnote-31) The *Autokran* decision helped to formulate the qualified *de facto* concern theory (*qualifizierter faktischer Konzern*). Under this theory, a legal presumption exists that a parent company did not show consideration and respect for the subsidiary's independent business interests. The parent company needs to provide exculpatory evidence in the court to rebut the presumption. In this way, the burden of proof shifts to the parent company.[[32]](#footnote-32)

However, in several decisions adopted after 2000, the FSC retreated from the qualified *de facto* *Konzern* theory. Under rulings in *Bremer Vulkan*,[[33]](#footnote-33) *Bremer Vulkan II,*[[34]](#footnote-34) and *KVB*,[[35]](#footnote-35) the FSC took a stance that a parent company will be liable to the subsidiary's creditors only if the parent interference in the subsidiary's affairs effectively destroys the autonomous existence of the subsidiary – in other words, the subsidiary becomes insolvent or nearly insolvent. This stance's theoretical background was found in the parent abuse of the subsidiary's company form – a justification already existing in the Anglosaxon piercing the veil doctrine.[[36]](#footnote-36)

Swiss jurisprudence has relied on the concept of good faith to allow the piercing of the company veil. Article 2 of the Swiss Civil Code (*Schweizerische Zivilgesetzbuch*, hereinafter: SCC) obliges every person to act in good faith in the exercise of their rights and the performance of their obligations. Law does not protect a manifest abuse of rights. According to the Swiss legal theory, the following factual situations justify invoking Art. 2 SCC: the commingling of parent's and subsidiary's assets, the subsidiary's undercapitalization, and the disrespect of the subsidiary autonomy (e.g., a failure to hold board meetings, or to adopt a yearly financial report).[[37]](#footnote-37) In a case decided in 2011,[[38]](#footnote-38) the Swiss Federal Court stated that the impression of identity between the parent and the subsidiary created by using similar company names, seat, business premises, organs, personnel, and telephone numbers had caused the "mix of spheres" (*confusion des sphėres*). In such a case, a creditor can require both the subsidiary and the parent to perform the obligation. The presence of two elements are necessary to invoke the abuse of rights rule: 1) the economic identity of a legal person and a dominating person, and 2) abusive reference to the legal person's independence.

The other legal concept used by the Swiss doctrine and jurisprudence is the *de facto* integration of the parent and subisidiary's management (*materielle Organschaft, faktisches Organ*).[[39]](#footnote-39) A *de facto* integration exists when a subsidiary is managed by its formal organs and *de facto* managers. Courts must assess the existence of *de facto* management on a case by case basis. Swiss courts consider that a simple influence of parent's organs upon the subsidiary's management is not sufficient to invoke the parent's liability. There must be a situation of double organs (*Doppelorgane*), where the same persons are sitting in the parent's and subsidiary's managerial bodies. In such a case, a plaintiff can invoke Art. 722 of the Law on Obligations, laying down a company's liability for wrongful doings of its organs to render a parent company liable for the subsidiary's obligations.[[40]](#footnote-40)

In French law, a creditor can invoke parent's liability in several situations: 1) fraudulent behavior of a parent company causing creditors belief that the parent and its subsidiary represent a single person;[[41]](#footnote-41) 2) commingling of assets; and 3) where a parent, notwithstanding its formal positions, acts as a subsidiary's director in a fraudulent or abusive way.[[42]](#footnote-42)

1. LIABILITY OF A PARENT COMPANY FOR SUBSIDIARY'S DELICTS

Traditionally, the liability of a natural or a legal person for civil, misdemeanor, or criminal wrongdoings has been based upon guilt. A person who intentionally (*dolus*) or negligently (*culpa*) performs acts prohibited by law or omits to take actions to which he/she is obliged will be held liable for damage caused to another person.[[43]](#footnote-43) Besides a person's intent or negligence, it is necessary to prove a causal link between the person's actions or omissions and harmful consequences.[[44]](#footnote-44) Only in exceptional circumstances, law invokes a person's delict liability without requiring the existence of a fault. For these reasons, cases in which it would be possible to declare a parent company responsible for a subsidiary's delicts are limited.

In Anglosaxon law, a parent company's liability for delicts of its subsidiaries is generally not recognized. Vicarious liability of a person for another person's delicts exists if there is an agency or a principal-servant relationship between them.[[45]](#footnote-45) In most cases, prerequisites for establishing the principal-servant or agency relationship between the parent and the subsidiary do not exist; consequently, the courts refuse to declare the parent liable.[[46]](#footnote-46) However, if a parent takes part in a delict together with its subsidiary, it will be held liable. In such a case, there exists a direct parent's liability and not the vicarious.

English case law provides examples of the direct liability of the company's shareholder in cases of fraud committed towards creditors. In *Stone & Rolls Ltd. v. Moore Stephens*,[[47]](#footnote-47) the court found the only company's shareholder and managing director Stojević deceitfully siphoned the company's assets and falsified accounts to show more profitable transactions than actually existing. Creditors of the company successfully sued both the company and its director and shareholder. However, both the company and director Stojević did not have enough assets to satisfy all creditors' claims. Creditors then sued the company's accountants, Moore Stephens, on account of negligent auditing of Stone & Rolls, by means of a derivative action. The court denied the right of Stone & Rolls to ask for compensation for damages caused by its fraudulent activities.[[48]](#footnote-48)

In cases where the defendant cannot prove the parent's involvement in the subsidiary's wrongful behavior, English courts will deny the defendant the right to ask the parent company to compensate for the damage. This view has been confirmed in recent cases. In *Okpabi and others v Royall Dutch Shell plc*,[[49]](#footnote-49) the court refused to grant compensation for environmental damages caused by the RDS subsidiary's operations in Niger. The court found RDS itself did not carry any operations in Niger and did not know about or had supervisory functions regarding its subsidiary's activities there.

A company's fraudulent behavior towards its creditors or third persons has been traditionally recognized as a valid argument to lift its veil in the US.[[50]](#footnote-50) US courts will declare the parent liable for damages caused to third persons if the following conditions are met: 1) a parent company has complete domination of policy and business practices in respect of a subsidiary's specific actions, so that that the subsidiary had no mind, will or existence; and 2) the parent used such control to commit fraud or wrong.[[51]](#footnote-51) In the case concerning US company Chevron Texaco and its Nigerian subsidiary, Chevron Nigeria Ltd.,[[52]](#footnote-52) the US court found the parent company liable for damages caused by its subsidiary's collaboration with the Nigerian military forces in suppressing the protests of Nigerian people against the company operation, causing deaths, injuries, and violations of human rights. The court established that the parent company actively communicated with the subsidiary at the time of the wrongful act's execution, had many of its officers employed in the subsidiary, and was actively involved in its security policy. On the contrary, in *Bestfoods*,[[53]](#footnote-53) the court did not accept the plea against the parent. The parent selected members of the subsidiary's board, appointed its officials as executives of the subsidiary, and one of these officials was active in the formulation of the policy causing environmental damages. All this evidence of the parent's involvement in the subsidiary's commercial operation was insufficient to find the parent liable. The court held that the piercing of veil requirements were not met since the two companies maintained separate personalities. The parent did not abuse the company form to commit fraud or subvert justice.

As already noted, German legal doctrine and jurisprudence take an ambiguous position towards the parent company's liability. So-called *Verhaltensschaftung* (conduct based-liability) theory requires, besides permanent and pervasive control over the subsidiary, particular conduct of the parent; e.g., negligence in managing the subsidiary's affairs invoke the parent's liability. Proponents of the *Zustandschaftung* (status-based) liability consider the existence of the qualified group relationship sufficient to establish the parent's liability. The FSC stance in *Bremer Vulkan* and *KVB* differs from both theories. Different from the *Verhaltensschaftung* theory, the court did not require permanent and pervasive control by the parent. It held sufficient to prove one singular exercise of control. In comparison to the *Zustandschaftung*, the court went much further, asking for the proof of parental behavior, causing the subsidiary's *Existenzvernichtigung* (existence nullity).[[54]](#footnote-54)

In Swiss law, the parent company's delict liability is possible in the *doppelte Organschaft* (double organs, interlocking directorates) situation, when the parent acted illegally or, at least, it violated usages (*handelte sittenwidrig*) in the broadest sense.[[55]](#footnote-55) The parent company's liability is based upon Art. 722 of the Code of Obligations: "A company is liable for damages caused by illegal acts executed by a person authorized to manage or represent the company in the performance of its duties. "

In all analyzed jurisdictions, a parent's total control over its subsidiary will not be sufficient to establish the parent's liability for its subsidiary's delicts. A plaintiff must present the court proof of the parent's fraudulent or abusive behavior in exercising control over the subsidiary.

Apart from civil liability for delicts (i.e., liability for damages caused by a wrongful act), a separate issue of liability of a parent company for criminal or misdemeanor wrongdoings of a subsidiary exists. It is especially significant in competition law.

1. LIABILITY OF A PARENT COMPANY IN EU COMPETITION LAW

A parent company's liability in EU competition law is closely connected with the concept of' undertaking. Articles 101 and 102 of the Treaty on the Functioning of the European Union (hereinafter: TFEU) designate undertakings as competition law subjects. The notion of undertaking in EU law is much broader than that of a company, implying "every entity engaged in economic activity, regardless of its legal status and the way in which it is financed ".[[56]](#footnote-56) The EU Commission and the Court of Justice consider the term undertaking to refer to a group of companies. This view has its source in the single economic unit theory.

In 1972, the European Court of Justice (hereinafter: ECJ) applied the single economic unit doctrine to extend its jurisdiction over parent companies situated outside the European Economic Community. In *Imperial Chemical Industries*,[[57]](#footnote-57) the ECJ found the existence of a single economic unit when "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 by the parent company." Consequently, the ECJ found that the Commission had jurisdiction over the foreign parent company.

This opinion was reiterated in the *Viho* judgment.[[58]](#footnote-58) If wholly controlled subsidiaries carry out instructions of a parent, they do not enjoy real autonomy in determining their course of action in the market. In such a case, the parent and its subsidiaries represent a single economic unit. Although *Viho* dealt with the Art. 101 case, the Court stated that a company group conduct could fall under the ambit of Art. 102 TFEU if other conditions for its application were fulfilled.[[59]](#footnote-59) Both cases opened the door for the application of a single economic unit theory in EU law.

Under the EU courts approach in *ICI* and *Viho*, two elements were necessary to apply Art. 102 upon a company group: 1) full control of the parent over the subsidiary, based on different legal, economic, and organizational factors, such as the percentage of the parent's shareholding in the subsidiary, the composition of the subsidiary's managing board, etc.; and 2) subsidiary did not act autonomously on the market but carried out instructions issued by the parent company. This approach was similar to the view expressed by US and European courts. A full parent's control over a subsidiary was not sufficient to hold the parent liable. It was necessary to prove a direct parent's involvement in a wrongful act, consisted of issuing instructions to the subsidiary. The EU courts relied on the traditional theory of delict liability – the parent was directly liable for a delict since it acted wrongfully on the market alongside the subsidiary. The parent was not responsible for the subsidiary's behavior. It was liable for its wrongdoings.

Later on, the ECJ started refining its position, making a slow but evident transgression from a direct parental responsibility to an entire company group's liability. In *Stora*,[[60]](#footnote-60) the ECJ rejected the defendant's argument concerning the necessity of proving the parent's influence over the subsidiary's acting on the market. The court deemed it needless for the Commission to show whether the parent actually exercised power over the subsidiary since the defendant was in a position to exert a decisive influence on its subsidiary's commercial policy. The wholly-owned subsidiary had to follow a policy laid down by the bodies which determine the parent company policy under its statutes.[[61]](#footnote-61)

In *Akzo*,[[62]](#footnote-62) the ECJ went further, creating a rebuttable presumption that a parent holding 100% shares of a subsidiary exercises decisive influence over the subsidiary. The same presumption exists concerning parent companies having little less than 100% of the subsidiary's shares.[[63]](#footnote-63) It was for the parent company to show sufficient evidence that the subsidiary acted autonomously. In practice, companies were facing a difficult, if not impossible, task to rebut the presumption of decisive influence.[[64]](#footnote-64) The ECJ held in one case that proving the nonexistence of any parent company's formal decision concerning instructions to the subsidiary was not sufficient to refute the presumption.[[65]](#footnote-65) The economic unit might exist on an informal basis, consisting of personal links between companies belonging to a group.[[66]](#footnote-66)

The ECJ stance was criticized for disregarding the presumption of innocence, which is one of the fundamental rights protected by the European Convention on Human Rights.[[67]](#footnote-67) Defenders of the ECJ view point out that the wording of TFEU articles 101 and 102 provide a legal basis for it. The term undertaking is not equated with a legal person. It is a different concept focusing on economic unity and disregarding legal personality. A group of companies that makes a single economic unity represents an undertaking in terms of Art. 101 and 102 personal spheres of application.[[68]](#footnote-68) The ECJ was following the same rationale in *Akzo*: "It is not because of a relationship of a 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."[[69]](#footnote-69) In par. 59 of the same decision, the ECJ again says: "In such a situation, a parent company and its subsidiary form an economic unit and therefore form a single undertaking…" Consequently, it is incorrect to talk about parent's company liability for subsidiary's wrongdoings. Instead, a company group, taken as a whole, is liable under Art. 102. In the view of the ECJ, there exists no strict (vicarious) liability of the parent for acts of its subsidiaries since the parent exerts decisive influence upon them.[[70]](#footnote-70) By exercising a decisive influence, a parent company "pulls strings in the company group".[[71]](#footnote-71)

However, the single economic unit theory, as construed in EU jurisprudence, suffers from serious shortcomings. It does not explain why the parent is liable for subsidiary's wrongdoings and not all sister companies within the same group.[[72]](#footnote-72) Since all companies within a group make a single undertaking, they all should be jointly and severally liable for a competition violation.[[73]](#footnote-73) Nevertheless, the ECJ holds only the parent responsible and not the sister companies.[[74]](#footnote-74) The explanation is that only the parent and not sister companies exert decisive influence upon the subsidiary involved in anticompetitive behavior. Advocate General clarifies this in *Akzo*: "…the parent company is one of the principals of the undertaking which negligently or intentionally committed the competition offense."[[75]](#footnote-75) Still, if the parent company pulls the strings of all subsidiaries, then the parent and all subsidiaries must make a single economic unit, i.e., undertaking. Excluding the liability of other sister-subsidiaries contradicts the single economic unit theory.

Secondly, it is not clear which percent of a shareholding is sufficient for the presumption to become effective. The ECJ deemed in *Elf Aquitaine*[[76]](#footnote-76) 97,55% shareholding enough to uphold the presumption. In another case, 60% of shareholding was considered insufficient.[[77]](#footnote-77) In *Holding Slovenske Elektrane (HSE) v. Commission*,[[78]](#footnote-78) the General Court considered, besides HSE 74% shareholding in TDR subsidiary, other factors, such as the composition of TDR supervisory board, which was dominated by HSE representatives and the power of the supervisory board to appoint the TDR managing director. The General Court found that the supervisory board had all information concerning the TDR commercial operation. Although the supervisory board did not have the power to issue binding instructions to TDR management, the General Court still found that HSE exerted a decisive influence upon TDR. Thus, they both formed a single economic unit. Apparently, in this case, the Court relied upon other factors besides the majority shareholding and found evidence on the execution of decisive influence. Still, between 74% and 97.55% shareholding lies a wide array of legal uncertainty. The existing EU case law does not provide clear guidance concerning the minimum percentage of shareholding, which makes the presumption on the existence of a single economic unit effective.

1. CONCLUSION

The approach to the issue of parental liability for subsidiaries is different in company and competition law. Several legal theories have been developed in Anglosaxon and European company law. Besides a high level of parent's control over a subsidiary, almost always an additional element is requireed, consisting of proof of the parent's abuse of the subsidiary's legal personality, the parent's active involvement in the subsidiary's operations, or at least the parent's decisive influence upon the subsidiary management. Even the single economic unit theory, applied in few instances before the US and German courts, requires evidence of the manifest parent's influence over the subsidiary business activity. Criteria for declaring a parent liable for delicts of the subsidiary are even harsher. Besides evidence on the full parent's control over a subsidiary, there must be proof of the parent's active involvement in the wrongful behavior or, at least, of the parent's abuse of the subsidiary's legal personality. Consequently, the parent's liability for delicts qualifies as a direct liability in national laws.

EU competition law has evolved from the traditional approach employed in company law to the specific interpretation of the single economic unit theory, based on the concept of the undertaking. The undertaking, within the meaning of Art. 101 and 102 TFEU, represents a single entity, with our without legal personality. In the interpretation of the EC and ECJ, a group of companies can be regarded as an undertaking. A parent company must control a subsidiary and exert a decisive influence upon its operation on the market. The control is determined by criteria such as the percentage of parent's shareholding, contractual, and organizational elements. Unlike German law, it is sufficient to show a decisive influence over the subsidiary's operation in general in EU law. The ECJ does not require the Commission to demonstrate decisive influence regarding the subsidiary's specific illegal act. In the presence of total control over the subsidiary, a rebuttable presumption of the parent's decisive influence arises. EU bodies deny the vicarious liability of the parent. They regard the parent and the subsidiary as a single undertaking; consequently, the parent and the subsidiary are jointly liable for competition infringements.

The said understanding of the concept of undertaking in EU law has been developed in the ECJ case law since the meaning of undertaking is not explained in primary EU law sources. While the ECJ has the power to interpret the Treaties under Art. 267 TFEU, it is doubtful whether a group of companies' classification as an undertaking represents a mere interpretation of TFEU provisions or creating a new legal rule. We incline to the latter characterization of the ECJ's understanding of the term undertaking in the context of the parent company liability for violations of Art. 102 TFEU.

Even though public interest concerns might justify the ECJ's extensive interpretation of the term undertaking, it conflicts with the rule of law. It is easier for the Commission to prove and sanction dominant companies' abusive behavior, which harms market competition and, ultimately, consumers. Still, the reliance upon the ECJ case law presumption on the existence of a parent company's decisive influence in the presence of 100% shareholding represents an exception to the general rule on personal liability for delicts. The case law of international organizations should not formulate legal exceptions. This method harms legal certainty and violates the long-established legal principle *Nulla poena sine lege*.

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