AUTORIDADE DA CONCORRÊNCIA

International Competition Network Annual Conference

BREAKOUT SESSION ON LIABILITY OF PARENT COMPANIES

New Delhi, March 2018

Opening statement

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The Portuguese experience on parental liability: introduction

It is a well-known fact that antitrust rules refer to the activities of undertakings or enterprises. These are the subjects of competition law. The notion of undertaking enjoys an autonomous meaning under EU competition law: it is an economic concept rather than a legal one. As a result, one single undertaking, within the meaning of competition rules, may be comprised of several legal entities, namely, in the quite common case of a group of companies. This is the sometimes otherwise called "single economic unit" or "enterprise entity" doctrine.

In effect, we commonly accept that "undertakings" infringe antitrust rules and that they are also liable for those breaches. But "undertakings" do not exist in the legal world. One cannot impose a fine on an undertaking, in the same way as one cannot sue an undertaking: one needs to sue or impose a fine on a person, either a legal or a natural one.

[1] The views expressed here are the author's own and do not necessarily reflect those of the AdC's Board.

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Particularly in the case of a group of companies, one needs to identify which legal entities within an undertaking will be held liable and whose turnover is to be taken into account for the purposes of determining the legal maximum of a fine, i.e. the cap. The whole group's or just the company's whose employees committed an infringement?

Because it was important to fix this mismatch between the subject of competition rules, which are undertakings or economic agents (since they pursue economic activities), and liability, which is imputable to legal persons, the Court of Justice of the European Union ("ECJ") developed the parental liability doctrine, which is well-established at EU level. Pursuant to this consistent case law, both the legal entity that has directly committed an antitrust infringement and any of its parent companies that have exercised decisive influence over that entity's business during the infringement *may* be held joint and severally liable for such an infringement and the payment of the resulting fine. In other words, the conduct of a subsidiary 'may be imputed to the parent company because, although having a separate legal personality, that subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company, having regard in particular to the economic, organisational and legal links between those two legal entities.' Thus, the fact that a parent company and its subsidiary constitute a single undertaking within the meaning of competition rules accounts for the joint liability of the parent company, '*without having to establish the personal involvement of the latter in the infringement*.'[2]

[2] This means that the legal test for a finding of parental liability rests on showing the exercise of actual control or decisive influence over the subsidiary's business throughout the infringement. No direct link or causality to the infringement needs to be shown, including whether the parent knew, could have known or had the duty to prevent the infringement (which would be no different than *normal* liability). The sole focus is on the parent company's relation to the subsidiary during the infringement.

The 'EU law concept of joint and several liability for payment of a fine' is thus taken by the ECJ as 'merely the manifestation of an *ipso jure* effect' of the concept of undertaking.[3]

In addition, the ECJ's case law has established a rebuttable presumption that a parent company holding all or almost all of the share capital in a subsidiary exercises decisive influence over this entity's business. The parent and/or the subsidiary will be in a much better position than a competition agency to provide evidence on the internal organization links within a group, in order to refute that presumption.[4]

In other words, competition law favours the *reality* (economic unit) over *fiction (*legal entity*).*

The creativity and activism of the ECJ in this respect are noteworthy, as shown, for example in the *ICI* (1972)[5] and *Akzo* cases (2009)[6]. Apart from the little word "*undertaking*" contained in Articles 101 and 102 of the Treaty on the Functioning of the European Union ("TFUE"), there is no other shred of legal basis, either in the Treaty or in any piece of secondary legislation, accounting for the "joint and several liability of a parent company" for antitrust breaches committed by a subsidiary. This development was thus quite original.

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[3] See Villeroy & Boch v Commission, ECLI:EU:C:2017:52, n. 150.

[4] It is noteworthy that the ECJ already made clear that the single economic entity doctrine does not infringe the right to be presumed innocent that is guaranteed by Article 48(1) of the Charter of Fundamental Rights of the European Union or the principles of *in dubio pro reo*, because it is merely evidentiary and does not constitute a presumption of guilt: "*It should also be made clear that, contrary to what is maintained by the appellant, the foregoing case-law does not infringe the right to be presumed innocent that is guaranteed by Article 48(1) of the Charter or the principles of in dubio pro reo and nullum crimen, nulla poena sine lege. The presumption that a parent company exercises decisive influence over its subsidiary when it holds all or almost all of the capital in the subsidiary does not lead to a presumption of guilt on the part of either one of those companies and therefore does not infringe either the right to be presumed innocent or the principle of in dubio pro reo*". (see Villeroy & Boch v. Commission, ECLI:EU:C:2017:52, n. 149.)

[5] Imperial Chemical Industries Ltd. v Commission of the European Communities, EU:C:1972:70.

[6] Akzo Nobel NV and Others v Commission of the European Communities, EU:C:2009:536.

The state of play may of course be further improved soon, once the so-called ECN+ Directive[7] becomes a reality and parental liability is also explicitly encapsulated in EU legislation.

Likewise, at domestic level, even though there is no explicit provision assigning joint and several liability to a parent company for antitrust breaches committed by a subsidiary, the notion of undertaking as a single economic unit was codified in Portugal's Competition Act in line with the ECJ's settled case law.[8]

Policy Reasons

There are, in effect, sound policy reasons underlying parental liability, which are important to recall here.

First, the need to ensure appropriate levels of deterrence, particularly for larger conglomerates, because the legal caps of the applicable fines will be calculated on the basis of the combined turnover of the subsidiary and the parent company, rather than that of the subsidiary alone, which is the logical approach when we are referring the same "undertaking."

If the cap of the applicable fine would only be determined on the basis of the turnover of the direct infringer alone, which most of the times is the turnover generated by a subsidiary at national level, the cap would be reached very quickly, particularly in smaller economies such as Portugal. And it is key that these economies are not perceived as "safe havens" for antitrust infringements, at the expense of its citizens' welfare. Furthermore, in case of infringements of long

[7] Proposal for a Directive of the European Parliament and of the Council to Empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, COM(2017) 142 final.

[8] Article 3 of the Competition Act, under the title "Notion of undertaking", reads: «*1 – The term undertaking, for the purposes of this law, shall be deemed to be any entity that has an economic activity comprising the supply of goods or services in a specific market, irrespective of its legal status or means of financing. 2 – A group of undertakings is deemed to be a single undertaking, even if the undertakings themselves are legally separate entities, where such undertakings make up an economic unit or maintain interdependence ties (…)*».

duration, after a few years, infringements would be fined exactly the same amount regardless of their duration.

Second, by expanding the group of companies that can be held liable, society will avoid difficulties and additional costs in collecting fines, besides limiting the risks of insolvency, which would obviously be socially undesirable, since fines may be enforced against parent companies as well, that have deeper pockets than its subsidiaries.

Third, parental liability mitigates the risk that companies engage in opportunistic behaviour by circumventing fines through internal re-structuring or internal shifts of turnover or assets, which would lead to under enforcement or under deterrence.

Fourth, parent companies will usually reap the benefits of wrongdoing by their subsidiaries, thus making it only fair that they should also share the consequences. Indeed, a strict corporate separateness approach would entail a 'moral hazard' problem.

Finally and more importantly, parent companies are more willing to effectively supervise their subsidiaries' activities if they are also called to feel the pain. In effect, parental liability leads to an increased risk of recidivism, as an aggravating circumstance in subsequent decisions, and to more exposure to damage claims. Hence, parental liability encourages effective compliance programs to be applied across an entire organization, which to a certain extent also reduces monitoring costs for enforcers and society.

In other words: parental liability is also justified from an efficiency perspective: without it, the parent will under-invest in precautionary measures below the optimal level of care, as it does not bear all the social costs following from an antitrust violation.[9] The underdeterrence problem that occurs when subsidiaries lack sufficient

[9] Koening, Carsten, "Comparing Parent Company Liability in EU and US Competition Law", World Competition 41, no. 1 (2018): 69-100.

assets to pay for fines or damages is aggravated when executives or employees are also not criminally liable for antitrust infringements.

A cautionary tale on parental liability

In light of these reasons, our policy approach in Portugal in the recent past has consisted in involving parent companies in antitrust cases whenever feasible and appropriate and despite the lack of a clear-cut legal provision detailing the existence of parental liability.

Though joint parental liability is inherent to the notion of *undertaking*, as laid down in Articles 101 and 102 TFUE and our respective domestic counterparts, the matter arguably becomes further complicated by the fact that, at national level, certain principles and rules of criminal law and procedure are said to be applicable within antitrust investigations, such as the principle of personal responsibility, together with the idea of corporate separateness, which are deeply rooted in the Portuguese constitutional and legal traditions.

For example, in a margin squeeze dominance case on access to data in the pharma intelligence sector,[10] the AdC sustained the parent's involvement on the basis of a theory of "*culpa in vigilando*", a sort of vicarious liability, for those of you with a common law background. In light of the principle of personal responsibility, a need was felt to show some sort of wrongdoing by the parent – a wrongful omission in this case – for having the right, the ability and duty to control the activities of its subsidiaries and avoid the infringement at issue by "the direct perpetrators." (i.e. the upstream and downstream firms, within the same group).

The case was upheld on appeal by the specialized review court – the Competition, Regulation and Supervision Court –, which concurred

[10] PRC/2009/13 - *Associação Nacional das Farmácias (ANF); Farminveste – S.G.P.S., S. A. (Farminveste SGPS); Farminveste – Investimentos, Participações e Gestão, S. A. (Farminveste IPG); HMR – Health Market Research, Lda. (HMR)*, decision of 22 December 2015.

with this approach.[11] Notwithstanding, the Lisbon Court of Appeals disagreed.[12] Though it fully upheld the case on its merits, by confirming the finding of an abuse of dominance, it "acquitted" the parent company. This led to a significant reduction of the fine from around 10 million to *circa* one million euros (because, not surprisingly, most of the turnover was consolidated on the parent and the group in question had gone through internal corporate restructurings throughout the relevant time period).

The facts of the case were particularly persuasive for a finding of parental liability: besides holding 100% of one of the infringing subsidiary's share capital, the parent and said subsidiary were also headquartered on the exact same premises, shared board members, *staff* and even carried the same company's designation. Although the Lisbon Court of Appeals was faced with overwhelming evidence that the parent and subsidiary were exactly the same *thing* (or single economic unit), it simply ruled that, in light of the principle of personal responsibility, a person cannot be liable for the acts of another; therefore a parent company has no duty to prevent its subsidiary from breaching antitrust rules. The Lisbon Court of Appeals thus favoured fiction over reality.[13]

What did we learn from here? The way ahead

In any event, this case signals an important first step forward when it comes to antitrust parental liability in Portugal, since it had never

[11] Case 36/16.0YUSTR Associação Nacional das Farmácias e a Farminveste - Investimentos, Participações e Gestão, SA.
[12] Case 36/16.0YUSTR.L1 Associação Nacional das Farmácias e a Farminveste - Investimentos, Participações e Gestão, SA.
[13] In contrast, v. for example judgment of the ECJ of 10 April 2014, *Commission v Siemens Österreich and Others and Siemens Transmission & Distribution and Others v Commission*, C-231/11 P to C-233/11 P, EU:C:2014:256, paragraph 45: "*a legal person who is not the perpetrator of an infringement of competition law may nevertheless be penalised for the unlawful conduct of another legal person, if both those persons form part of the same economic entity and thus constitute an undertaking within the meaning of Article 101 TFEU*".

been tested as such at national level and it was well accepted by the Competition Court.

The unwillingness of some national civil judges to comply with EU case law (including to accept the ECJ's jurisdiction when it comes to the interpretation of EU law), and their tendency to use concepts and principles that they are more familiar with, such as corporate law or criminal law, should not come as a surprise. Clearly, the misguided approach taken by the Lisbon Court of Appeals here, which to a certain extent was the result (let's face it) of the conservative way how we had brought the case before it, did not fully consider the special nature of competition law and its subjects.

Looking forward, it is key to bear in mind, on the one hand, that parental liability is inherent to the notion of undertaking as a single economic entity, as interpreted by the ECJ's settled case law and codified in the Competition Act. This is a concept of *substantive* EU competition law, which is enshrined in Articles 101 and 102 TFUE. As a result, it applies against any national conflicting rules or provisions, which national judges have the duty to set aside if necessary, to ensure the effectiveness and consistent application of EU law throughout the Union, pursuant to the primacy principle. This outcome can be achieved through a reference for preliminary ruling to the ECJ, if needed.

On the other hand, the parental liability doctrine does not ignore the principle of personal responsibility. On the contrary. Given the special nature of competition rules and its subjects, this principle is linked to the "undertaking" as an economic unit, rather than to a single legal entity.

Additionally, the idea of corporate separateness is far from being an absolute principle within the Portuguese legal system. For example, according to the Portuguese Corporate Code, under certain circumstances, a parent company may be liable for the payment of civil debts incurred by its subsidiary, when the parent is dominant

within the corporate sense, for example because it holds more than 90% of the share capital of a subsidiary. This is actually a case of joint, automatic, strict liability, allowing for an automatic piercing of the corporate veil with regard to the payment of a monetary debt.

Moreover, when it comes to private enforcement of antitrust rules, the legislation implementing the Damages Directive in Portugal already provides for parental liability, including by establishing a presumption that a legal entity holding 90% or more of the share capital of a subsidiary exercises decisive influence over this entity's business and, therefore, will be jointly liable to pay the resulting antitrust damages.

Finally, it is a fact that some national courts may be reluctant to accept the ECJ's jurisdiction and thus apply EU law, by complying with the primacy principle under the present circumstances, that is, when the source of the legal rule – a parent company joint liability – is not explicitly enshrined in a Treaty provision or in a piece of EU legislation, but rather stems from a series of court judgments. Particularly in continental Europe, the possibility for courts to lay down legal rules or principles is something that may still be more difficult to grasp. Therefore, also in the interests of clarity and legal certainty, it is preferable that this doctrine is clearly spelled out in legislation. This outcome will most likely occur in a near future in the context of the implementation of the ECN+ Directive, which will possibly include a specific provision on parental liability, thus mandating Member States to explicitly implement it in their national legal systems.

The social benefits of corporate separateness

Just to wrap up this part of the debate, allow me to make a final remark.

There may be aspects of the parental liability doctrine that still need some further clarification and "fine tuning" by the ECJ. In effect, the discussion might not be complete if one does not acknowledge the

social benefits of allowing a certain degree of corporate separateness, which can be seen as the downside of a full-fledged parental liability.

In effect, corporate separateness can be said to encourage free enterprise, risk taking and market entry by individuals. Without it, people might be discouraged from investing in new businesses and innovations, which would naturally be detrimental to the competitive process and consumer welfare.

How should we strike the right balance? How many parent companies could one find joint and severally liable? How many layers of limited liability should be pierced, so to say? Even where we are dealing with controlling shares of almost 100%, should we remove all layers of limited liability protection or should the bus stop somewhere?

The question is whether a fair balanced approach can be reached, whereby it may be possible to combine the sound policy objectives of parental liability, while preserving some of the beneficial aspects of corporate separateness that I have just mentioned.

Without presuming to know the answer, I would suggest that a parent company is still a company that owns another company.

Therefore, the policy objectives of corporate separateness will not be essentially undermined, in my view, so long as one is still ultimately addressing a legal person rather than a natural one. To put it more simply, it appears that the benefits of limited liability may still be preserved if the 'bus stops' at the level of the individual shareholder as a natural person.[14]

Thank you for your attention. I am looking forward for the debate.

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[14] In effect, that natural person can hardly be considered an undertaking from a material standpoint, since, unlike, for example, self-employed professionals such as lawyers, accountants or doctors, an individual in such a scenario will not be directly engaged, as such, in an economic activity, through the provision of goods or services in a given market.