THE SINS OF THE SON: PARENT COMPANY LIABILITY FOR COMPETITION LAW INFRINGEMENTS

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Abstract: *This paper summarises the current state of the law in what concerns the liability of parent companies for their subsidiaries' infringements of EU and Portuguese Competition Law, while contrasting such rules with general principles of Corporate Law and the tendencies for their evolution at the EU and national levels. It is argued that, despite the frequent criticism of European case-law on parent company liability, Competition Law must still take several expansive steps of parent liability in order to achieve internal coherence. Courts – especially at the national level – still seem to find it difficult to let go of the legal concept of undertaking.*

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1. INTRODUCTION

> *"For I, the LORD your God, am a jealous God, punishing the children for the sins of the fathers to the third and fourth generation of those who hate me, but showing love to a thousand generations of those who love me and keep my commandments."* (Exodus 20:5-6)

When a subsidiary is caught red-handed in an anti-competitive practice by the European Commission, parent companies are often still surprised to find that, not only are they held liable for that infringement, but that the applicable fine is calculated by reference to the turnover of the group, rather than merely that of the participating subsidiary, bringing it to much higher values than it could otherwise rise to. In such a mind set, it seems, the whole point of having a son is so as not to bear the consequences of his sins.

The issue – lifting the corporate veil – is not new. It has been the subject of debate within the realm of Corporate Law for some time. And its expression within the realm of Competition Law has also been the object of significant doctrinal analysis.

This paper hopes to contribute to the debate, while trying to bridge the gap between the fields of Corporate and Competition Law. The objective is not to analyse the evolution of the case-law, a task which has been attempted by many before. Instead, we shall focus on the law as it is currently interpreted, and tackle aspects which we perceive as crucial and less seldom highlighted.

Many previous discussions focused on the existence of a rebuttable presumption that allowed attribution of liability to the parent company in cases of fully-owned subsidiaries. While this issue has, at least for the moment, been laid to rest, the horizons of the debate have broadened.

Why is there a presumption only in cases of full ownership or quasi-full ownership? How does this case-law on parent company liability square with the well established single economic entity doctrine and with the notion of control in other areas of Competition Law? Is it correct to limit Competition Law fines through recourse to concepts of Corporate Law? Ultimately, is attribution of liability to parent companies, in these contexts, fair and justified?

An additional issue of concern must be that the same law – EU Competition Law – is being applied in different ways depending on whether it is enforced by the European Commission or by National Competition Authorities. While the present paper will focus – as a case study – on the Portuguese legal order, it starts from the assumption that, in several Member States, the method of calculating competition fines differs from the one followed by the Commission, and the option for attribution of liability to a parent company may be subject to different considerations and restraints.

2. PARENT COMPANY LIABILITY UNDER EU LAW

2.1. Beyond the realm of Competition Law

Limited liability aims at eliminating three types of transaction costs: (i) individual shareholders and creditors' costs arising out of the need to monitor other shareholders' assets; (ii) shareholders and creditors' costs in monitoring directors; and, finally, (iii) investment costs, favouring diversification of the investment[3].

The regimes of company liability – a matter of Civil and Corporate Law – remain mostly within the realm of national sovereignty. Nonetheless, the European Union has used some of its competencies under the TFEU, in particular internal market provisions, to adopt regulations and directives which regulate specific liability issues. This is the case with legislation on air carrier liability, liability for defective products, merger and division of public limited liability companies, etc.

However, none of these regimes regulate parent company liability in the context of corporate groups, even though they sometimes allow Member States to introduce an additional level of protection. This is the case of the Environmental Liability Directive (Art. 2(6)), whose implementation in Portugal has extended liability to the parent in the event of fraud or abuse (Art. 3(2) of the Portuguese Environmental Liability Act).

In European Law, the general principle of limited liability remains practically intact, even in domains where the prevalence of other social values (like those protected by Competition Law) would perhaps justify a different option. The phenomenon is especially clear within the area of environmental liability, where the traditional legal entity principle has given way to the lifting of the corporate veil in several legal orders (e.g., CERCLA). The EU has been unable to impose this innovation to all Member States, instead allowing each State to decide for itself.

3 Easterbrook & Fischel, 1985, 1991: *passim*.

Proposals which arose across the Atlantic, defending partners' *pro rata* liability for torts perpetrated by the company[4], have also failed to obtain any echo in European Law.

These options may not be difficult to understand if we keep in mind the history of corporate groups at the European level. European Law does not deliberately oppose the enterprise principle, nor does it find the reasons for the limitation of liability superior to other social values at stake. It is not a desire to preserve limited liability that explains the silence of European Law in what concerns parent liability, in domains where such liability would be (at least) reasonable. Rather, this silence derives from the obstacles found in the attempts to harmonize the law of corporate groups. Even though corporate groups attracted the Community's attention from the very beginning, it was never possible to legislate in this regard (with the exception of the 7th Directive, on consolidated accounts). The draft 9th Directive, on corporate groups, which would have addressed parent company liability, had to tackle radically different rules across member States. Ultimately, the attempts at harmonization, often seen as an attempt to impose the German *Konzernrecht* on the rest of Europe, failed[5].

In spite of *"the long and diversified history of groups"* in European Law[6], the assessment of the EU's achievements in this domain must clearly be negative, especially if we compare it to the results obtained in other areas of Corporate Law[7]. Against this background, it is not surprising that sectorial Regulations and Directives have avoided establishing parental liability, which would become a source of conflicts.

This being said, it should be noted that the Courts' discussions of parent company liability for the purposes of the enforcement of EU Competition Law by the European Commission have limited themselves, at least on the surface, to the rules and principles deriving from Competition Law alone, with the exception of limitations which may be imposed on it by fundamental rights and related principles, such as the principle of fault or the presumption of innocence.

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4 Hassman & Kraakman, 1991: 1879.

5 Menezes Cordeiro, 2005: 751.

6 Hopt, 2007: 200.

7 Sacristán Represa, 2005: 193-194.

2.2. Competition Law

Determining whether a parent company may be held liable for an infringement of Articles 101 or 102 TFEU carried out by a subsidiary has wide reaching legal consequences, which may be summarized as follows:

- The parent company may be held *jointly and severally liable* for the infringement, not only by competition authorities, but also by customers in private suits for damages (which may also have jurisdictional consequences).
- The *basic amount for the calculation of the fine* will be determined by the European Commission starting from the value of the group's (not the subsidiary's) *"sales of goods or services to which the infringement directly or indirectly relates in the relevant geographic area within the EEA"* (and possibly also worldwide), during the last full business year of participation in the infringement[8].
- The amount of the *fine may be increased due to recidivism*, if any subsidiary of the group has participated in an identical or similar competition infringement before, sanctioned by the Commission or by a national competition authority[9].
- The *fine may be increased to ensure deterrence*, in the case of *"undertakings which have a particularly large turnover beyond the sales of goods or services to which the infringement relates"*[10].
- The *maximum fine* will be 10% of the group's (not the subsidiary's) total worldwide turnover in the preceding year[11].
- Being treated as the same undertaking also means that *inspections* concerning a subsidiary's alleged infringement may be carried out at the headquarters of the parent company (or of other subsidiaries).

The basic legal test under EC Competition Law for the attribution of liability to the parent company appears simple and straightforward: if, in general terms, the parent company *could and did exercise decisive influence* over the subsidiary, it may be held liable[12].

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8 Commission Guidelines on fine setting, paras. 12-18.

9 Commission Guidelines on fine setting, para. 28(§1); EGC, *Michelin*: 290.

10 Commission Guidelines on fine setting, para. 30.

11 Reg. 1/2003, Art. 23(2).

12 ECJ, *ICI*: 137-138; ECJ, *AEG*: 50; ECJ, *Stora Kopparbergs*: 80; EGC, *Coöperative Verkoop*: 136.

The formal simplicity of the test has been rendered harder to grasp due to the continuous repetition of one of the formulations included in *ICI*, according to which an infringement may be attributed to the parent company, *"in particular where the subsidiary does not decide independently upon its own conduct in the market but carries out, in all material respects, the instructions given to it by the parent company"*[13]. The confusion which may be raised by this choice of wording should be set aside by the recognition that what the Court intended to identify were the characteristics that made two companies belong to the same economic unit – in other words, what rendered them the same undertaking, under EU Competition Law. This was made very clear from the outset: *"the formal separation between these companies, resulting from their separate legal personality, cannot outweigh the unity of their conduct on the market for the purposes of applying the rules on competition"*[14].

The legal test requires two steps in the analysis. One must determine: (i) the legal possibility of control; and (ii) its actual exercise. While it may seem that the latter test necessarily includes the first, there are situations in which the demonstration of acts typically associated to the exercise of control – such as issuing instructions – may not suffice to attribute liability. Thus, if Company A issues "instructions" to Company B, of which it is a minority shareholder, the mere fact that Company B acts in accordance with those instructions is not enough to show imputability to Company A, if the latter was not legally capable of controlling the other company. In such cases, there could be an agreement or concerted practice between two independent undertakings.

The first step of this test becomes significantly more relevant when presumptions of exercise of control are applied, as described below.

It is important to stress that the legal test has nothing to do with instructions or even knowledge by the parent company relating specifically to the infringement[15]. The issue is not whether the parent company instructed the conduct that led to the infringement, or whether it knew or should have known about the infringement, but whether the parent company and the subsidiary are, for the purposes of Competition Law, the same undertaking, in accordance with the "single economic entity" doctrine, which has been

13 ECJ, *ICI*: 133.

14 ECJ, *ICI*: 140; see also ECJ, *Akzo Nobel*: 54-59.

15 EGC, *Alzo Nobel*: 58; EGC, *Itochu Corp*: 58.

settled case-law for decades[16]. This is a frequently misunderstood aspect of this debate, which is too often stirred only by the opposing legal (Corporate Law) and functional (Competition Law) concepts of "undertaking".

While the basic legal test is always the same, the burden of proof in order to impute the infringement to the parent company is different depending on the relation between the parent company and the subsidiary. In the following analysis we shall distinguish: (i) cases of full ownership; (ii) cases of quasi-full ownership; and (iii) other cases.

(i) *Cases of full ownership*

Under EU Competition Law, as currently interpreted by the ECJ and the EGC, whenever a parent company owns 100% of the shares of a subsidiary, there is a rebuttable presumption of exercise of decisive influence[17].

In other words, the Commission need only show that a subsidiary is fully-owned (the first step of the basic legal test) in order to attribute liability to the parent company. The burden of proof is then shifted, so that, in such cases, it is up to the parent company to adduce sufficient evidence that it could not or did not, in fact, exercise decisive influence over the subsidiary.

In the opinion of several authors, there were, until recently, unsolved contradictions in the case-law of the Courts in what concerns the presumption of exercise of decisive influence, or even discrepancies between the position of the Commission and EGC and that of the ECJ.

In the very least, it seems reasonable to affirm that there has been an evolution in the way the Court has approached this issue, ever since its first incursion into it in 1972[18]. Most recently, dissenting authors had focused their attention on two cases that seemed to stand out: the ECJ's judgment in *Stora Kopparbergs* and the EGC's judgment in *Bolloré*. In the latter, the Fifth Chamber of the EGC stated that, *"although the evidence relating to the 100% shareholding in its subsidiary provides a strong indication that the parent is able to exercise a decisive influence over the subsidiary's conduct on the market, this is not in itself sufficient to attribute liability to the parent for the conduct of its subsidiary*

16 ECJ, *ICI*: 133-134; EGC, *Arkema*: 66 and 77.

17 ECJ, *AEG*: 50; ECJ, *British Gypsum*: 149; ECJ, *Stora Kopparbergs*: 80; EGC, *Limburgse Vinyl*: 961 and 984; EGC, *Michelin*: 290; EGC, *Coöperative Verkoop*: 136; EGC, *Akzo Nobel*: 60-62; EGC, *Itochu Corp*: 49-53; ECJ, *Akzo Nobel*: 60-64.

18 ECJ, *ICI*: 131 et seq.; see Opinion of AG Mischo in *Stora Kopparbergs*.

(…). *Something more than the extent of the shareholding must be shown, but this may be in the form of indicia"*[19].

Nonetheless, whether such discussions of the case-law were justified or merely the result of misinterpretations, they have now been laid to rest by the ECJ's judgment in *Akzo Nobel*, as recognized even by those who consider it a *"decision against basic legal principles* (…) *and in favour of the excessive fines imposed by the Commission in the recent past"*[20].

While it is settled that the described presumption will continue to be applied and upheld, what is far from clear is whether it is truly rebuttable.

It is difficult to identify cases where the Commission has openly accepted, in such a scenario, that the parent company should not be held liable for the subsidiary's infringement. In *Raw Tobacco Spain*[21], it did so for Universal (*"apart from the corporate link … there is no indication in the file of any material involvement of Universal … in the facts which are being considered in this decision"* – para. 376), but the details behind this option remain shrouded in mystery. There is reason to suspect that this case will stand out as an accident, rather than a precedent.

On the other hand, the Courts have never refused attributing liability to the parent company on the grounds that sufficient evidence of autonomy had been presented. And they have explicitly rejected several arguments put forward to sever liability:

- Parent company being merely a holding company – it still coordinates budgets and financial investments within the group[22];
- Absence of a policy of the subsidiary of providing specific information to the parent company on its activities in the market in question[23];
- Minor role of the subsidiaries' activities and turnover within the group[24];
- Parent company being active on a separate market from that of the subsidiary[25];

19 EGC, *Bolloré*: 132.

20 Riesenkampff & Krauthausen, 2010: 41; see also Sorinas & Jorns, 2009: 8.

21 COMP/C.38.238/B.2.

22 EGC, *Limburgse Vinyl*: 988-989; EGC, *Arkema*: 76.

23 EGC, *Arkema*: 78.

24 EGC, *Bolloré*: 143-144; EGC, *Arkema*: 79.

25 EGC, *Arkema*: 80; EGC, *Itochu Corp*: 58.

- Subsidiary having its own production installations and its own staff[26];
- Subsidiary entering its turnover into separate annual accounts[27];
- Subsidiary acquiring a significant portion of supplies from competitors of the parent group[28];
- Absence of power, under applicable national law, to exert a decisive influence on the commercial policy of the subsidiary, in the absence of even an attempt to put an end to a known infringement[29];

It seems it is not possible to draft an accurate list of elements that may be put forward by parent companies to rebut the presumption, particularly because *"the nature and importance of* [evidence] *may vary according to the specific features of each case"*[30]. In other words, the legal standard seems to be little more than a case by case approach guided by *"common experience"*[31].

Even in the broadest interpretation of this presumption, a few situations will still probably be considered to fall outside its scope, such as a 100% shareholding acquired by a financial institution on a temporary basis, with a view to reselling it, and with further conditions (see Art. 3(5)(a) of the Merger Regulation); or a 100% owned company placed under a court-appointed trustee[32] (an example that corresponds to Art. 3(5)(b) of the Merger Regulation).

The case-law has identified two further situations in which the applicability of the presumption has not yet been settled.

First, the above mentioned presumption may not apply when, instead of a parent "company", subsidiaries are fully held by a natural person or persons[33]. The Court has now stated explicitly that *"the mere 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 companies are a single economic unit with the result that, under Community competition law, the actions of one company*

26 EGC, *Bolloré*: 142.

27 EGC, *Bolloré*: 142.

28 EGC, *Bolloré*: 143-144.

29 ECJ, *Stora Kopparbergs*: 84.

30 EGC, *Akzo Nobel*: 65.

31 Opinion of AG Kokott, *Akzo Nobel*: 75.

32 Sorinas & Jorns, 2009: 9.

33 ECJ, *Siderúrgica Aristrain Madrid*: 97-99.

can be attributed to the other and that one can be held liable to pay the fine for the other"[34]. It then went on to analyse further indicia of exercise of decisive influence in order to attribute joint and several liability to both subsidiaries. However, since a natural person may be deemed an "undertaking" under EU Competition Law[35], it is still left unanswered how the Court would react if the Commission were to attribute the fine to the natural persons controlling the subsidiaries in question. One (erroneous) reason for hesitation on this issue may be the different treatment of natural persons and legal persons in national Corporate Law requirements relating to groups (see below).

Second, it is unclear whether the presumption may be used to attribute liability in cases of joint control. The EGC has once concluded that a situation of shared control over a joint venture *"is analogous to that* (…) *in which a single parent company* [holds] *100% of its subsidiary, for the purpose of establishing the presumption that that parent company actually exerted a decisive influence over its subsidiary's conduct"*[36]. Perhaps significantly, this joint venture was constituted as a *"purely contractual entity without separate legal personality from its partners"*[37].

(ii) ***Cases of quasi-full ownership***

Shareholdings that are very near to 100% – i.e. 90% or more – have also been treated by the European Commission as allowing for the use of the presumption of exercise of decisive influence. This creates an interesting parallel with the requirements for the responsibility of parent companies under national Tax Law (see below).

This approach has been confirmed by the EGC in *Arkema*:

> *"Il resort en outre de la jurisprudence que, si une société mère détient la quasi-totalité du capital de sa filiale, il peut raisonnablement en être conclu que ladite filiale ne détermine pas de façon autonome son comportement sur le marché et qu'elle forme par conséquent, avec sa société mère, une entreprise au sens de l'article 81 CE.* (…)
>
> *Dans ces conditions, dès lors que la Commission prouve que la totalité ou la quasi-totalité du capital d'une filiale est détenue par sa société mère et que, par conséquent, cette*

34 ECJ, *Dansk Rørindustri*: 118.

35 Whish, 2008: 85.

36 EGC, *Coöperative Verkoop*: 138.

37 EGC, *Coöperative Verkoop*: 137.

dernière est en mesure d'exercer une influence déterminante sur la politique commerciale de sa filiale, il incombe à la société mère de renverser la présomption"[38].

The ECJ has not yet tackled this extension of the presumption.

(iii) ***Other cases***

Apparently, as the case-law stands, in all other cases when the Commission may wish to attribute liability to the parent company (i.e. when the parent company has less than a 90% shareholding in the subsidiary), it will have to produce sufficient evidence to take both steps of the basic legal test: it must show that the parent company could exercise decisive influence over the subsidiary, and that it actually did so. In principle, this demonstration is possible also in relation to a minority shareholder (if there are factors awarding them control, in practice, over the company) and to situations of joint control.

The Commission must show that the companies in question constitute a single economic unit, and not that there were *"instructions given by the parent company to its subsidiary to participate in the cartel"*[39].

Decisive influence must be assessed within the context, in particular, of the *"economic, organizational and legal links between those two entities"*[40], and it should relate to the subsidiary's commercial policy[41], since the fundamental criteria behind the single economic entity doctrine have to do with conduct on the market.

That being said, the decisive influence does not have to relate to the subsidiary's *"commercial policy in the strict sense"* (i.e. distribution and pricing strategy) – according to the EGC, the Court has, in these contexts, looked at pricing policy, production and distribution activities, sales objectives, gross margins, sales costs, cash flow, stocks and marketing, etc., but *"it cannot be inferred that it is only those aspects that are covered by the concept of the business policy of a subsidiary for the purposes of the application of Articles 81 EC and 82 EC with respect to the parent company"*[42].

38 EGC, *Arkema*: 69-70; see also EGC, *Michelin*: 290.

39 EGC, *Bolloré*: 132.

40 ECJ, *Akzo Nobel*: 58; ECJ, *Dansk Rørindustri*: 117.

41 EGC, *Akzo Nobel*: 63-64; EGC, *Coöperative Verkoop*: 136.

42 EGC, *Akzo Nobel*: 63-64.

The following are a few examples of the elements which have been considered relevant in the case-law:

- Representation of the subsidiaries by the parent company during the administrative proceedings before the Commission (the "sole interlocutor"); or even prior representation in other contexts[43];
- Inclusion of the subsidiary in a vertical integration scheme[44];
- Presence on the board of the subsidiary of a member of the parent company's Board of Directors, or of persons with management-level positions within the parent company, even if they do not have authority as agents of the parent company, since they can ensure that *"the subsidiary's course of action on the market is consistent with the line laid down at management level by the parent company"*[45].

While the burden of proof is, so far, clearly assigned to the Commission (notwithstanding uncertainty as to the limits of the case-law on quasi-full ownership), the evidentiary standard is obscure. Since the ECJ does not generally review assessments of facts by the EGC, it is likely that this standard will, for practical purposes, come to be determined by the EGC alone[46], which has shown a greater openness to a more straightforward application of the single economic entity doctrine.

3. PARENT COMPANY LIABILITY UNDER PORTUGUESE LAW

3.1. Corporate Law

3.1.1. General assessment: the group as a legal unit?

It has been noted that *"in the group everything is different"*[47] and *"everything is more complicated"*[48]. Despite the traditional view centered on the single corporation ("entity approach"), the need to adapt general Corporate Law to the reality of corporate groups has long been recognized, trying to balance

43 ECJ, *Dansk Rørindustri*: 120.

44 EGC, *Bolloré*: 147; AG Mischo, *Stora Kopparbergs*: 50.

45 EGC, *Bolloré*: 137-140; see also ECJ, *Dansk Rørindustri*: 120.

46 ECJ, *Metsä-Serla*: 30 and 37; ECJ, *Dansk Rørindustri*: 122.

47 Wiedemann, 1988: 9.

48 Fleischer, 2005: 759.

"unit" and "multiplicity"[49] and to harmonize the singular interests of affiliated corporations, their shareholders and creditors, on the one hand, and the "interest of the group" as a whole, on the other hand. Especially, the deepening of economic integration and the higher degree of centralization within the group, as well as the inevitable dilution of the individual corporation in the group as an economic unit, all bring the problem of imputability to the center of the debate on corporate groups.

In spite of the evidence of the group as an *economic unit*, Portuguese Corporate Law – as others – does not treat it as a *legal unit*. Moreover, unlike other legal systems (*e.g.*, German), Portuguese courts and literature have never sustained the unity or the personification of the group, nor have they, in any other way, followed an "enterprise approach". Among the conceptions defended abroad, the classic "unity theory" (*Einheitstheorie*), which appeared in the early stage of German *Konzernrecht*[50], above all at the hands of R. Isay, saw the group as a "complex undertaking" composed by several corporations, and drew significant consequences from this interpretation, such as the acknowledgement of a protection against disturbances engendered against it. From there, Haussmann went a step further and argued that corporations would become confused with the group itself, to the point where each corporation would even stop being treated as a corporation and could not individually be the subject of rights and duties anymore. From a no less daring perspective, the group would appear as a *network*: a flexible net where we would find semi-independent centers of decision, well articulated and coordinated[51]. More modest conceptions would regard the group as a civil partnership[52], which would also allow treating it as a legal unit.

None of these theories – long criticized even in the context of German Law – have ever found any echo or support in Portuguese Law. However, the imputation problems are acknowledged and must be solved. Portuguese Corporate Law tries indeed to tackle those problems in a set of rules which allow us to identify the Portuguese legal system as one of the few which systematically regulates groups of corporations (mainly alongside the German *Aktiengesetz*). Nevertheless, there are important gaps in Portuguese

49 Bälz, 1974: 320; Teubner, 1990: 67.

50 Hommelhoff, 1982: 2.

51Teubner, 1993: 281.

52 Koppensteiner, 2006: 175.

Law, especially because it adopts a restrictive concept of "group": the exercise of control or dominant influence over the subsidiary is not enough to speak of a group, which is only legally acknowledged when control arises out of full ownership or of contract [articles 488 *et ss.* of the Portuguese Companies Code (PCC)]. Therefore, many groups arise *de facto*, but are not legally recognized (they are not *de jure* groups), even though the interests involved require protection. Moreover the PCC does not regulate groups of companies when one or more of the members of the group are not headquartered in Portugal (article 481), which represents a notable limitation on the efficacy of this law.

3.1.2. Parent company liability in general

Under Portuguese Law, the liability of parent companies varies according to the type of group. While the PCC foresees a special liability regime for parent companies of *de jure* groups, there are no similar provisions for *de facto* groups. In the case of the latter, creditors may only find an additional level of protection in general Civil Law mechanisms, which remain relatively unexplored.

In *de jure* groups, parent companies are entitled to issue detrimental orders to their subsidiaries, with no need to ensure specific compensation, as long as the envisaged action meets its own interests or the interests of another company in the group (Art. 503 PCC). Thus, one usually finds references to a "group interest"[53], which is not so much a "common interest" of the grouped societies, but rather coincides with the interest of the parent company in the economic performance of the group[54]. The large degree of lawful instrumentalization of subsidiaries justifies the broader liability foreseen for such groups. Thus:

- The *parent company is liable for the subsidiary's debts* (Art. 501 PCC): this is a direct and unlimited liability for all debt, imposed *ipso jure* on the basis of the group relationship. The parent company is held liable even if it played no role in the acceptance of the obligation that led to the debt and, what's more, even if it has never actually exercised influence over the subsidiary. Creditors are, thus, vastly protected, based exclusively on the

53 Engrácia Antunes, 2002: 738.

54 Perestrelo de Oliveira, 2007: 103.

possibility of exercise of decisive influence[55]. This has been described as a manifestation of the lifting of the corporate veil[56].

- *Directors are liable for instructions that do not meet the required standards of diligence* (Art. 504 PCC): suits may be brought by the subsidiary itself or by minority partners, regardless of their share of the capital. Although not explicitly foreseen, one must also admit subrogation suits by creditors, as long as the respective conditions are met (Arts. 606-609 of the Portuguese Civil Code).
- The *parent company is jointly and severally liable with its directors*, in accordance with the general principles of the Civil Code (Art. 483) and the Portuguese Companies Code (Art. 6(5)).
- The *parent company must cover the subsidiary's losses* (Art. 502 PCC): the parent company must compensate its subsidiary for losses incurred within a group, regardless of their cause. This mechanism is very fragile, however, not only because it rests on easily manipulated accounting instruments, but mostly because it can only be enforced at the moment of the termination of the group relation, not while the subsidiary is still within the group (differently, e.g., from the solution under German Law).

As a result of these complementary mechanisms, creditors of subsidiaries are awarded a rather significant level of protection, being able to rely on the parent company for the payment of debts, even if the facts that led to such debts were entirely alien to it. This deeply contrasts with the protection of creditors in *de facto* groups, rendering the Portuguese Companies Code strikingly incoherent.

In *de facto* groups, the liability of the parent company remains a largely unexplored issue in Portuguese Law. Differently from German Law – the main source of inspiration for Portuguese regulation of groups – hardly any legal relevance is awarded, in Portugal, to *de facto* groups, i.e. groupings of companies wherein unitary economic direction rests on something other than a subordination contract or full ownership. It should be noted, moreover,

55 Criticizing this solution, Engrácia Antunes, 2002: 803.

56 Menezes Cordeiro, 2000: 131.

that full ownership does not give rise to a *de jure* group when the owner is a natural person[57].

Although the issues facing *de jure* and *de facto* groups are essentially identical, and despite the extraordinary proliferation of *de facto* groups, the PCC is completely silent as to the protection of interests affected by the latter. Thus, in most cases where a company exercises "decisive influence" over another, including cases of quasi-full ownership, the liability of the parent company is not specifically regulated. The sole exception is when the parent previously held full ownership, in which case the regime of *de jure* groups continues to be applicable (Art. 489(4)(c) PCC, *a contrario*).

Nonetheless, in our view, there are several ways of arriving at the liability of the parent company in *de facto* groups, on the basis of general Civil Law provisions:

- *Liability on the grounds of trust or expectations*: the idea of a protection of expectations specific to the law of groups, initially put forward in Germany by Rehbinder[58], and hesitantly received in doctrine[59] and in case-law[60], holds that, in certain cases, the protection of third parties is justified by the creation of a perception of "unitary undertaking". The use of advertising, brands, logos and other common identifying features all allow the subsidiary to avail itself of the goodwill already established for the group as a whole. It is thus often argued that such public presentations of group identity create legitimate expectations in third parties which should be legally protected[61]. However, such liability depends on meeting strict requirements[62] and, therefore, cannot be seen as a general mechanism for achieving liability of the parent company for a subsidiary's obligations.
- *Liability of the parent company as* de facto *director of the subsidiary*: parent companies often meet the requirements to be held as *de facto* directors, allowing for their (at least civil) liability in relation to the subsidiary

57 Perestrelo de Oliveira, 2009: 1121

58 Rehbinder 1969: 324.

59 Wiedemann, 1988: 89, Canaris, 1971: 371.

60 See, e.g., BGE, *Swissair*.

61 Rieckers, 2004: 1; Lutter, 1997: 293; Brechbul, 1998: *passim*; Kuzmic, 1998: *passim*.

62 Carneiro da Frada, 2004: *passim*.

and even third parties. Essentially, the law requires lasting and broad management influence by someone who is not a *de jure* director, so that one may identify the *"positive exercise of management functions similar or comparable to those of formally appointed directors"*, with *"autonomous decision making power"* and *"a certain permanence and systematic nature"*[63]. It has been noted that *"the group constitutes* (…) *a structure particularly capable of giving rise to situations which can be subsumed to the concept of* de facto *directors"*[64]. A strict interpretation should, however, be followed[65]: whenever *de jure* directors remain essentially free in their management, despite obedience to instructions or general policies set by third parties, the figure of the *de facto* manager should not be called upon.

- *"Lifting of the corporate veil"*: the lifting of the corporate veil, on the basis of *bona fide*, traditionally holds a special position within corporate groups[66]. However, one should keep in mind that it cannot be generally applied to legal personality within the group[67] and that it is not an *"absolute means of imputation"*[68]. Since a "multi-company undertaking" cannot be the subject of rights and obligations, the lifting cannot be directed at the group or, as has been put forward, against the multi-company network in itself (*Haftungsdurchgriff auf den Konzernverbund selbst*)[69].
  The group increases the likelihood of the occurrence of factual circumstances that may justify the lifting – *maxime* the entanglement of legal spheres or similar types of abuse[70], but the mere existence of economic, financial and administrative integration, and of control or of unitary direction, are an insufficient justification. The principles developed in case-law and doctrine on the disregarding of personality in general are, thus, applicable to the group. In particular, this mechanism must continue to be applied in restrictive terms – indeed, its exceptional nature

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63 Ricardo Costa, 2006: 29.

64 Embid Irujo, 2003: 974.

65 Pereira Dias, 2007: 132.

66 Menezes Cordeiro, 2000: 131.

67 Emmerich & Habersack, 2009: 307.

68 Bork, 1994: 237.

69 Teubner, 1991: 209.

70 Ribeiro, 2009: *passim*.

may even deserve particular emphasis in this domain. Its acceptance in case-law has tended to be limited to cases where legal personality has been used *"illicitly or abusively in such a way as to cause damages to third parties"*, and it should only be invoked *"when there is no other legal basis to challenge the behaviour of the director or company in question"*[71].
Generally, this mechanism is used only to control partners' use of companies to (objectively or subjectively) pursue illegal aims, in the absence of an alternative adequate legal provision. In any case, only a very limited number of liability issues in groups may be solved through the "lifting of the veil", in this strict sense.

- *Liability for measures against livelihood (Existenzvernichtungshaftung)*: this theory of German case-law and doctrine concerns so-called "qualified *de facto* groups", i.e., groups where the intensity of unitary management is such that it is no longer possible to individualize specific damages-causing measures. While initially there was a tendency to apply, through analogy, the rules relating to *de jure* groups[72], after the Bremer-Vulkan judgment it has been held that the parent company is liable for the termination or the endangering of the existence of the subsidiary. This was first treated as a situation of "lifting of the veil"[73], and subsequently as tort liability[74]. The issue has not yet been addressed in the Portuguese legal order.

These various mechanisms might theoretically allow for an effective protection of companies' creditors. This, however, requires their efficient enforcement by the courts, namely through the easing of the standard of proof and through judicial reversals of the burden of proof, which are as yet uncommon in national case-law and doctrine[75].

Although general Civil Law mechanisms may to some extent compensate for legislative shortcomings, it would clearly be preferable to see the explicit introduction of protective mechanisms at the level of *de facto* groups, so as

71 Porto CA, 25 October 2005; Lisbon CA, 5 July 2000.

72 BGH, *Autokran; Tiefbau; Video; Stromlieferung; TBB*.

73 BGH, *KBV*.

74 BGH, *Trihotel*.

75 For a portrayal of the differing situation under German Law, see Baumgartel *et al.,* 2009: 230-257.

to avoid the *"hypocrisy"* in which these currently exist[76]. It is perhaps not a coincidence that, while the relevant rules of Portuguese Law are only applicable to *de jure* groups, most groups are *de facto* ones.

3.1.3. Parent liability for subsidiaries' infringements

Under Corporate Law, the liability of parent companies for illegal actions attributed to subsidiaries may be specifically tackled in different ways, of which we highlight the following:

- *Debts*: if the obligation to pay compensation (tort liability) or a fine (administrative offences) has translated into a debt of the subsidiary, in accordance with Art. 501 PCC, the parent company may be held liable, in the cases of full ownership (or in the rare cases of subordination contracts), with no further evidence being required beyond complete control over the subsidiary. Decisive influence is not enough.
- *Complicity*: even in the absence of complete control, the parent company is liable if it was an accomplice in the facts in question, under general provisions.
- *Fraud or abuse*: the corporate veil may be lifted in case of fraud or abuse of the legal personality. A similar and increasingly autonomous option is to hold the parent company directly liable when it issued instructions that jeopardized the livelihood of the subsidiary, leading it to bankruptcy and to the resulting inability to pay its debts (*Existenzvernichtungshaftung*).

Thus, even if limited to situations of debts, in cases of complete control the parent company may be held liable solely on the basis of the possibility to exercise control, with no need to show actual exercise of control. In other cases, the parent company may only be held liable if it participated (or was an accomplice) in the facts, if there was abuse of legal personality, or if it jeopardized the subsidiary's livelihood.

3.1.4. Bottom-line: entity approach v. enterprise approach

Despite the almost absolute hegemony of the "entity approach" in Portuguese Law, the legislator has also taken into account considerations typical of "enterprise law" in relation to *de jure* groups. Thus, the law foresees that the

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76 Spada, 1996: 2191.

parent company is liable for subsidiaries' debts, exclusively on the basis of full ownership.

Occasionally, the parent company is also deemed liable for infringements carried out by subsidiaries, so as to protect certain social values (e.g. environmental protection), but only in cases of fraud or abuse. This corresponds to the general principle according to which a parent company may be liable for the conduct of a subsidiary whenever legal personality has been abused. Aside from this strict sense of the lifting of the corporate veil, the parent could only be liable if it is shown that it instructed or otherwise participated in the unlawful conduct in question.

The rules applicable to *de facto* groups are very similar: the parent company may only be held liable for unlawful conducts of subsidiaries in one of the previously described circumstances. However, especially in the case of the lifting of the corporate veil, particular care must be taken, being mindful of the justifications of legal personality and limitation of liability.

It should be noted that, under Tax Law, the legislator has also taken large steps to lift the corporate veil, much closer to those taken in Competition Law. Under articles 69 and 70 of the Portuguese Corporate Income Tax Code (following a solution apparently common to most Member States), the parent company is responsible for calculation and payment of the corporate income tax for the entire group, defined as including those companies where, directly or indirectly, it holds at least 90% of the share capital (with additional requisites to guarantee, *inter alia*, an actual and non-transitional control).

In light of the above, it must be concluded that, if one were to apply the rules of Portuguese Corporate Law, parent companies could only be held liable for infringements of Competition Law if it were shown that they participated in the facts (e.g. as instigator) or if the requirements for the lifting of the corporate veil were met (which include wrongdoing).

3.2. Competition Law

EU Competition Law is (also) enforced by national competition authorities, but in accordance with their own national procedural legislation, which determines, *inter alia*, the regime applicable to fines (Art. 5 of Reg. 1/2003). National competition authorities often apply EU and national Competition Law, in parallel, to the same infringements, as they are bound to do whenever there is an effect on trade between Member States (see Art. 3 of Reg. 1/2003).

In what is relevant for the present discussion, the Portuguese Competition Act has many similarities with European Competition Law, but also some differences, that may or may not impose a different approach to the issue of parent company liability.

The concept of "single economic entity" is recognized and enforced. Indeed, Art. 2 of the Competition Act has taken on that concept, as foreseen in EU case-law, in order to define the notion of "undertaking". It even goes further than EU Competition Law, by directly tying the notion of *"interdependence or subordination"* (in essence, the power to control, or to exercise decisive influence) to the list of criteria used to include companies within the same economic group, when calculating market shares and turnover in the context of merger control (majority shareholding, more than half the votes, right to appoint majority of members of the Board, etc.). In other words, under Portuguese Competition Law, the determination of which companies fall within the same "single economic entity" has been legally tied to the criteria used in merger control.

The Act is applicable to any practices whose effects are or may be felt on Portuguese territory (Art. 1(2)), and it expressly foresees the possibility of decisions being addressed to foreign companies (Art. 23(2)). Fines are addressed to the *"undertakings that took part in the infringement"* (Art. 43(1)), and limited to 10% of those undertakings' turnover in the last year of the infringement (with no territorial limitation as to where this turnover was obtained). There is an article dealing specifically with attribution of liability (Art. 47), but it does not tackle parent company liability. Art. 44 lists several of the mitigating and aggravating factors recognized in the Commission's Guidelines on fine setting.

Thus, the letter of the Portuguese Competition Act, in itself, seems to allow the same interpretation that has been adopted at the EU level (or an even more expansive one) in what concerns fine setting and parent company liability. And yet, there appear to be substantial differences in the practice and interpretation followed by the European Commission and the Portuguese Competition Authority (PCA).

It is impossible to determine with certainty if this indeed is the case, since the PCA does not publish its decisions under Arts. 101 and 102 TFEU and their national equivalents (the Competition Act does not explicitly foresee the publication of such decisions), and there are no guidelines on fine setting.

Nonetheless, there are strong indicia, based on publicly available information, suggesting that the PCA has applied fines to subsidiaries found to have participated in cartels, rather than to their parent companies, even though they constituted a single economic entity, as is shown in the following examples:

- in *Nestlé Portugal* (31/04), a € 1 million fine was imposed on the national subsidiary of the Swiss-based Nestlé group;
- in *Vatel* (21/05), a € 545.000 fine was imposed on the national subsidiary of the German-based Esco group;
- in *Coimbra Hospital Centre* (06/03) and in *Complementary means of diagnostics* (04/05), fines were imposed on the national subsidiaries of the American-based Abbott group (€ 7,65 million), the German-based Bayer group (€ 5,85 million), the Italian-based Menarini group (€ 2,8 million), and the American-based Johnson & Johnson group (€ 1 million); and
- in *Coimbra Hospital Centre* (06/03), a € 650.000 fine was imposed on the national subsidiary of the Swiss-based Roche group.

Thus, even though the concept of undertaking, the relevant rules applicable to fines and the substantive provisions being enforced are identical, the same infringement will be attributed to the parent company of the group or exclusively to the national subsidiary, depending on which authority handles the case – the European Commission or the PCA. It being fair to assume that similar situations arise in other Member States, there seems to be a curious unevenness in decentralized enforcement within the European Competition Network.

This being said, the question becomes: what justifies the difference between the interpretation of essentially similar Competition Law provisions at the EU level and at the national level? It should be noted that the apparent difference discussed below relates only to the imposition of fines by the PCA, and not to civil proceedings (i.e. private enforcement).

One should consider that, unlike the European Commission, which can decide on fines while moving almost exclusively within Competition Law – with some limits imposed by fundamental rights –, the PCA is bound by the Competition Act, but also, in whatever is not specifically foreseen therein, by the General Regime for Administrative Offences (GRAO – see Art. 22(1) of the Portuguese Competition Act).

Art. 7(2) of the GRAO seems to suggest that a fine can only be imposed on legal persons if the infringements were carried out by their own bodies in the exercise of their respective functions, and Art. 8 excludes strict liability.

However, the issue is not whether the GRAO (and the Criminal Procedural Code) allows the fining of parent companies for infringements carried out by subsidiaries, but whether the Portuguese Competition Act has derogated from the GRAO, imposing a *lex specialis* in this respect (see Art. 22(1)), as it has in so many others, such as for the amount of fines or for, within limits, the principle of *nemo tenetur se ipsum accusare*[77]. It should be noted that, unlike the debate around self-incrimination, the attribution of liability to a parent company does not bring into play a comparable fundamental right with explicit constitutional protection.

It is our belief that the Competition Act, by imposing the functional concept of undertaking, and foreseeing fines directed at "undertakings" as defined within that Act, does indeed constitute a *lex specialis* for this purpose. Even if one were to oppose derogation from the principle of personal responsibility or from the prohibition of strict liability, it must still be recognized that Competition Law addresses its prohibitions to the single economic unit, not to the legal entity, and thus it is only at that level which fault must be sought. As long as fault is ascribed to the single economic entity in question, there is no violation of either of those principles. One should indeed note that it is the law itself that creates a special legal subject in what concerns competition law: not the literature or the courts.

The Portuguese Competition Authority's option to direct fines at national subsidiaries alone, rather than also to foreign parent companies, seems to have more to do with policy, than with insurmountable legal obstacles.

It should also be noted that the PCA faces an obstacle which is absent at the European level, i.e. particularly conservative views at the level of judicial control. Ironically, the Courts responsible for controlling the Authority's decisions – the Commercial Courts – are specialized in Corporate Law and, thus, firmly rooted in the ideology thereof. Even though the Lisbon Commercial Court has recognized that the GRAO is only subsidiarily applicable, it has refused to attribute liability to a parent company, arguing

77 See Teixeira, 2009: 114; Sousa Mendes, 2009: 211-212; Sousa Mendes, 2010: 123-124 and 138-142; Martinho, 2010: 171-172; Ramos, 2010: 178-179, and judgments of the Lisbon Commercial Court quoted in these works.

that the concept of single economic entity does not allow for the sanctioning of companies that did not themselves carry out an unlawful act, since administrative offences are incompatible with strict liability[78].

Although, ultimately, it is up to the Appeals Court, and possibly to the Constitutional Court, to settle this issue, an opportunity for review must first arise. Only the PCA can create such an opportunity.

4. IS IT FAIR?

4.1. Internal coherence and fairness within Competition Law and policy

Criticism of the case-law that has allowed parent companies to be found jointly and severally liable for their subsidiaries' infringements of competition law seems to be based on a fundamental misconception of the applicable legal framework.

This misconception is shown in the attempt to apply concepts of undertakings and liability regimes, arising from Civil and Corporate Law, to another branch of the law, where a functional concept of undertaking prevails, which is intimately connected to Economic theory, and specifically to the theory of the firm[79].

These approaches fail to recognize that, even if there are general rules shielding parent companies from liability for the actions of their subsidiaries, Competition Law emerges as a *lex specialis*, which derogates from those general rules whenever it contradicts them. This holds true both for EU Law and for national law. General rules are derogated to the extent that Competition Law and its fines are aimed at undertakings, as defined by Competition Law (single economic entities).

The question is not whether a parent company can be held liable for an obligation of a subsidiary, but whether there is a special rule of law which imposes directly on the parent company the obligation to pay a fine imposed on the basis of a conduct of its subsidiary. Such a special rule is supposedly justified by an overriding public interest. As was mentioned above, the protection of competition (with the ultimate goal of consumer welfare) is not the only public interest which the legislator has found to justify the lifting of the corporate veil (see Environmental Liability Directive and Portuguese

78 LCC, *Vatel*: 6-8.

79 Williamson, 2009: 726.

Environmental Liability Act). Indeed, the *effet utile* of Competition Law would be jeopardised if the veil were not removed, since the successful enforcement of fines would be *"jeopardised by* (…) *transfers of assets between the parent company and its subsidiaries"*[80], and their dissuasive effect would be significantly reduced by the artificial interposition of separate legal entities with much smaller ranges of activities and turnovers.

These ideas have guided the case-law from the beginning:

> *"In the circumstances, the formal separation between these companies, resulting from their separate legal personality, cannot outweigh the unity of their conduct on the market for the purposes of applying the rules on competition"*[81].

And the discussion of this issue in the current leading case could not have made it clearer:

> *"It must be observed, as a preliminary point, that Community competition law refers to the activities of undertakings* (…), *and that the concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed.*
> *The Court has also stated that the concept of an undertaking, in the same context, must be understood as designating an economic unit, even if in law that economic unit consists of several persons, natural or legal* (…).
> *When such an economic entity infringes the competition rules, it falls, according to the principle of personal responsibility, to that entity to answer for that infringement* (…).
> *The infringement of Community Competition Law must be imputed unequivocally to a legal person on whom fines may be imposed* (…).
> [Repetition of basic *ICI* principle on possibility of attribution of liability to the parent company]
> *That is the case because, in such a situation, the parent company and its subsidiary form a single economic unit and therefore form a single undertaking for the purposes of the case-law mentioned* [above]*"*[82].

80 Opinion of AG Kokott, *Akzo Nobel*: 43.

81 ECJ, *ICI*: 140

82 ECJ, *Akzo Nobel*: 54-59; see also EGC, *Akzo Nobel*: 58; EGC, *Arkema*: 66.

These clarifications accurately show why the attribution of a subsidiary's infringement to its parent company, in this context, does not introduce strict (i.e. no fault) liability, and is compatible with the principle of personal responsibility and with the presumption of innocence[83].

Another aspect of the debate, too often silenced, concerns internal incoherence within Competition Law. There is no apparent reason why decisive influence should be assessed differently when applying the Merger Regulation or when attributing Arts. 101 or 102 infringements to a parent company. Thus, the fact that the Merger Regulation requires only the possibility of control (not the demonstration of actual exercise) introduces an aberrant double-standard[84], as does the difference in criteria for what must be shown in order to establish decisive influence.

Furthermore, even within the context of Art. 101, imputability is a two-bladed sword. As expressed by A.G. Mischo:

> *"The principle of imputability does not work in only one direction, that is to say, it does not serve solely to place on the parent company responsibility for an infringement committed by the subsidiary; it also serves to take certain conduct outside the scope of Article* [101] *of the Treaty, because where the subsidiary does not enjoy any real autonomy in determining its course of action on the market, the prohibitions laid down by Article* [101(1)] *may be considered to be inapplicable in the relationship between it and the parent company with which it forms one economic unit"*[85].

Companies welcome the inapplicability of Competition Law to relations between parents and subsidiaries, allowing them to reach whatever agreements they wish within the group on the grounds that they constitute a single economic unit[86], but then wish to discard that approach when it comes to paying fines. Interestingly, history shows that the exclusion of intra-group

83 See further Opinion of AG Kokott, *Akzo Nobel*: 39 and 74; for a theoretical underpinning to the relation between presumptions in Competition Law and presumption of innocence, see Castillo de la Torre, 2009: 517-519.

84 Wils, 2000: 106-107.

85 Opinion of AG Mischo, *Stora Kopparbergs*: 26.

86 ECJ, *Béguelin*: 8-9; ECJ, *Centrafarm*: 41; ECJ, *VIHO Europe*: 51.

agreements from the scope of antitrust scrutiny is merely a possible, rather than necessary, solution[87].

Companies are also more than happy with a double standard in the requirements of imputability in each situation. In fact, the double standard seems to be sanctioned by Commission practice. If company A holds 60% of company B, the latter is assumed to belong to the same economic unit as A, and Art. 101 TFEU is not applicable to agreements between them. It is difficult to provide specific examples of this approach, since the issue would mostly arise in the context of the now-extinct comfort letters, which were not public. The case-law appears to be favourable to this approach, following an *a contrario* interpretation[88].

If the Commission wants to challenge intra-group agreements under Art. 101, it has to provide enough evidence that, despite a majority shareholding, company A does not exercise a decisive influence over company B. Considering the difficulty of access to such intra-group information and the need to prove a negative fact, this is a very difficult task.

Thus, when it comes to the interdiction of anti-competitive intra-group agreements, there seems to be a presumption of exercise of decisive influence which is closely tied to the notion of control under the Merger Regulation – beginning at the majority of shares, not at quasi-full ownership – and which is very difficult to rebut.

In other words, each blade of the sword is forged with a presumption meant to be used by each party in antitrust fencing – the Commission or companies –, and which allows for little defense by the other, but the blade used by companies is by far larger.

A possible explanation for this fundamental inconsistency in the case-law approach to what is, after all, the very same issue, may be that the Courts have never been fully able to move beyond preconceptions arising from Corporate Law notions of legal personality and limits to liability.

But, while this may be the legal solution *de jure condito*, the debate would not be complete without tackling the desirability and justification of this solution.

From a policy perspective – in order to answer the question "is it fair?" – the justification of the lifting of the corporate veil in the context of Competition

87 Williamson, 2009: 732.

88 EGC, *Baustahlgewebe*: 107.

Law enforcement must be that public interests are being pursued which outweigh the interests being pursued by the general rules on legal personality and liability. Competition Law aims at protecting the competitive process, with the ultimate goal of increasing consumer welfare. The general rules on legal personality and liability aim at protecting freedom of economic initiative and organization, and are essentially guided by concerns of economic promotion and incentive. The choice of allowing the first goal to restrict the latter has much to do with liberal v. State-guided approaches to the market economy.

It is clear that the founding Treaties are based on the assumption (expressed in the German ordoliberal school of thought) that one objective does outweigh the other, as all Competition Law is based on a restriction of the freedom of economic initiative and enterprise. And we happen to agree with that assessment.

However, one must also be persuaded that the derogations from the general rules are proportional to the degree in which one interest outweighs the other. We believe this proportionality test to be met.

It is fair to attribute liability to parent companies and to calculate the applicable fine in relation to the turnover of the group. Such an approach is compatible, and indeed required, by the purpose of antitrust fines. As summarized by one author:

> *"In imposing fines and periodic penalty payments, the Commission's main aim is to ensure that the prohibited conduct does not recur. Thus, the essential purpose of both types of penalty is, in the main, to deter and persuade. In the specific case of fines, the Community Cours have recognized their twofold character, in that they punish past acts and have a general deterrent effect for the future, and this applies not only to the undertaking involved, but also to others who might be tempted to engage in the same type of conduct.* (…) *The focus on the "deterrent effect" of fines is of particular relevance where the infringement involves large undertakings which are presumed to have the legal and economic knowledge and their internal structures will enable them more easily to recognize that their conduct constitutes an infringement"*[89].

By applying fines to the legal entity at the head of the single economic unit, competition authorities drastically increase their dissuasive effect. The parent company is made to take full responsibility for eliminating anti-competitive

89 Ortiz Blanco 2006: 442-443.

behaviour within the group of companies it controls[90]. This approach is also justified by the need for efficient and result-maximizing management of the competition authorities' limited resources.

And it is fair to introduce a rebuttable presumption to facilitate this attribution of liability. Presumptions are a commonly used and necessary tool in Competition Law, given the difficulties the authorities and private parties face in obtaining extensive evidence of practices: *"the characteristics of evidence tendered as proof of infringements of competition rules imply that it must be open to the authority or private party on whom the burden of proof lies to draw certain conclusions from typical sequences of events on the basis of common experience.* (…) *The facts and information which are necessary for that purpose originate in any case in the domain of the parent and subsidiary company. It is therefore perfectly justifiable to require the latter to discharge the burden of adducing evidence in this respect"*[91].

Then there is the issue of the two-bladed sword: there is an internal coherence and balance in the system, which allows presumptions to be established to benefit both the enforcing authorities and the targeted companies alternatively. As the case-law stands, this balance is actually tilted in favour of companies.

While many authors seek to identify in the case-law the imposition of a *probatio diabolica*, the evidentiary standard required from companies is nonetheless easier to meet than the one imposed on the Commission, which does not have complete access to and knowledge of undertakings' internal documents. Furthermore, as was highlighted by the EGC, in order to rebut the presumption, companies need not produce direct and irrefutable evidence of the subsidiary's autonomous behaviour on the market – it is sufficient that they put forward sufficient evidentiary elements to demonstrate such autonomy[92], following the same standard of drawing conclusions from typical sequences of events, on the basis of common experience.

4.2. Reconciling Corporate and Competition Law?

Finding a parent company jointly and severally liable for an infringement carried out by a subsidiary tends to be presented as an affront to general

90 Whish, 2008: 94.

91 Opinion of AG Kokott, *Akzo Nobel*: 72 and 75.

92 EGC, *Arkema*: 82.

principles according to which a person should only be responsible for its own conduct, and separate legal personality implies separate liabilities. Incidentally, it should be noted that some legal orders have gone as far as foreseeing criminal parental liability of natural persons for acts of their children[93]. To a large extent, the separation of legal personalities allowed under Corporate Law has much to do with the protection of the patrimony of companies, and is aimed precisely at severing liability ties.

While this clear separation of liability does not always hold true (we have noticed that the parent company can be held liable on the basis of general rules and principles), there are clearly different levels of willingness to lift the corporate veil in these two branches of the law. Under general rules of Corporate Law and Civil Law, the parent company is normally only liable when it has participated in the facts or when legal personality has been abused. The mere exercise of control is not enough to attribute to it liability for subsidiaries' infringements.

And yet, it is clear that even these general rules allow for two types of exceptions to the limitation of liability: internal exceptions, reacting to abuses of such limitation, and external exceptions, relating to the protection of certain social values (consumer protection, environmental protection, etc.). In such cases, the (economic) values which justify the autonomous legal personality of companies give way to opposing values, such as those protected by Competition Law. The solution arrived at fits squarely within the logic of the system: it is the result of balancing the principles at stake, and determining which should prevail.

It is true that in the case of other external exceptions, such as under environmental liability rules, the parent company's liability still depends on the existence of abuse or fraud. But the fact that Competition Law does not require these conditions typically associated to the lifting of the corporate veil should not be overestimated. Actually, the exceptional nature of this branch of the law does not have to do with the rules for attribution of liability to the companies that constitute a group, but instead rests upstream, in the consideration of the group as an economic unit. The parent company is held liable because it is a part (the directing part) of that economic unit.

93 See, e.g., Weinstein, 1991.

Without having to go as far as to identify in the group a "new corporate personality"[94], European and Portuguese Competition Law have valued the economic reality of the group above the protection of the formal separation of its constituting entities. This is not incoherent with the general rules of the legal system, nor does it necessarily imply a tendency for the creation of a new legal concept, under enterprise law, which might be used in all cases as the subject of a group's rights and duties (right-and-duty bearing unit).

In the words of Blumberg: *"enterprise law is not a transcendental doctrine reflecting the emergence of a new legal unit – "economic entity", "enterprise", or "undertaking" – corresponding to the complex corporate organism conducting the activity. It does not supersede entity law, except in discrete areas where it better serves the underlying policies and objectives of the law. Entity law continues unchanged in other respects"*[95]. This should appease at least some of the fears arising from parent companies' liability under Competition Law.

There is also no encroachment on the principle of presumption of innocence, as it is not implied or assumed that the parent company has actually participated in the infringement. Rather, economic effects are imputed to the parent company – as they are in other fields –, on the basis of its responsibilities and powers within the group, of the objectives promoted by Competition Law and, ultimately, of considerations of distributive justice.

5. CONCLUSION

While some Member States are showing a tendency to lift the corporate veil even within the confinements of Corporate Law, general rules still do not attribute liability to parent companies for infringements carried out by their subsidiaries, on the basis of control alone. This is so despite the recognition of a "group interest", allowing for a complete instrumentalisation of subsidiaries, and the self-promoted perception of groups as unitary undertakings. The European Union has been unable to reach an agreement on this level, even when it comes to the protection of values associated to other branches of the law, such as environmental protection. One exception to this state of affairs is Competition Law (it has been mentioned that Tax Law can also be seen as another exception).

94 Blumberg, 1993: 232.

95 Blumberg, 1993: 253.

Authors who criticize the Commission and the Courts for the ease with which they ascribe liability to parent companies for the anti-competitive behaviour of subsidiaries would do well to take a step back and reassess this issue within the full framework of Competition rules and policy. Perhaps the most surprising aspect of this case-law is precisely the overly careful approach to the fining of parent companies. The Courts have preferred to create a situation of internal incoherence in EU Competition Law, rather than risking too much of a shock to the traditional concept of legal personality and of the limits of corporate liability. This is so even though they recognize that the derogation from these general rules is the product of the enforcement of a *lex specialis*, justified by a balance between the opposing social values and legal interests at stake, a balance which is by no means a stranger to Corporate and Civil Law.

Now that the presumptions of exercise of decisive influence, in cases of full ownership or quasi-full ownership, have been settled, the Commission and the Courts must consider the next step and guarantee a level playing field for the enforcement of Competition Law. The internal logical coherence of Competition Law requires the evidentiary standard and the notion of decisive influence, for the purposes of attributing liability to parent companies, to be brought in line with those used in merger control, even if possibly limited to the dimension of positive control[96]. Unless adequate justification is given for the continued double standard, the requirement of demonstration of actual exercise of decisive influence should be dropped, or, in the very least, the existing presumption should be extended. As highlighted by Wils, *"as long as the parent company retains the ultimate power to direct its subsidiaries'* (…) *operations, the degree of autonomy can only exist by its grace"*[97].

Only after such harmonization has occurred will the two-bladed sword that is the concept of the single economic entity be fairly balanced. This has already been achieved (although only in theory) in Portuguese Competition Law, by legally tying the concept of single undertaking, under the national equivalents to Arts. 101 and 102, to the requirements for decisive influence used in merger control, without requiring actual exercise of decisive influence.

We have also noted a striking contrast between the enforcement of Competition Law by the European Commission and by the Portuguese NCA

96 See Whish, 2008: 93.

97 Wils, 2000: 103.

(a conclusion which might be extendable to other NCAs). The NCA repeatedly ignores the single economic entity doctrine present in its own law (as does the Lisbon Commercial Court), addressing its decisions on anti-competitive infringements to national subsidiaries, rather than foreign parent companies. The objective of decentralized and uniform enforcement of EU Competition Law cannot be achieved while different companies continue to be held liable for an infringement, depending on which authority handles the case.

In short, EU institutions must take the principles followed since long ago to their ultimate, logical consequences. And national competition authorities must decide whether to actually apply the single economic entity doctrine, and push it past the appeal procedure, or to strike it from their laws. It is time for the enforcement of Competition Law to complete the process of lifting the corporate veil. The son and the father are, after all, but two components of the same ethereal entity.

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