EU Antitrust Fines and the Single Economic Entity

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1 Introduction

When determining a subject of interest within EU competition law, I found the question of fines to be especially interesting. Not only are the fines given in competition cases especially strict, but the doctrine governing a parent company's liability for its subsidiaries is constantly expanding. With this, more and more parent companies are finding themselves the target of such fines. The doctrine of parental liability has been developing throughout the last decades, mainly through case-law, a change which I decided to map. I will also give a description of the general rules governing the size of fines imposed.

As fines for infringing art.101 and 102 TFEU are those which have the most far-reaching consequences, and since decisions regarding such are those which most often are contested, they will be the main focus of this thesis. When speaking of antitrust fines further on in this document, the phrase should be understood as "fines imposed due to a violation of art. 101 or 102 TFEU", unless otherwise specified.

When it comes to the actual procedure surrounding the investigation of infringements, and the procedure for issuing fines I will only briefly touch these subjects. Suffice it to say that the European Commission is responsible for the investigation of companies, the opening of proceedings against a company and the imposition of fines[1]. As will be mentioned later, their decisions are susceptible to a full review by the ECJ.

2 The questions at hand

When an antitrust violation has been determined, it can at times be difficult to determine which undertaking is responsible for said infringement. This can easily be

[1] Art. 105 TFEU

determined when the infringement only includes one small undertaking which is solely responsible for all its behavior on the market. When it is to a greater or lesser extent controlled by other undertakings, however, the question of which undertaking should be held liable for the infringement is not as simple.

Liability for an infringement of antitrust legislation should lie with the undertaking responsible for the choice to infringe. As such, one will first look to the legal entity which infringed. Where this undertaking does not govern its own behavior, however, the responsibility must fall on the undertaking which does govern, or in other words, the company that has a decisive influence on the infringing undertaking. As I will show at a later point, case-law now shows that not only the actual decision to infringe will determine which undertaking is liable. Just as important, if not more important, will be the question of which undertaking had the power, or should have had the power, to make said decision.

I will in the following chapters first determine which rules govern the size of fines imposed. Secondly, I will give an explanation of the "single economic entity" doctrine, and show how this influences fines imposed. I will then show the development of parental liability in this field. I will at times offer certain opinions concerning these topics. I will, however, not treat in full the question of whether the doctrine itself or the Commission's use of it is in accordance with international legislation, or whether it encourages competition in the market.

3 Fines in European antitrust law.

As in the similar area of penal law, it is not easily determined what the purpose of antitrust fines really is. Is there one singular purpose, or are the fines inspired by several different purposes? Wouter P. J. Wils suggests[2] that there are two main lines of thinking regarding the purpose of antitrust fines, on the one hand the deterrence approach, and

[2] Wils, p.12-15

on the other the internalization approach. These can easily be summed up as such: The internalization approach calls for the violating party to be fined the sum total loss his violation has caused. The deterrence approach calls for a fine large enough to outweigh all benefits of a violation, thus deterring the violator from repeating his behavior, and deterring others from choosing to violate. Wils covers the arguments for either approach quite well in his document, and as the internalization approach has had considerably less impact on the current practice of the Commission and the ECJ, I will in the following assume the deterrence approach to be the one upon which the current rules in EU antitrust are based.

Seeing as deterrence is the main reason[3] for issuing fines for antitrust violations, it has been necessary for the Commission to find the method of issuing these fines that is most effective, but also which is the most "healthy" for the market as a whole. In other words the Commission must not only seek to punish the violator, they must also seek to protect competition in the market. The fine imposed should serve both of these purposes. As one of the main reasons companies choose to violate antitrust laws is the fact that they stand to make a profit from it, a fine must aim to at least be larger than the economic gain the violator received. If the fine is so large that it reaches the level where the violator is not able to pay, it may lead to bankruptcy when shareholders are not able to raise new capital. The price of such a bankruptcy can be very high, leading to loss of employment for many and the loss of investments for shareholders. One also loses an entity in the market one must assume that certain other companies as well as consumers to one degree or another have become dependent upon. Not only this, a bankruptcy can easily lead to anticompetitive effects, as removing a company (or in cartel cases possibly several companies) from the market, concentrates market power with its competitors. Whether or not such a concentration would be negative would, of course, vary from case to case.

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[3] "*It is settled case-law that the fines imposed for infringements of Article 81 EC, as laid down in Article 15(2) of Regulation No 17, are designed to sanction the unlawful acts of the undertakings concerned and to deter both the undertakings in question and other economic operators from infringing*",
Lafarge SA v Commission, case C‑413/08 P, paragraph 102

For the fines imposed for breaching Art. 101 and 102 TFEU to be effective without bankrupting the violating company, the Commission has chosen a solution which defines a maximum fine to be imposed for different infractions. This maximum fine is based on the annual turnover of the company, representing a percentage of that amount (varying between 1% and 10% of depending on the type of fine imposed).

As the size of the violating company is so key to the size of the fine imposed it is very important to clearly determine which entity is responsible for the violation of Articles 101 and 102 TFEU. There are two main reasons for this: To make sure that the fine is directed at the correct company, and to make sure that the size of the fine is appropriate. Clearly defining the violating party, especially through using the doctrine of the single economic entity (see chapter 4 on Parental liability), allows the Commission to hinder large companies from hiding behind their much smaller subsidiaries, putting the blame on them. Such behavior would not sufficiently deter the parent company from committing similar violations vicariously through its other subsidiaries.

One must nonetheless acknowledge that the fines imposed in EU antitrust cases are often formidable, and as parent and subsidiary often are considered to be financially unified (to a certain extent) in these cases, a parent and subsidiary have a lot to lose in being considered a "single economic entity".

3.1 The different fines that may be imposed, and their sizes.

In Council regulation no. 1/2003[4]art.23 and 24 certain limitations are set for the imposing of fines due to breaches of TFEU art. 101 and 102.[5].

These limitations are determined based on the annual turnover of the undertaking, the fine being limited to a certain percentage of this turnover. Put briefly the limitations are as follows:

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[4] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

[5] Consolidated version of The treaty on the functioning of the European Union, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0047:0199:en:PDF

A party which intentionally or negligently refuses a legal request for evidence, which supplies the Commission with incomplete, misleading or false information, or fails to rectify such errors within a given timeframe, may, according to Council Regulation (EC) No 1/2003, art. 23 (1)[6] be fined up to 1% of their annual turnover in the preceding year.

An undertaking which infringes art. 101 or 102 TFEU, or which contravenes a decision from the Commission regarding interim measures, may be fined up to 10% of its annual turnover.[7]

An undertaking may in certain cases be issued a periodic penalty payment of no more than 5% of its average daily turnover in order to compel an infringing party to cease the infringement, or in order to compel them to comply to a decision made by the Commission.[8]

3.2 Determining the magnitude of fines.

The Commission is in no way forced to give the maximum fine in every case. The maximum limit will nonetheless influence the size of the fine imposed, a high limit leading to higher fines. This is in connection to the fact that annual turnover serves to give an idea of how much capital the undertaking at hand actually has, and how large a fine needs to be to serve its purpose, i.e. to motivate the company never to infringe competition rules again. There would be little point in sanctioning anti-competitive behavior at all if the fines imposed were so small that they did not "hurt" for the undertakings they were imposed upon. At the same time the max-limit will serve to ensure that fines are not so large that they cause irreparable harm to the infringing party.

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[6] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty

[7] As above, paragraph 23 (2)

[8] As above, paragraph 24.

As pointed out by Mils, one of the main reasons for antitrust violations is the fact that such violations can be profitable.[9] At times hugely so. One of the main reasons for imposing fines for such violations is to make them unprofitable, thereby making them less attractive to undertakings to begin with.

When determining the amount of a fine the Commission will first seek to determine the value the infringement has had for the violator. The Commission will look to the sales that a violating company has had during the last full year of participating in the infringement. This value is dubbed the "value of sales"[10]. As one cannot assume that all sales made by an infringing party are due to the infringement, the value of sales will be multiplied with a percentage, no more than 30%.[11] The percentage that is used will reflect the severity of the violation. Once the value of sales has been multiplied with this percentage, it is multiplied with the amount of years the undertaking has participated in the infringement. The resulting amount will, as long as it does not exceed the 10% limit, be the fine to be imposed.

The Commission's margin of appreciation regarding the size of the fine is therefore limited to the setting of the percentage which the value of sales is to be multiplied with. In this area, however, they do have a wide margin of appreciation. Fines can vary in size from a symbolic fine of €1000 to the full 10% of the violator's annual turnover. As an example of how high the fines can get, in the Intel case[12] the fine was set at €1,06 billion, a sum which was estimated to only represent 4,15% of the company's annual turnover.[13]

In the commissions guidelines[14] there are several extenuating and aggravating circumstances to be taken into account when determining the size of fines to be imposed. As I have already pointed out, these fines can in no case exceed the maximum

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[9] Wils, Wouter P.J., Optimal Antitrust Fines: Theory and Practice, p.8.
[10] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 paragraph A 13
[11] As above, paragraph 21.
[12] Intel v Commission, Case T-286/09
[13]http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/09/235&format=HTML&aged=0&language=EN&guiLanguage=en
[14] Guidelines on the method of setting fines imposed pursuant to Article 15 (2) of Regulation No 17 and Article 65 (5) of the ECSC Treaty, (98/C 9/03)

amount as this is defined in council regulation 1/2003. This is not to say that the final size of the fine is a given, many factors will influence how large or small the fine actually is.

In the following I will attempt to give an account of most of the facts that weigh in favor or disfavor of a violating company.

3.2.1 Equality and proportionality

Before moving on to the specific extenuating or aggravating factors that might influence the level of a fine imposed, it is important to specify that these factors are meant to contribute to ensure equality and proportionality in the fines imposed. Companies are not to be arbitrarily punished with high fines; rather, the fines are meant to reflect the actual degree of culpa shown by the individual violator. As such, companies which have committed similar violations and which resemble one another in size and market power should receive similar fines. As stated in the Krupp Thyssen Stainless case[15] *"the Commission is not entitled to disregard the principle of equal treatment, a general principle of Community law which is infringed only where comparable situations are treated differently or different situations are treated in the same way, unless such difference of treatment is objectively justified."* That such a principle is found in antitrust law should come as no surprise. It harmonizes with the right to a fair trial in ECHR art. 6 that one can not be punished more strictly than another for the same violation, unless there are clear aggravating circumstances present which warrant the stricter punishment. A company may not be given a stricter fine based on matters such as those mentioned in ECHR protocol nr. 12, art. 1.

Not only are fines to be imposed in a fair manner, treating equal cases equally, but the fine imposed must be found to be proportionate to the breach of art.101 or 102 TFEU. As deterrence is in many ways the main motivation behind the issuing of antitrust fines, one might point out that this would most easily be done by setting very high fines. The principle of proportionality, used also in penal law, requires that a punishment be

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[15] Krupp Thyssen Stainless GmbH and Acciai speciali Terni SpA v Commission of the European Communities. Joined cases T-45/98 and T-47/98.

proportional to the violation it is based upon. In evaluating what is proportional the Commission must not only look to what the nature of the violation is, but also the circumstances surrounding it.[16] It is worth noting that the principal of proportionality, though commonly cited, is not an absolute. The Commission is not required to apply an absolute mathematical formula in order to arrive at a fine that is directly proportionate to the infringement. Rather the principal of proportionality requires that the fine not be directly disproportionate. In the Arkema case[17] the ECJ stated the following: "…*the General Court held that although the Commission is not required to apply a precise mathematical formula and has a margin of discretion when determining the amount of each fine, it was entitled to take into consideration the difference in economic capacity in applying a multiplier… without infringing the principle of proportionality*". The following paragraphs will show which matters may be considered relevant when the Commission determines the level of culpa a company has shown, and therefore what fine would be proportionate to the violation.

3.2.2 Gravity

In the 1998 guidelines for the method of setting of fines[18] (now replaced by the 2006 guidelines) two main issues were listed as influencing the size of the fine imposed: gravity and duration. As has already been mentioned the duration affects the fine in a very direct way in that a portion of the value of sales is multiplied with the amount of years the infringement lasted. As such, the question of duration is really little more than counting years.

Determining the gravity of an infringement is a much more complicated issue. The 1998 guidelines divided infringements into 3 groups: minor, serious and very serious. Although these guidelines have been replaced, this can be used to effectively show how serious the commission considers different forms of infringements to be. The list consists of :

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[16] Wils, Wouter P.J., Optimal Antitrust Fines: Theory and Practice, p. 20

[17] Arkema SA v Commission, Case C‑520/09 P, paragraph 93.

[18] Guidelines on the method of setting fines imposed pursuant to Article 15 (2) of Regulation No 17 and Article 65 (5) of the ECSC Treaty, paragraphs 1 A and B.

Minor infringements: Trade restrictions with a limited market impact, affecting only a relatively limited part of the European market.

Serious infringements: Typically as above, but with a greater degree of market impact and affecting a larger part of the European market. Abuse of a dominant position.

Very serious infringements: "…horizontal restrictions such as price cartels and market-sharing quotas, or other practices which jeopardize the proper functioning of the single market"[19]. These may also include abuses of a dominant position by a company holding a virtual monopoly.

These three groups are not absolute, and more than anything serve to show what the commission considers to be the most harmful behavior. It can easily be noticed that the size of the infringing companies is one of the main criteria in determining the gravity of an infringement, and this will be treated further in paragraph 3.1.3.

In addition to the nature of the infringement, the actual damage done to the market will be of importance (although almost impossible to determine), as will the amount of goods sold because of the infringement, and the value of these.[20] This is tied closely to the idea that fines imposed should have a deterrent effect, which they will only have as long as the amount of the fine is higher than the amount won by the infringing party.

3.2.3 Company size and parental liability

The question of parental liability according to EU antitrust law is one with far-reaching consequences. This is for three main reasons: Firstly, a parent undertaking found to be liable for its subsidiary's infringement may be held jointly and severally responsible for fines imposed to the subsidiary. Secondly, as the limitations to fines are based upon the annual turnover of the infringing undertaking, where parent and subsidiary are found to belong to the same economic entity, their annual turnovers will be added together, thereby raising the maximum limit of the fine imposed. Thirdly, the commission is

[19] Guidelines on the method of setting fines imposed pursuant to Article 15 (2) of Regulation No 17 and Article 65 (5) of the ECSC Treaty, paragraph 1A
[20] Kerse/Kahn p. 388

prone to give higher fines to larger companies[21]. The last of these will be discussed in this paragraph, while the first two will be treated in chapter 4 on parental liability.

Some of the main purposes of the fines being higher for larger companies are, firstly, that large companies with a great financial capacity to harm their competitors and the market in general should be punished severely to ensure that the fine has an adequately deterrent effect. Furthermore, larger companies usually have sufficient knowledge and competence to be able to see the effect of their own actions, and to be familiar with the relevant legislation regulating competition in the market. This larger amount of knowledge also results in a greater degree of culpa, as the one who knowingly violates should be fined more strictly than the one who ignorantly does the same. Principles such as these obviously go both ways, allowing for leniency towards smaller companies with little ability to damage the market, or who are unaware of the adverse results of their actions. The aim being to, as far is it is possible, apply a punishment that is proportional to the violation. The commission has in its newest guidelines, published in 2006[22], not mentioned this proportionality based on the size of the violating party. As these newer guidelines can be seen as an opportunity for the commission to "develop further and refine its policy on fines" one may assume that the aforementioned arguments are nonetheless relevant[23].

A last reason for giving higher fines to larger companies is that companies which control a large part of the market they operate in, more easily can hinder competition in that market. This is the case both when a single company seeks to hinder competitors from entering the market, and when a group of companies form a cartel to hinder competition in the market. It stands to reason that a smaller company or a group of companies that controlled little of the market would be less able to hinder competition, and as such that their infringements would be less worthy of punishment.

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[21] "Guidelines on the method of setting fines imposed pursuant to Article 15 (2) of Regulation No 17 and Article 65 (5) of the ECSC Treaty", paragraph 1A, seen in the context of "Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003" paragraphs 20 and 22.

[22] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003

[23] Montesa, p. 556.

One possible problem with focusing on the size is when a company is condemned and fined harshly on this ground alone. Although there must be proportionality in the fine imposed, there must also be equality, and if one gives harsher punishments to larger companies without there being other justification for the harsh punishment, it could be contrary to the principle of equality. This would be the case especially where a company is large but does not control a similarly large portion of the relevant market. As has already been mentioned, however, larger companies do often control large portions of the market, and are more able to avoid committing accidental infringements. As such, the commission should not have trouble proving that the infringing company did in fact cause a greater degree of harm than a smaller company would have, or that it was better equipped to avoid infringements.

3.2.4 Other aggravating circumstances

The Commission, in its 2006 guidelines[24], lists the following factors as aggravating circumstances, or factors which will result in a higher fine.

3.2.4.1 **Repetition**

Where an undertaking has repeated the same offence, this will call for a higher fine. The wording used in the guidelines require not only that the infringement should regard the same article of TFEU, but that the infringement be "the same or similar". When such repetitions take place, the basic amount of the fine
((value of sales) x (percentage no higher than 30%) x (years of infringement)) is increased by 100% for each repetition.

This is one of the few factors in the fine which seem to reflect only to a small degree the potential damage of the infringement. An infringement will not be more harmful to the market simply because the undertaking has been guilty of similar infringements before. The fact that this circumstance potentially leads to a 100%+ increase in the fine imposed, no small increase, shows how important the matter of determent is to the

[24] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (Text with EEA relevance), paragraph 28.

Commission. I note this as the increased fine for repetition must be seen as having as its primary purpose the deterring of undertakings from repeating their violations.

3.2.4.2 **Refusal to cooperate**

An undertaking refusing to assist the commission in its work is also an aggravating circumstance. Although it may seem natural to allow for stricter fines where an undertaking seeks to hinder the Commission, one might ask whether there are better ways to sanction this. As has been mentioned earlier a company may be fined up to 1% of their annual turnover for failing to supply the commission with correct information, or for knowingly giving them incorrect information. Should an undertaking be given a stricter fine for its infringement in addition to receiving a 1% fine (based on Council Regulation (EC) No 1/2003, art. 23 (1)) it might result in a breach of ECHR. In its protocol 7, article 7, the act of punishing anyone twice for the same crime is prohibited. The question is whether simply allowing the matter to affect the size of a fine constitutes a punishment? This question can also be asked regarding the matter of issuing stricter fines to repeat offenders, as this in reality represents a second punishment for the first offence.[25] This issue is far too wide to be treated fairly in this thesis. Consensus on the topic seems to be that allowing for stricter punishments in the future due to past infringements is not contrary to the right to be tried only once for a crime. While I am unsure of whether I agree with this conclusion, it applies easily to the topic of repeat offence.

When it comes to the issue of refusal to cooperate, it seems to me that the same arguments which allow for giving stricter punishments to repeat offenders do not necessarily apply there. These fines will be given more or less simultaneously and regard the same infringement, no newer infringement will have taken place. As such, there is a possibility that a stricter fine being imposed at the same time as a 1% fine is imposed may be contrary to Protocol 7 ECHR.

[25] See Carissa Byrne Hessick & F. Andrew Hessick, *DOUBLE JEOPARDY AS A LIMIT ON PUNISHMENT*, Cornell Law Review, Vol. 97, No. 3, 2012

3.2.4.3 **Leadership**

In cases where several undertakings have cooperated in infringing, typically cartel cases, the degree of participation may influence the level of the fine imposed. As such, an undertaking which either a) led or b) instigated the infringement is likely to be fined more heavily than a company which did little to participate. Also listed in the 2006 guidelines as more worthy of high fines are companies which seek to force other companies to cooperate illegally. The same goes for situations where a violating undertaking has sanctioned other undertakings in order to protect its own illegal behavior. This was shown in the Nintendo case[26], where the court stated the following: "*It follows, in particular, that the role of 'ringleader' played by one or more undertakings in a restrictive agreement must be taken into account in setting the fine, in so far as undertakings which have played such a role must for that reason bear a special responsibility by comparison with the other undertakings. The Commission argued that Nintendo supervised, implemented, and ensured compliance with, a number of measures designed to limit parallel trade. It must be held that the Commission did not err in considering… those facts".* Such cases of "mafia" behavior are clearly worthy of higher fines, and in my mind at a level much higher than the other aggravating circumstances. An offence is not more severe simply because one has offended before, and a refusal to cooperate will usually only lead to the commission having higher expenses in order to gather the necessary evidence (bad enough in itself, as the wasted resources will likely lead to other infringements not being detected). Where an undertaking actively punishes others in order to protect its own infringement, this threatens the entire purpose of antitrust law. As stated before, antitrust fines have as one their main purposes the removal of economic incentive of infringing, by punishing the infringer financially. Where threats of economic sanctions are used to make sure undertakings continue infringing, this may work on a "dollar to dollar" basis in nullifying the commissions efforts. For this reason it would be especially important for the commission to be strict when issuing fines to the undertaking which uses such methods to protect its own infringement. By compelling others to violate, an

[26] Nintendo Co., Ltd and Nintendo of Europe GmbH v Commission of the European Communities, Case T-13/03, paragraph 128.

undertaking also shows that it is well aware of its own unlawful behavior. This may also be a standalone reason for issuing higher fines, when compared to an undertaking that unwittingly infringed antitrust laws.

3.2.5 Mitigating circumstances

The mitigating circumstances mentioned in the 2006 guidelines are to a great extent simply opposites of the aggravating circumstances. The ones mentioned explicitly in the guidelines are as follows:

3.2.5.1 **Compliance**

Where an undertaking shows that it ceased its infringement as soon as the commission intervened, this will naturally lead to a lesser fine than had it continued its violation. This does not apply to secret agreements. [27] This criterion will especially serve the undertaking which was unaware of its own infringement, and which had no intention of infringing. As such it will quickly seek to ensure that its behavior is in accordance with law. This will in turn spare the Commission the extra work of forcing the undertaking to comply through other means.

3.2.5.2 **Limited involvement**

Where an undertaking has only been involved in an infringement to a small degree, this will allow for smaller fines. This is in accordance with the fact that undertakings with a leading role in the infringement are given stricter fines. The wording used in the guidelines points out that it is not simply "following orders" or being lucky enough not to have a leading role that allows for the lesser fines, but rather when an undertaking has "*avoided applying* [the offending agreement] *by adopting competitive conduct in the market*"[28]. In other words the undertaking must have shown through its actions that it wished to infringe to a lesser degree than its co-conspirators. This can also be shown through the undertaking failing to meet with other undertakings participating in the

[27] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, paragraph 29.
[28] As above.

infringement. The violating party in the case of Denka Chemicals v Commission claimed that it had showed that it distanced itself from a cartel by only going to a portion of meetings held by the cartel. Neither the Commission nor the General Court supported this claim. The court stated that "*the applicants none the less gave the impression to their competitors that they were taking part in the cartel and, therefore, contributed to encouraging it. In addition, none of the participants in the cartel in question stated that the applicants had adopted a 'low profile' during the infringement. For those reasons, it cannot be considered that their role was exclusively passive."*[29] The guidelines also allow for lesser fines where the undertaking was negligent of its own infringement. It can be assumed that these two situations often will coincide, as the negligent undertaking hopefully, once it has been made aware of its infringement, will seek to rectify its situation.

At the same time Jones/Sufrin point out[30] that the fact that an undertaking had a compliance program in place will not count as a mitigating factor. As quoted from the PO Video Games case, "*the Commission does indeed welcome all steps taken by undertakings to raise awareness amongst their employees of existing competition rules, these initiatives cannot relieve the Commission of its duty to penalize their very serious infringement of competition rules*"[31]. One must be able to expect from an undertaking that it not only expresses its desires to its employees through such programs, but that it also actually monitors and controls the professional conduct of its employees. Simply having a program in place would be an "easy out" for undertakings, if it did not require any further action from the management to ensure that the program was actually followed by the employees.

[29] Case T‑83/08, Denki Kagaku Kogyo Kabushiki Kaisha, established in Tokyo (Japan) and Denka Chemicals GmbH, established in Düsseldorf (Germany) v Commission, paragraph 255.
[30] Sufrin/Jones p. 1114-1115
[31] OJ L255/33, Commission decision regarding PO Video Games, PO Nintendo Distribution and Omega — Nintendo, paragraph 451.

3.2.5.3 **Cooperation with the Commission**

The leniency notice of 2006[32] opens for fines to be dropped entirely or to be considerably reduced in certain cartel cases where the infringing undertaking cooperates with the Commission. In cases that are not covered by the leniency notice, or where an undertaking gives further help than is required by the leniency notice or other EU law, this cooperation may warrant reductions of the fine imposed. As a complete lack of cooperation leads to higher fines, one must assume that doing only that which is required would lead to an unchanged fine. For cooperation to lead to reduced fines would therefore require not only cooperation, but cooperation beyond what the Commission can legally demand. As with other mitigating factors such cooperation will lead to a reduced work-load for the Commission, and an increased ability, therefore, to investigate and pursue other infringements. Encouraging such cooperation through reduced fines is therefore likely to be beneficial for both infringing parties and the commission. [33]

3.2.5.4 **Encouragement from public authorities**

Fines can also be reduced where a public authority or legislation has either authorized or encouraged behavior that is contrary to art. 101 or102 TFEU. This defense has been attempted, but without much luck. In the Ziegler SA v Commission case it was argued that since the Commission had not acted against an infringement at an earlier time, it had given consent to the behavior. The court disagreed, stating that *"mere knowledge of anti-competitive conduct does not imply that that conduct was implicitly 'authorised or encouraged' by the Commission."*[34]

Cases where a public authority has more clearly given instructions (or where instructions have really been given at all), relating to the 2006 guidelines do not exist.[35] The question of to what degree a fine can be reduced based on this defense is therefore somewhat unclear. One could argue that an undertaking which was instructed by national or EU authorities to infringe against competition rules really has not behaved in

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[32] Commission Notice on Immunity from fines and reduction of fines in cartel case, OJ C 298, 8.12.2006, p. 17–22.

[33] Kerse/Khan p. 410

[34] In Case T‑199/08, Ziegler SA v. Commission, paragraph 157

[35] Some cases are mentioned, however, in Kerse/Khan p.414

a way worthy of sanction at all. Seeing as the guidelines do not allow for the fine being dropped in its entirety one must assume that the undertaking will be held responsible for its actions despite being authorized to infringe. Should the undertaking hold that it had not behaved in a way that warranted sanctioning, it would have to demand retribution from the authority which gave the misleading authorization.

3.2.6 The Commission's margin of appreciation.

Despite the Guidelines of 2006 giving a fairly comprehensive list of aggravating and mitigating circumstances, the Commission is not bound by these when it decides upon the size of a fine to be imposed. This is also reflected in the wording of the guidelines, especially under paragraphs 30 and 31. These state two of the main purposes of antitrust fines, namely deterrence and ensuring that the violating undertaking does not profit from its infringement. Especially paragraph 30 is strong in its use of words when it states that "the Commission will pay particular attention to" the need to ensure a deterrent effect. As such it is more important for the fine given to have the desired effect than it is for the Commission to follow the guidelines statements on mitigating and aggravating circumstances. It is also worth noting that the list of aggravating and mitigating circumstances in the guidelines is not absolute, and other factors may also influence the final size of the fine imposed. However, due to the principle of equality, one may assume that the Commission could not rightfully ignore one of the mitigating circumstances listed.

The guidelines afford the Commission a considerable margin of appreciation, but not one that is without review from the courts. As stated in the KME Germany case[36]: "*whilst… the Commission has a margin of discretion with regard to economic matters, that does not mean that the Courts of the European Union must refrain from reviewing the Commission's interpretation of information of an economic nature. Not only must those Courts establish… whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account*". This solution ensures the Commission the freedom to customize

[36] KME Germany AG, KME France SAS and KME Italy SpA v Commission, Case C‑389/10 P, paragraph 121

fines to a given situation, and hinders them from setting fines arbitrarily. The fact that the court may fully review economic sides of the case also serves to protect undertakings receiving a fine, a protection needed to ensure a fair trial. As the Commission in many ways figures as "both judge and jury" when setting fines, it is entirely necessary that their decisions can be tried by a court to ensure a fair "trial" for the undertakings receiving the fine. Although one could argue that communication between an undertaking and the Commission is not a "trial", the fact that a fine is imposed and that this fine is often considered to be a form of punishment, speaks for allowing the violating party some of the same rights as would be afforded in a court.

4 Parental liability in European antitrust

4.1 Introduction

Defining economic units is not only relevant when imposing fines for violations of antitrust law, but also in other competition law cases. When determining whether two undertakings should be allowed to merge, it will be relevant to determine how large an economic entity each of the two undertakings actually belongs to, thus being able to determine how large a portion of the market is controlled by said entities. A merger will be prevented where a parent company with only a small market share owns several subsidiaries, all with similarly small market shares, if the total market share of these is sufficiently large. The doctrine of the single economic entity will demand that the market shares of these companies must be seen as one.[37]

The doctrine of the single economic entity will also be relevant when determining whether or not an undertaking has violated TFEU Art. 101, as there can be no illegal cooperation between companies[38] when these companies are found to be part of the same economic entity.[39] As stated by the Commission in the IJsselcentrale case[40]: "*It is true that article 85 is not concerned with agreements between undertakings belonging to the same group of companies, and having the status of parent company and*

[37] Montesa/Givaja p.564.
[38] Jones, p.137
[39] Kolstad p. 24
[40] Commission decision of 16 January 1991, IV32.732, *IJsselcentrale and others*, paragraph 23. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1991:028:0032:0046:EN:PDF last visited 23.04.12

subsidiary, if the undertakings form an economic unit within which the subsidiary has no real freedom to determine its course of action on the market…"

For these and for other reasons the question of when to consider several companies to belong to the same economic entity will often be key. It is also one of the matters often contended in European competition law, which is no surprise when one considers how it affects the size of fines imposed.

4.2 To what degree is a parent company responsible for its subsidiaries antitrust violations?

Case-law and legislation in most western countries state that only the legal entity who has committed a violation should be held liable for that violation. It is also contrary to the criminal justice system, with a few exceptions, to hold someone other than the violator responsible for a crime. Each individual is only responsible for his own behavior. Still, even in regular penal law we find situations where the question is regarded slightly differently. Where crimes are committed under duress we are willing, to a certain extent, to pardon the one who committed the crime, and rather point the finger at the one responsible, the one who pressured the perpetrator. In certain cases parents are also held liable for their children's behavior. Although there are many differences between the single unit in antitrust, and the coercion of criminal law, the principal behind this idea can be applied in competition law. Where one company determines the behavior of another on the market, fines should be directed not only at the violating company, but also at the parent company which allowed or even decided upon the unlawful behavior. [41] As such, the case law of the EU when it comes to antitrust has built up a doctrine which seeks to identify the source of antitrust violations, and place liability with the violator. By defining groups of companies as "single economic entities", the Commission shows the real structure of deciding power within these company-groups, not just the legal structure.

[41] Kerse/Khan, p. 363-364

4.3 What is the single economic entity?

The practice of considering two (or more) legal entities as a single economic entity within European competition law is old, though not undisputed. As early as in the Europemballage and Continental Can v Commission case in 1973 it was stated that "…*the circumstance that this subsidiary company has its own legal personality does not suffice to exclude the possibility that its conduct might be attributed to the parent company. This is true in those cases particularly where the subsidiary company does not determine its market behaviour autonomously but in essentials follows directives of the parent company*."[42] When this doctrine was first developed is for this discussion irrelevant, what is relevant is that the doctrine has continued to be applied by the Commission, and accepted by the European Court of Justice. Since the first times it was applied it has, however, changed considerably. Whether this has been for the better or worse, I will leave for later. I will in the following give a short description of the doctrine of the single economic entity, and then describe how case-law has redefined said doctrine through the last few years.

The doctrine of the single economic entity aims to identify the true nature of an undertaking operating in its market. In most cases one would assume that an economic entity is no bigger than the one legal entity of which it is formed. This is the case in most areas of law. Still, with the complex structures of today's undertakings, often consisting of large company-constellations, it can become increasingly difficult to direct a sanction at the correct legal entity. The term "undertaking" is key in understanding where the single economic entity fits in t EU antitrust law, as the undertaking is something different than a company or a legal entity.[43] In fact, in certain ways the single economic entity is synonymous with the "undertaking" of art. 101 and 102 TFEU,[44] the doctrine of the single economic entity is simply a way of describing what the Commission understands an undertaking to be.

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[42] Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communiti, Case 6-72, paragraph 15.
[43] Kerse/ Kahn p. 362.
[44] Kerse/ Kahn p. 363.

There are mainly two ways in which two or more undertakings can be found to belong to the same economic entity. First, when a parent company owns all (or a sufficient majority of) the shares in its subsidiary. Second, when an overall view of the relationship between the two companies suggests that the parent company is able to control the subsidiary. This second alternative has often been applied, even when the parent company owns a sufficient amount to allow the Commission to use the first alternative.[45] One can assume that this is to hinder the parent company from countering the claim that the two companies form a single economic entity, as the presumption applied where a parent owns most or all of its subsidiary is harder to rebut (see paragraph 4.4).

The doctrine of the single economic entity should not be understood to mean that the companies involved are to be treated as one in all matters. The concept of the single entity stretches no further than the competition rules from which it has sprung. It is to be understood as an expression of a parents capability of determining its subsidiaries behavior in the given market (whether or not it chooses to determine that behavior), and the responsibility that follows this capability.

4.4 The evolution of the single economic entity doctrine

As mentioned earlier the doctrine of the single economic entity is old and well established. The earliest mention of it I can find in European case-law (more specifically the case-law of the ECSC treaty) is an opinion from the case Musegatt v Haute autorite[46], where the author of the opinion quotes Mestmäcker: "*The freedom of enterprise of the servient company is reduced to nothing by the "unified control" of the group and by the incorporation of the subsidiary into the economic scheme of the parent company. Affiliation to the group deprives the subsidiary company of the ability to act according to an economic scheme of its own. The "given conditions" of such a subsidiary's operation are prescribed not by the market but by the instructions of the principal company."* In this case the relationship between parent and subsidiary was used to show that a cartel could not be formed between parent and subsidiary, as they must be considered to be governed by the same leading group.

[45] Montesa/Givaja, p. 563-565
[46] Mausegatt v Haute autorité, Case C-13/60, opinion of Mr Advocate-General Roemer, p. 135-136.

By 1972 this idea had developed to not only allow cooperation between parent and subsidiary in cartel situations, but also to allow for parents to be held liable for their subsidiaries' violation. The court of justice stated in Imperial Chemical Industries v Commission[47] that "*By making use of its power to control its subsidiaries established in the Community, the applicant was able to ensure that its decision was implemented on that market. The applicant objects that this conduct is to be imputed to its subsidiaries and not to itself. The fact that a subsidiary has separate legal personality is not sufficient to exclude the possibility of imputing its conduct to the parent company. Such may be the case in particular where the subsidiary, although having separate legal personality, does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company*." At this point the court had already established that liability for a violation of the competition rules should go to the company which made the decision to violate. The requirement for such liability is that the subsidiary must carry out, in all material aspects, the instructions given to it by the parent company. Exactly how this is to be understood is not made clear in this judgment, but one could presume that the court requires the parent, to be held liable, to completely control its subsidiaries behaviour in the market. As such, for the Commission to be able to hold a parent company liable, it would first have to prove that the parent actually determines, in all material aspects, the behavior of the subsidiary.

The ideas presented in this judgement would lay the foundation for the future doctrine of the single economic entity, but no more than that.

Early on in the case law of European Antitrust the Commission presented an idea slightly different from the one presented in Imperial Chemicals.
Stora Kopparberg v Commission[48] removed some of the demands placed on the Commission. The court stated that it was no longer necessary in all cases to prove that the subsidiary carried out the instructions given to it by the parent company. It

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[47] Judgment of the Court of 14 July 1972, Imperial Chemical Industries Ltd. v Commission of the European Communities, Case 48-69, paragraphs 130-133
[48] Stora Kopparbergs Bergslags AB v Commission of the European Communities. Case C-286/98 P, p.28

determined that an undertaking which fully owned another undertaking and which was in a position to could be presumed to exert decisive influence on the subsidiary, especially when the parent company "presented itself… as sole interlocutor"[49]. Finally the court pointed out that the parent company had done nothing to disprove this presumption. This became one of the first judgments that shifted the burden of proving that a subsidiary was in all reality governed by its parent company, from the Commission and to the parent company. It was also a first step in allowing the Commission to base its decision solely on the fact that the parent owns all shares in the subsidiary.

The Stora Kopparberg case still caused confusion in that it doesn't really identify what evidence the Commission needs to provide to reach the same conclusion in future cases. The court said the following: "*the Court of First Instance did not hold that a 100 per cent shareholding in itself sufficed for a finding that the parent company was responsible. It also relied on the fact that the appellant had not disputed that it was in a position to exert a decisive influence on its subsidiary's commercial policy, or produced evidence to support its claim that the subsidiary was autonomous*". The court here shows that the parent company did own 100% of its subsidiary, but does not clearly state whether that would be sufficient in all cases to prove decisive influence. It simply points out that the court of first instance chose to rely on other facts. Whether the Commission needed to provide these other facts or not is not entirely clear.

The court further developed this idea in Michelin v Commission[50] where it held that when a parent company owns more than 99% of a subsidiary "*There are… reasonable grounds for concluding that those subsidiaries do not determine independently their own conduct on the market*" and that " *Community competition law recognizes that different companies belonging to the same group form an economic unit and therefore an undertaking within the meaning of Articles 81 EC and 82 EC if the companies concerned do not determine independently their own conduct on the market"*. In other words, the court considers that a parent company owning its entire subsidiary is

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[49] Stora Kopparbergs Bergslags AB v Commission of the European Communities. Case C-286/98 P, paragraph 29
[50] Case T‑203/01 Michelin v Commission [2003] ECR II‑4071, paragraph 290

reasonable grounds for concluding that the two companies form a single economic unit within the meaning of EU competition rules. The court also points out that the parent may be held liable for the subsidiary's violation. By stating that the companies form an economic unit within the meaning of articles 81 EC and 82 EC (101 and 102 TFEU) the court also allows for the companies to be considered as such when setting the maximum amount of fines.[51]

What was described as giving "reasonable grounds for concluding" in Michelin v. Commission, was later described as being the source of a presumption in Akzo Nobel v Commission. The applicant in this case held that the parent company owning 100% of its subsidiary was not sufficient to prove that the parent exercised decisive influence over its subsidiary. The court did not agree, and answered as follows:
That being so, it is sufficient for the Commission to show that the entire capital of a subsidiary is held by the parent company in order to conclude that the parent company exercises decisive influence over its commercial policy. The Commission will then be able to hold the parent company jointly and severally liable for payment of the fine imposed on the subsidiary, unless the parent company proves that the subsidiary does not, in essence, comply with the instructions which it issues and, as a consequence, acts autonomously on the market.[52]

There are several noteworthy developments in the Akzo Nobel case. Firstly, the court states that there is a presumption that when a parent company owns 100% of its subsidiary, it must be presumed that the parent also exercises decisive influence over it ("the 100% presumption"). In other words, it was no longer necessary to prove actual influence in the individual case as long as the parent company was the sole owner of the subsidiary. Allthough this may seem a small difference from the Michelin case, the wording is far more precise in Akzo Nobel. It also serves to completely dispel the notion that supplementary evidence need be presented when a parent company owns it subsidiary fully. Akzo Nobel also points out the form of liability to be placed on the parent company. Liability is not shifted from the subsidiary to the parent, rather they are held jointly and severally liable.

[51] Montesa/Givaja, p.556
[52] Akzo Nobel v. Commission, Case T-112/05 paragraph 62.

In its ruling in the Akzo Nobel[53] case the court also held that the parent company had not presented sufficient evidence to prove that the subsidiary acted independently of it. It had not been able to prove that it was not in a position to govern its subsidiary either. The fact that such a lack in the defense led to an automatic assumption that the two companies should be seen as one, points to the fact that the burden of proof has been shifted.

It is the Commission's responsibility to prove that a mother company is able to, and has, exerted decisive influence over its subsidiary. Nonetheless, when a parent company is the sole owner of its subsidiary, this requirement is found to be met. As such, it rests on the parent company to rebut the presumption that it controls its subsidiary (the actual requirements of the rebuttal have evolved over the last year or so. For more information on this see paragraph 4.5)

Whether one states that the burden of proof has been flipped in these cases, or whether it has been met by the Commission will be an important distinction in these cases. In respect to determining what is required of the parent company, however, it is irrelevant. As long as the parent company is the sole owner, and the Commission rests its arguments on this, the responsibility to prove that a parent and subsidiary do not form a single economic entity rests on the parent company. As this will be the case irrelevant of the answer to the question above, I will not treat it further.

Not only does the 100% presumption hold that a parent company has the ability to exert decisive influence over its subsidiary, but that it has in fact done so (or should have done so) in the case being argued. This was further emphasized in General Quimica v. Commission[54]. This assumption only applies where the Commission has chosen to use the 100% presumption. Where the presumption has not been applied by the Commission, it will not be sufficient for them to prove that the parent *could have*

[53] General Química and Others v Commission, C-90/09 P, paragraph 85
[54] General Química and Others v Commission, C-90/09 P, paragraph 39

exercised decisive influence, they must also prove that they have done so in the given case.[55]

In certain newer cases the 100% presumption has been expanded to also include situations where the mother company owns less then 100% of its subsidiary. This is evident in, for example, the Elf Aquitaine case[56]. Here, the assumption of decisive influence was applied even though the parent company owned only 98% of its subsidiary. This decision was appealed, but as the applicant decided to argue that the 100% assumption in itself was unlawful, the more specific question of whether the presumption could be applied in cases where the parent owned less than 100% of its subsidiary was never answered, only mentioned briefly.[57] The appeal did make it clear however, that the Court of First Instance, when holding that the arguments presented by the applicant were insufficient to rebut the 100% presumption, was obligated to explain why the evidence was insufficient. [58]

In the Avebe case[59] it was found that to presume decisive influence, 50%ownership could be sufficient in certain cases. In the aforementioned case Avebe was one of 2 owners who each held 50% ownership in the violating subsidiary. The courts decision to expand the 100% presumption in this case was based on several facts. Firstly, the fact that the subsidiary was a special kind of company called a "Venootschap onder firma", or VOF, a Dutch and Belgian form of company. Such companies are "*purely contractual* [entities] *without seperate legal personality from its partners… each partner holding 50% of that entity*."[60] Each of the two companies had two representatives who cooperated to manage the subsidiary, and were entitled to make binding agreements on behalf of the company. Due to national legislation surrounding this particular type of company, the parent companies were also held responsible for the subsidiaries policy at a national level. Furthermore the parent companies were nationally held responsible for all the subsidiaries obligations. These facts combined

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[55] See Jones etc. p.139
[56] Elf Aquitaine v Commission case T-174/05, p.87
[57] Arkema v Commission,Case C-521/09 P paragraph 63
[58] As above, paragraph 167
[59] Avebe v Commission, Case T-314/01
[60] As above, paragraph 137.

made it possible for the parent companies to exert decisive influence, and spoke to the fact that they did exert such influence. I nonetheless find it interesting that the Commission chose to apply the 100% presumption in this case, when they found it necessary to mention all of these other facts to convince the court that the presumption indeed could be applied. When all that is required to hold the parent company liable is to prove that parent and subsidiary belong to the same economic entity, would it not be equally possible for the Commission to prove this without applying the 100% presumption? One possible answer to this question may be the fact that the presumption allows the Commission to refrain from proving that the parent exerted influence in the given case. By choosing to base its case on the 100% presumption, the Commission effectively lowers the standard of proof for itself. Kerse/Kahn[61] point out that the Commission had applied the doctrine of the single entity in cases where a parent owned much less than 100% of its subsidiary long before the Avebe case. As early as in the Commercial solvents case of 1974[62] the Commission considered two companies to belong to the same entity when the parent owned only 51% of the subsidiary. The decision was, however not based on the 100% presumption, but on a number of factors which suggested that the parent company exerted influence over its subsidiary.

The Arkema v Commision[63] case follows the same line of thinking. In it the court states that a parent company to successfully rebut the 100% presumption must provide "sufficient evidence to show that its subsidiary acts independently on the market". This can be seen as a reiteration of the original "in all material aspects" criterion used in the Imperial Chemical case[64]. Imperial states that the Commission is required to prove that a parent determines all its subsidiaries behavior to prove that they belong to the same economic unit. It would naturally only be necessary for the parent to prove that it does not control a certain area, in order to rebut a presumption that they are in fact two parts of the same economic unit. Although this assumption would make sense, newer case-law shows that it is incorrect.

[61] Kerse/Kahn p.368.
[62] Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission of the European Communities. Joined cases 6 and 7/73.
[63] Arkema SA v. European Commission, case C‑520/09 P, paragraph 40.
[64] Judgment of the Court of 14 July 1972, Imperial Chemical Industries Ltd. v Commission of the European Communities, Case 48-69, paragraph 133

As is shown above, the doctrine of the single economic entity has become more and more important in the evaluation of whether a parent should be held liable for its subsidiaries violation. Whereas early case law primarily asked the question "did the parent company decide, in the given case, the behavior of the subsidiary?", newer case law focuses instead on the question "do parent and subsidiary belong to the same economic entity?" In addition to shifting the focus of what question needs to be answered, the development of the 100%presumption following the Stora Kopparberg case, has simplified the task of the Commission, and made it increasingly difficult for a parent company to defend itself.

The 100% presumption itself can be positive, in giving the Commission the possibility to hold the right company liable in a situation where it is often difficult to provide the necessary evidence. Had the job of the Commission been too difficult, it would be easy for large companies to simply hide behind their smaller subsidiaries, thereby effectively dodging fines. Still, newer case law shows that the Commission might be using the presumption as a tool to avoid proving a parent companies decisive influence, even where the parent company does not entirely own the subsidiary, or even a majority in it. This can of course be seen as a tool as mentioned above to ensure the protection of competition, especially through making certain that fines are of the right size and directed at the correct target company.[65] At the same time one must ask how far the 100% presumption can be taken without the negative impact this has on the accused outweighing the benefit it represents to the Commission.

As the newest case law concerning the single economic entity also treats to a large extent the question of rebutting the 100% presumption, I will treat them both together.

4.5 To what extent can the 100% presumption be rebutted?

Where the 100% presumption is applied by the Commission, it is often mentioned that this is a rebuttable presumption. Exactly what the standard of proof for such a rebuttal is, has not been clearly defined in case law as of yet.[66] Even if the answer had been

[65] Bourke, p.5
[66] Montesa/Givaja, p. 566

clearly stated at an earlier time, it is quite possible that that answer would have changed by now. Even the matter of what is to be rebutted has changed over the last few years. Whereas the parent company previously needed to rebut a presumption that it has exerted decisive influence over its subsidiary, newer case law asks instead for proof that parent and subsidiary do not in fact belong to the same single economic entity. By proving the latter, a company will have shown that it can in no case be held liable for the other company's behavior. Case law in this area shows that companies can only be held liable for the violations of other companies where the two belong to the same economic entity. Proving the former, that the parent has not exercised decisive influence, does not necessarily free the parent from liability. As long as the parent and subsidiary belong to the same entity, a parent will usually have had the chance to direct its subsidiary's behavior. If it has chosen not to do so, resulting in a violation of competition rules, this does not necessarily speak for freeing them from liability.[67] Where a company has been in a position to prevent a violation, one should expect them to do so. Once again, had the contrary been the case, this could easily be seen as an incentive to let subsidiaries with little turnover take care of violations, thereby minimizing fines.

One problem for a parent company can arise when it tries to hinder its subsidiary's violation. Should the violation still occur, the fact that the parent was unable to prevent this will not lead to the parent being held any less liable.[68] The parent could, of course, argue that it has proved that it does not exert decisive influence as it could not stop its subsidiary from violating competition rules. The Commission would, however, just as easily be able to point out that the parent, since it issued orders to the subsidiary, must have at some point assumed that it *could* exert such influence. In any case the parent will only be able to prove that it did not influence in this case, while case law shows that what really must be disproved is the notion that parent and subsidiary belong to the same economic entity.

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[67] This idea is mentioned briefly in Jones etc. p.139
[68] Bottemann/Atlee, subheading 3 "Irrebuttable presumption?"

In the Avebe case[69] the courts uses the expression "adducing evidence to establish that its subsidiary was independent". This does not clearly define what kind of independence is required, and in that way can be understood to apply both to evidence concerning a single entity, or to evidence concerning decisive influence in the given case.

The Azko Nobel case[70] was much more specific, making it clear what is required in order to rebut the 100% presumption. The court stated the following: "*it is for the parent company to put before the Court any evidence relating to the economic and legal organizational links between its subsidiary and itself which in its view are apt to demonstrate that they do not constitute a single economic entity.*" To rebut the 100% presumption, one need prove that parent and subsidiary do not form a single economic entity.[71]

This was also shown in the Dow Chemical v Commission case[72]. Here the parent company could to a large extent prove that it had not exerted decisive influence over its subsidiary. This was first and foremost proven in the fact that the parent company was not aware of the violation. The violation had not been planned by the parent company, nor had the subsidiary's upper management. Rather a middle-management leader in the subsidiary, who controlled only a small part of the company's actual behavior in the market, had been responsible for the violation. As this was the case, the parent company was not able to acquire information sufficient to stop the violation from happening. The court found that this was of no consequence, and emphasized that the presumption the parent company needed to rebut was the presumption that the parent and subsidiary belonged to the same economic entity, not that the parent had exercised influence in the given case.

As the matter of ownership often is a given in the relevant competition law cases, one can ask: "What is sufficient to disprove the 100% presumption?" As has been proved

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[69] Avebe v Commission case T-314/01, paragraph 136
[70] General Química and Others v Commission, case C-90/09 P, paragraph 67
[71] Herbertsmith.com, see reference table.
[72] Case T‑42/07, The Dow Chemical Company etc. v European Commission, paragraph 63

from the Dow Chemical case, it is not sufficient to prove that the parent could not exert influence. As this seems to be exactly what one needed to prove according to the Stora Kopparberg case, it seems there has been an evolution of the 100% presumption that results in a new requirement for rebutting it.

It has not clearly been defined by the courts how one can effectively rebut the 100% presumption. All that has been stated time and again is that the presumption *can* be rebutted. A few possible ways to successfully rebut the presumption would be to show that: a) the parent does not in fact own a large enough share of the subsidiary to in any case exert decisive influence over it. b) That decisive influence can in no situation be exerted as the parent owns preferred shares in the subsidiary (in opposition to common shares) or c) a shareholders agreement prevents the parent company from freely deciding over its subsidiary's market behavior. In any of these cases the presumed result would be that despite one company owning shares in the other, they do not in fact belong to the same economic entity. These three suggestions are not given by the courts, and as such can in no wise be guaranteed to be effective in rebutting. They should, however be effective in addressing the issue at hand, namely, proving that the two companies are not part of the same entity even when one owns a considerable part of the other.

As one of the key components of the single economic entity is ownership, one could ask whether it really is possible to rebut a presumption based on 100% ownership. As far as I have seen it has not successfully been done, nor do I see how it possibly could be done. As long as a company owns 100% percent of its subsidiary, it would necessarily control that company, and as such belong to the same economic entity. Even if a written agreement between the two existed, stating that the parent were to exercise no influence on the subsidiary, it could effectively give itself permission to break that agreement.

The burden of proving that two companies do not belong to the same economic entity is considerable. It is made even harder by the fact that the expression "single economic entity" isn't clearly defined through any international treaty or other form of legislation. All that is clear is that it is not sufficient to prove a lack of decisive influence, nor is it sufficient to prove that the parent owns less than 100% (see the Elf Aquitaine and

Avebe cases.) What is required to actually rebut the presumption, therefore, remains unknown.[73]

4.6 A few key traits of the single economic entity.

As has already been shown the doctrine of the single economic entity has developed quite a bit since it was first applied in the early days of EU competition law. I will here try to sum up the doctrine as it exists today.

Firstly, the doctrine identifies the economic entity as one separate from a legal entity. This does not mean that the legal connections between two companies are irrelevant. Instead legal connections are on of many different ways in which a parent and subsidiary can be found to form an entity. Thus, if the two are not legally connected, there are still several other ways in which they can be found to be connected to such an extent that they form an economic entity.

As previously mentioned the single economic entity doctrine can be applied in several instances. Firstly it will lead to a sharing of liability between the relevant companies, as pointed out in the Akzo Nobel case "*the Commission will then be able to hold the parent company jointly and severally liable for payment of the fine imposed on the subsidiary"*[74]. As can be seen from this statement, the single economic entity doctrine is also unidirectional, meaning that liability is only transferred from the violator to a company controlling it. Liability will not be transferred from a violating parent to its innocent subsidiary. By holding the parent company liable for its subsidiary's violation one also hinders the parent from using the subsidiary to handle liability for violations intended to benefit the parent.

In addition, the link between the two will result in the tying together of their annual turnovers when the Commission sets fines for the subsidiary, as has already been shown in paragraph 4.3. To add to what has already been discussed one can note that the

[73] Montesa/Givaja, p.566-572. The authors suggest several possible solutions to this problem, though it is uncertain whether any of these suggestions could actually be applied successfully.
[74] Akzo Nobel vs. Commission, Case T-112/05, paragraph 62.

Commission has been cautious in the past when setting such combined fines, and has at times limited the amount each company is held liable for. This has been done in a way that leaves each company liable only for an amount that reflects the portion of the infringement which it was personally responsible for. By doing so the principle of proportionality is better preserved, ensuring that the decision will not be overturned on this basis. [75] I doubt that dividing up the liability for a fine in this way is truly necessary, and it does, in some ways, break with the idea of a single economic entity. After all, if the two companies are to be considered as one, they should also be fined as one. By dividing the liability for the fine the court shows that it considers the companies to be separate entities. Despite this, should such a practice turn out to be an error, it would be an error on the side of caution.

Finally, the two being linked together has a similar effect as a agency agreement, resulting in the two being allowed to cooperate to a far greater extent then otherwise without this being illegal cooperation.[76] Where companies are normally hindered from cooperating when they both operate in the same market, agency agreements do not trigger the ban against such cooperation in art. 101 TFEU. As agency agreements allow the companies to be considered as one in such cases, so companies belonging to the same economic entity may cooperate without this being contrary to the rules in art. 101. To what extent a company can claim the 100% assumption, especially in cases where the parent does not in fact own 100%, I am unsure. One must assume that just as the Commission has chosen to rely on a group of facts in such cases, a parent would have to show more evidence than just ownership. Knowing that most parent companies do in fact instruct their subsidiaries, gathering such evidence should not be a problem.

In considering whether two companies belong to the same economic entity, the following factors will be of interest.

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[75] Kerse/Kahn p. 369.
[76] Jones, p. 139

4.6.1 Ownership

This first factor is a natural consequence of what has already been mentioned concerning the 100% presumption. Where a company owns all of or large parts of another company, they can often be presumed to belong to the same economic entity. This follows from the idea that a company which owns another will use its control of its subsidiary to steer it in the direction that is most lucrative for the two companies seen as one. In other words, the two companies are working for the interests of the same individuals, and can therefore, and often do, act on the market as a single larger entity. Several cases already mentioned also show a parent owning less than 100% of its subsidiary can be considered to belong to the same economic entity as it where a) the Commission applies the 100% presumption or b) the ownership combined with other pieces of evidence show that the two companies behave as one in the market. The smaller the fraction owned by the parent company of the subsidiary, the easier it would be to prove that the two are not part of the same economic entity. One may assume that the same applies to rebutting the 100% presumption, although there is little case-law to base such an assumption on.

As mentioned earlier, ownership will most likely only be relevant when it comes with actual power to instruct the subsidiary. [77]If a parent owns shares that do not give voting rights, they would likely have little bearing in the evaluation of whether the parent and subsidiary belong to the same economic entity.

4.6.2 Economic independence

The degree of economic independence between the two companies will be key when evaluating whether the two belong to the same economic entity[78]. See for example Beguelin Import v GL Import-Export[79]. This should come as no surprise as money often brings power. A company which is entirely financially dependent on another would most likely have to follow instructions from that other company when making decisions. This is not to say that a company which does not support another

[77] Bourke p. 7, referring to an opinion of the Advocate General in the Choline Chloride case.
[78] Jones etc. p.135.
[79] Case 22/71 Beguelin Import v GL Import-Export, paragraph. 8.

economically does not have any power over it, power can be derived from other factors. As such this criterion will only be effective when positive. In other words, a company that supports another financially will almost always belong to the same economic entity as it, while companies without such financial ties may also belong to the same economic entity.

4.6.3 The degree of instructions given

It will be of interest to note whether or not a parent has given instructions to its subsidiary, independent of whether the subsidiary follows these instructions. This is mainly because such instructions show to what extent the parent company considers itself entitled to instruct the subsidiary. Where it does not give instructions, chances are it does not consider itself entitled to give instructions. This will speak in favor of the two companies not belonging to the same economic entity.

4.6.4 Obedience to instructions.

The degree of obedience to instructions given by a parent company will also be of importance when evaluating whether two companies belong to the same economic entity. Similar to the last point, this gives an idea of how the subsidiary considers the connection between itself and the parent company. Where it follows instructions, it likely considers itself to be bound to do so. This in turn speaks in favor for the two companies belonging to the same economic entity. Of special importance will be instructions given concerning market behavior, as is shown in the ArcellorMittal case.[80]

4.7 The standard of proof where the 100% presumption is not utilized

As I have previously shown, companies which own 100% of their subsidiaries may be presumed to form a single economic entity (as this term is used in connection with Art 101 and 102 TFEU) with that subsidiary. What then of the situations where the parent

[80] Joined cases C‑201/09 P and C‑216/09 P, ArcellorMittal Luxembourg SA v Commission, paragraph 96

company is *not* the sole owner, and/or where the Commission chooses not to apply the 100% presumption?

To prove that a parent and subsidiary form a single economic entity one must not prove that the parent owns 100% of its subsidiary, rather, one must, prove that the parent can exert a decisive influence over its subsidiary, and that it has done so in the given case[81]. The term "decisive" influence, to be of worth must be defined further. In the Clearstream Banking vs. Commission case the court describes such influence as a situation where the subsidiary "*carried out, in all material aspects, the instructions given to it by the parent company*." This requirement is rather strict, making the task quite difficult for the Commission (or national competition authorities choosing to follow EU case-law) to prove such a connection. Not only is it required that the parent company is allowed to instruct its subsidiary, it is further required that the subsidiary actually follows these instructions. It is furthermore not sufficient for the subsidiary to follow the instructions given by the parent in matters regarding the relevant antitrust violation; the subsidiary must follow instructions given in "*all material aspects".* This resonates well with the idea of the single economic entity representing two or more companies acting in complete synchronization with one another. Case law shows that the Commission and ECJ have been somewhat more lenient in their interpretation of what constitutes a single economic entity, with the Advocate Generale stating that "*the decisive factor is whether the parent company, by reason of the intensity of its influence, can direct the conduct of its subsidiary to such an extent that the two must be regarded as one economic unit."* [82] As the requirements for applying the 100% doctrine when it comes to ownership are sinking, along with an increased use of supplemental evidence where it is applied, one may assume that the cases where the assumption is not applied will be fewer and fewer with time.

[81] Case T-301/04 Clearstream Banking AG e.a. v Commission, paragraph 198.
[82] Choline Chloride opinion, supra note 11, footnote 93, as quoted in Bourke p.7.

4.8 Can other companies than the parent be held liable in a "single economic entity" situation?

The idea of holding a parent company liable for its subsidiaries violation when the two belong to the same single economic entity need not only apply to these two companies. Especially when it comes to large multinational organizations, these often exist not as singular legal entities, but as large groups of companies tied together by a central parent company. Usually this parent company will provide strategy and instructions for the subsidiaries to a certain point.

At times, however, the structure of the organization may be slightly different, where several subsidiaries are owned by one central holding company. In this situation the parent company may hold little or no actual deciding authority, rather this authority is held by one or more of the subsidiaries. Would, in this situation, liability be held by the parent company, by the violating company alone, or by the sister company who decided upon the violation?

Since one purpose of identifying company groups as single economic entities is to place liability with the company that decided upon the violation, a sister company can be held liable where it instructed the violating company to violate. This was shown in the case of Luxembourg SA v Commission .[83] Here a subsidiary had taken over "*the commercial activities of the parent company,"* and was therefore held liable for its sister company's violation.

The fact that a sister company was found to belong to the same single economic entity as its parent company and the violating company will necessarily also affect the size of the fine imposed. In the Akzo Nobel case the court stated that the maximum fine must be set on "…*the basis of the total turnover of all the companies constituting the single economic entity acting as an undertaking for the purposes of Article 81 EC, since only the total turnover of the component companies can constitute an indication of the size*

[83] ArcelorMittal Luxembourg SA v Commission , joined cases C‑201/09 P and C‑216/09 P, paragraph 104.

and economic power of the undertaking in question…"[84] Exactly how widely one should interpret this is not clearly stated here, but must be based on the definition of what a single economic entity, as the phrase is used in connection with art.101 and 102 TFEU, is. Case law suggests that all companies belonging to the same economic entity will contribute to the "total annual turnover" used when defining the fine. Whether all companies will be held jointly and severally liable for the violation is much less certain. I would suggest that allowing all companies in a single economic entity to be held liable for the violation is overkill, resulting in a punishment of legal entities who had nothing to do with the violation, and who had no opportunity to prevent it. As such, liability should be held only by companies which: A) contributed directly in the violation. B) influenced subsidiaries/sister companies to violate. C) Were in a position that most often allows such influence, but chose not to use it, thus "allowing" a sister company or subsidiary to commit a violation.

By holding only companies in these groups liable, one ensures that fines are not given to companies who in no way can rectify their behavior, making the fine simply an expense, having no real punitive effect.

Seeing as the single economic entity as such is the "party" to which a fine is directed (being represented by one or more of the legal entities it consists of), it will be irrelevant whether or not certain companies within the entity operate solely outside of the EU. As long as one of the companies in the economic entity operate within the EU or EEC to an extent that satisfies the demands of art.101-103 TFEU, the economic entity as a whole will be considered to operate within that same market[85].

4.9 Some problems surrounding the use of the 100% presumption where the parent company does not own 100%.

The newest case law in EU antitrust law has given us a situation where the 100% presumption may be applied by the Commission where the parent company owns between 50% and 100% of its subsidiary. As I have already shown, this may be seen clearly in amongst others the Avebe case. This expansion of the 100% presumptions

[84] Akzo Nobel vs. Commission, Case T-112/05, paragraph 90.
[85] Jones etc. p.139

area of impact leads to an interesting dilemma. In the case of Baustahlgewebe v Commission[86] it is stated by the court that a company, to be able to exert decisive influence over another, must own a majority of the shares in that company.[87] If this really is the case, it may be possible that the 100% presumption can be applied in all cases where the parent owns more than 50% of its subsidiary. Knowing that, according to Baustahlgewebe, a parent company can never exert a decisive influence without owning 50%, one ends up in a situation where the 100% presumption potentially may be applied in all cases where there is any potential for the companies forming a single economic entity. If newer case law proves this to be the case, the burden of proof will in all reality have been shifted from the Commission to parent companies wishing to defend themselves. Knowing how hard it has been for parent companies to defend themselves against the 100% presumption, this could be problematic.

It is interesting, at the same time, to see that the 100% presumption has often been used in cases where it is backed up by other evidence. Although the presumption, from the name alone, requires no other evidence than proving a certain level of ownership on the parent company's part, the Commission has in many cases chosen to give further evidence. In the Avebe case, as mentioned before, the presumption was not applied relying only on the fact that the parent company owned 50% if its subsidiary, rather the Commission also emphasized what form of company structure had been applied, how the remaining shares in the subsidiary were distributed, and other matters.

Should the court in time find that similar additional evidence is required where the parent company owns less than 100% of its subsidiary, it appears that the 100% presumption has changed from being just that, and becoming more and more a "single economic entity presumption." In other words, the Commission may be required to put forth evidence that the parent had power to exert decisive influence over its subsidiary as the two belong to the same economic entity (or that it should have had such power, all things considered[88]). Once it has done so, it is presumed that such influence has in

[86] Case T-145-89 Baustahlgewebe GmbH v Commission (1995) ECR II-00987 paragraph 107
[87] Algaard, p.14
[88] Case T‑42/07, The Dow Chemical Company etc. v European Commission, paragraph. 63

fact been exerted in the case at hand. The smaller a piece of the subsidiary the parent owned, the harder the burden of proving that the two form such an entity would be.

Should this be the case, more evidence being required to apply the 100% presumption when the parent owns a lesser part of the subsidiary, it would serve to balance out the changes in the doctrine concerning the 100% presumption. The presumption being applied where less than 100% is owned, would then be counteracted by more evidence being required by the Commission.

The question of to what extent the single economic entity doctrine can be applied when there are more than one parent company's who own shares in a subsidiary is uncertain. As already shown in the Avebe case, two parent companies may both be held liable for the subsidiary's violation. At the same time, the Baustahlgewebe case provided that a parent to exert decisive influence, must own at least 50% of the subsidiary. As such, a subsidiary can only belong to the same single economic entity as no more than two parent companies, and then only when the parents each own 50% of the subsidiary. The fact that two parents each own this amount is, however, no guarantee that they each form a single economic entity with the subsidiary, far from it.

This in turn shows how important it can be to have a correct understanding of the term "single economic entity". It should not be seen as requiring a direct line of ownership, rather it serves to describe control between companies, and to what degree the companies have the same goals and motives on the market.

4.10 The 100% presumption in relation to Article 6 ECHR.

It has been argued in several cases, among them the Elf Aquitaine[89] case, that the 100% presumption, and really the doctrine of the single economic entity, violates ECHR art. 6. Several reasons for this are argued. Firstly that it breaks with the idea that both sanctioning and liability should be personal, and can not be attributed to others than the violator. Secondly that it is in breach with the presumption of innocence. For procedural

[89] Elf Aquitaine v Commission case C-521/09, paragraph 29.

reasons these questions are not fully treated in the aforementioned case. Yet, as was mentioned under subheading 5.2, no one has ever successfully rebutted the 100% presumption. This applies also to companies who have argued that the doctrine as a whole is contrary to the rights established in Article 6 ECHR.

In answering these concerns, the most natural solution seems to be pointing out that the single economic entity to a certain extent answers them all. As long as the two companies are considered to be one, only the violator is being held liable, or sanctioned. When it comes to the question of the 100% presumption being contrary to the presumption of innocence, it is necessary that the 100% presumption only presumes a decisive influence between companies, it does not presume guilt. The company being suspected of an infringement is presumed innocent until proven guilty; the 100% presumption serves only to define the company being investigated. As the parent company often is included in the proceedings against its subsidiary, it will be given opportunity to defend itself and its subsidiary against the complaints lodged against it. Even should the parent hypothetically not be listed as a party in the case, it would usually be full aware of the complaint lodged against its subsidiary and have opportunity to aid it in defending itself. As the parent is also given opportunity to rebut the 100% presumption (however difficult this may be) the right to a fair trial, as this term is understood when reading Article 6 ECHR, is met.

Finally, no matter what the Commission should decide, as I have already mentioned in paragraph 3.2.6, the ECJ can subject the Commissions decision to a full review. This applies not only to the size of the fine imposed, but also to the decision to consider two companies as a single economic entity. [90]

[90] Kerse/Khan, p. 446

5 Reference table

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