Florida State University Journal of Transnational Law & Policy

Volume 2 | Issue 1 Article 7

1992

European Community Competition Law: Is the Corporate Veil Lifted Too Often

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EUROPEAN COMMUNITY COMPETITION LAW: IS THE CORPORATE VEIL LIFTED TOO OFTEN?

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I. INTRODUCTION

A. *The Doctrine of Lifting the Corporate Veil in Company Law*

THE notion that an incorporated limited company is a separate legal entity from its shareholders has always been a fundamental principle of company law.[1] According to this doctrine, a company should be treated by law as an absolutely independent entity with complete separation between the company's property and that of its shareholders. Under this theory, corporate rights and obligations cannot be imputed to the shareholders, and shareholders cannot sue or be sued under the company's name.

This guiding principle has been maintained not only when the shareholders are natural persons but also when the shareholders are corporations. Even holding companies controlling a number of subsidiaries functioning as mere "departments of one large undertaking owned by

1. *See* Salomon v. Salomon & Co., [1897] App. Cas. 22 (1896) (appeal taken from Eng.). *See also* ROBERT R. PENNINGTON, COMPANY LAW 32 (6th ed. 1990).

the holding company"[2] frequently are treated as independent entities under company law.

The separate legal entity principle of company law is accepted not only at common law, but also by most recognized systems of law. Indeed, in *Barcelona Traction*, the International Court of Justice (ICJ) stated that in this field international law is

> called upon to recognize institutions of municipal law that have an important and extensive role in the international field . . . . All it means is that international law has had to recognize the corporate entity as an institution created by States in a domain essentially within their domestic jurisdiction . . . . Municipal law determines the legal situation not only of such limited liability companies but also of those persons who hold shares in them. Separated from the company by numerous barriers, the shareholder cannot be identified with it. The concept and structure of the company are founded on and determined by a firm distinction between the separate entity of the company and that of the shareholders, each with a distinct set of rights . . . .[3]

However, like any other fundamental legal principle, the separate corporate entity principle has never been absolute. At times it has been disregarded by both the legislatures and the courts to protect other fundamental legal interests. As a result, the doctrine of "lifting (or piercing) the corporate veil" has developed. According to this doctrine, a company's rights and obligations can be imputed to its shareholders by focusing on the economic relationship and ignoring the legal one.[4]

The doctrine has been very carefully applied by the courts. While trying to protect legal definitions, courts have lifted the corporate veil only in cases where it was clear that the company possessed no independent will. In these cases, the company was considered to be only a tool serving its shareholder to achieve goals prejudicial to the public order, such as fraud or evasion of obligations imposed by law or contracts.[5]

When there is no real distinction between the will of the company and that of its shareholders, the principle of the separate legal entity itself is violated. In *Barcelona Traction*, the ICJ stated

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2. PENNINGTON, *supra* note 1, at 37-38.

3. Barcelona Traction, Light & Power Co. (Belg. v. Spain), 1970 I.C.J. 3, 34-35 (Feb. 5) (concerning the locus standing of Belgium to grant diplomatic protection to a Canadian-incorporated company, merely on the ground that the shareholders were Belgian nationals).

4. *See* PENNINGTON, *supra* note 1, at 38-48.

5. *Id.*; *see also* L.C.B. GOWER ET AL., THE PRINCIPLES OF MODERN COMPANY LAW 126-28 (4th ed. 1979).

> [f]or the same reasons as before, the Court must here refer to municipal law. Forms of incorporation and their legal personality have sometimes not been employed for the sole purposes they were originally intended to serve . . . . Here, then, as elsewhere, the law, confronted with economic realities, has had to provide protective measures and remedies in the interest of those within the corporate entity as well as of those outside who have dealings with it: the law has recognized that the independent existence of the legal entity cannot be treated as an absolute. It is in this context that the process of 'lifting the corporate veil', or 'disregarding the legal entity' has been found justified and equitable in certain circumstances or for certain purposes. The wealth of practice already accumulated on the subject in municipal law indicates that the veil is lifted, for instance, to prevent the misuse of the privileges of legal personality, as in certain cases of fraud or malfeasance, to protect third persons such as a creditor or purchaser, or to prevent the evasion of legal requirements or of obligations.[6]

European Community (EC) law defines certain cases in which the separate legal entity should be disregarded.[7] This Article examines "lifting the corporate veil" in light of EC institution case law. It surveys decisions of the Commission of the European Communities (Commission), the European Court of Justice (ECJ) and the Court of First Instance.[8] Additionally, the terms "agreements" and "undertakings" in Articles 85 and 86 of the European Economic Community Treaty (EEC Treaty) are interpreted as indicated in decisions by the Commission, ECJ, and Court of First Instance.

This Article also explores whether EC competition law respects or disregards the separate legal entity principle. Finally, it examines whether the EC case law adopted the precautions accepted (as stated by the ICJ in *Barcelona Traction*) by most domestic systems of law. The analytic methodology is to describe exceptions to the entity principle in cases decided by the Commission and the ECJ.

B. *The Economic Unit Theory*

The Economic Unit Theory (EUT) embodies the positions articulated in the EC institutions' case law concerning the legal entity principle. It was defined by a non-EC body in the following words:

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6. *Barcelona Traction*, 1970 I.C.J. at 39-40.

7. *See* Joseph P. Griffin, *The Power of Host Countries Over the Multinational: Lifting the Veil in the European Economic Community and the United States*, 6 LAW & POL'Y INT'L BUS. 375 (1974); Case 56/85, Brother Indus. Ltd. v. Commission, 1 C.M.L.R. 792, 802 (1990); Case 171-179/87, Canon Inc. v. E.C. Council ECJ NEWS BULL., Mar. 17, 1992.

8. Because of its short history, few decisions from the Court of First Instance are available for analysis.

> the theory of enterprise unity involves considering as a single economic entity, and even though they have separate legal personalities, enterprises belonging to the same group, and subject to the same control . . . but [the theory] should not lead to *automatically imputing subsidiary's behaviour to the parent*[9].

The EUT concentrates on economic reality rather than on legal forms. A legally separated group of companies is regarded as a single unit; therefore, rights and obligations of one member of the group are imputed to another. The following statement of the Commission was later adopted by the ECJ:

> Where a subsidiary is wholly-owned by its parent company and it is found as a matter of fact that the subsidiary is not able to engage in economic action which is autonomous of its parent company, then in spite of their separate legal identities the two companies will be regarded as one for the purposes of Community competition law.[10]

The EUT, even though it includes the principle of lifting the veil,[11] does not necessarily include all the safeguards accepted by most domestic systems of law in applying the principle.[12] For example, the EUT does not necessarily require a linkage between lifting the veil and the notion of fraud or evasion of legal obligations. Additionally, the EUT does not require that economic reality will have priority over legal form only when the latter is used to prejudice the goals of the separate legal entity doctrine.

The application of the EUT, without further distinction, could jeopardize some very important legal interests. For example, the rights of the company's creditors and minority shareholders could be imperiled. Additionally, the economic security of transactions conducted with third parties could be prejudiced. Indeed, even the authors of the

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9. ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT COMMITTEE OF EXPERTS ON RESTRICTIVE BUSINESS PRACTICES, RESTRICTIVE BUSINESS PRACTICES OF MULTINATIONAL ENTERPRISES, sec. 5 (1977) [hereinafter OECD]. *See* GOWER, *supra* note 5, at 124 ("[L]ifting the corporate veil" is more justified in "pyramid of limited companies" cases, than in cases where "a limited company is treated as an agent for whose acts its human corporators are liable." In the former case the incorporator's objective is "less likely to be defeated if the holding company is made responsible for the acts of its subsidiaries . . . .").

10. Decision 69/195, Re Christiani & Nielsen N.V., 1969 C.M.L.R. D36 (Supp.).

11. *See* BOAZ BARACK, THE APPLICATION OF THE COMPETITION RULES (ANTITRUST LAW) OF THE EUROPEAN ECONOMIC COMMUNITY TO ENTERPRISES AND ARRANGEMENTS EXTERNAL TO THE COMMON MARKET 41 (1981); *see also* Marsha C. Huie, *The Intra-Enterprise Conspiracy Doctrine in the United States and the European Economic Community*, 36 AM. J. COMP. L. 307, 323 (1988).

12. *Barcelona Traction*, 1970 I.C.J. at 39-40.

Organization for Economic Cooperation and Development (OECD) report conclude that the theory should not be applied to every pertinent situation.[13]

Automatic application of the EUT could not only lead to outcomes prejudicial to principles of company law, but could also jeopardize equal application of EC competition law. The conclusion reached from some cases could be that a transaction between two legally separated undertakings falls outside the scope of EC competition law. This same theory could lead in other cases to imposing a fine on a parent company for the conduct of its subsidiaries. Appropriately, this theory has been described as a "double-edged weapon."[14]

The following sections review the Courts' and the Commission's case law applying the EUT. They examine whether the case law is consistent, and exactly what considerations EC institutions utilize in applying the EUT. Finally, a formula is suggested for balancing the necessities of EC competition law with the legal entity principle to minimize the impact of the former on the latter.

II. The Application of the Economic Unit Theory by the EC's Institutions: A Case Law Review

A. General

This section provides an overview of the case law applying the EUT. The cases in which the theory was applied or discussed are divided into three major groups:

(a) Subsidiary Violations Group:
Cases in which infringements of EC competition law carried out by subsidiaries were imputed to a parent company.
(b) Successor Undertakings Group:
Cases concerning the liability of successor undertakings.
(c) Related Undertakings Group:
Cases concerning the relations (especially agreements) between related undertakings.[15]

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13. *See* OECD, *supra* note 9.

14. Richard Whish, Competition Law 241 (2d ed. 1989); *see* Huie, *supra* note 11, at 322 (discussing the implications of the theory when viewed as a shield from liability as well as an offensive weapon).

15. Gower states that:

> [I]n the cases where the veil is lifted, the law either goes behind the corporate personality to the individual members, or ignores the separate personality of each company in favour of the economic entity constituted by a group of associated companies. The latter situation is often merely an example of the former, the individual members be-

The Subsidiary Violations and Related Undertakings Groups fall within the scope of the classical definition of lifting the corporate veil. Thus, cases in these groups concentrate mainly on the company and its shareholders. In the Subsidiary Violations Group, the concentration is on relations between the economic unit and third parties. Cases in the Related Undertakings Group concentrate on the internal relations among the members of the economic unit. The Successor Undertaking Group, however, contains cases where the undertaking which violated EC competition law either ceased to exist or transferred its activities to another undertaking. Thus, this group does not focus upon relations between the company and its shareholders, but upon the economic continuation between companies which existed (or operated) in the past and those existing (or operating) in the present. Cases included in the Subsidiary Violations Group can be described as dealing with the "external relations" of the economic unit, for example, agreements and transactions conducted between the members of the unit and third parties. In contrast, cases included in the Related Undertaking Group deal with the "internal relations" of the economic unit, or the agreements and transactions conducted among the members of the unit.

Another important distinction between the Subsidiary Violations and the Related Undertakings Groups is that the implementation of the EUT in the former case widens the circle of undertakings subject to jurisdiction of EC competition law by overcoming extra-territorial and other jurisdictional problems. The latter, in contrast, limits the application of EC competition law by defining agreements and transactions, otherwise falling within the scope of Article 85 of the EEC Treaty, as merely intra-enterprise activities. Intra-enterprise activities are usually granted a decision of negative clearance.

In spite of the distinction mentioned above, the Successor Undertakings Group, like the other two groups, tries to expose the economic

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> ing corporate rather than human beings, but even when that is so the two situations are worth distinguishing since there seems to be a greater readiness to lift the veil in the latter.

GOWER, *supra* note 5, at 112. But Gower also discussed cases belonging to the second group stating that:

> [T]here is evidence of a tendency to recognise the substance rather than the legal form by treating the whole group of holding and subsidiary companies as one entity or, more rarely, to recognise the continued unity of the enterprise where one company takes over from another or from an unincorporated firm.

Id. at 137. *But cf.* CHRISTOPHER BELLAMY & GRAHAM D. CHILD, COMMON MARKET LAW OF COMPETITION 127 (3d ed. 1987); WHISH, *supra* note 14, at 216; BARRY E. HAWK, 2 UNITED STATES COMMON MARKET AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE 68 (2d ed. Supp. 1990) (discussing other divisions of cases in which the EUT was applied in competition cases).

reality behind the legal definition. This group of cases, therefore, can be characterized as a (non-traditional) form of lifting the corporate veil. The conclusion follows that application of the EUT to this group should entail the same considerations described by the ICJ in *Barcelona Traction*.[16] The only difference is that in the Subsidiary Violations and Related Undertakings Groups the economic unit contains actual undertakings, but in the Successor Undertaking Group the unit contains existing and former undertakings. This difference should not affect the applicable considerations, but does affect the way in which they should be applied. Thus, while the notion of fraud or evasion of legal obligations is always required, in the Successor Undertaking Group one may not speak easily about control of one company by another. The identity between the two companies is a more meaningful issue for discussion than the control exercised by one over the other.

B. Cases Where Subsidiary Violations of EC Competition Law Were Imputed to the Parent Company (Subsidiary Violations Group)

1. Cases in Which the Corporate Veil Was Lifted in Order to Overcome Difficulties of Extra-Territorial Jurisdiction

There is no other group or sub-group of cases, in which the EUT was applied, that has been discussed, analyzed and criticized so often.[17] Yet, in light of a recent development in the EC case law,[18] it seems that the application of this theory in this context will be less frequently required in the future. The first time the EUT was applied

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16. 1970 I.C.J. at 39-40.

17. *See, e.g.*, BARACK, *supra* note 11, at 40-73; Noel L. Allen, *The Development of European Economic Community Antitrust Jurisdiction Over Alien Undertakings*, 1974/2 LEGAL ISSUES EUR. INTEGRATION 35; Valentine Korah, *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v. Commission of the European Communities*, 11 COMMON MKT. L. REV. 248 (1974); John K. Bentil, *Control of the Abuse of Monopoly Power in EEC Business Law: A Commentary on the Commercial Solvents Case*, 12 COMMON MKT. L. REV. 59 (1975); John Dietz, *Enforcement of Anti-Trust Laws in the EEC*, 6 INT'L LAW 742 (1972); Stuart S. Malawer, *International Law, European Community Law and the Rule of Reason*, 8 J. WORLD TRADE L. 17 (1974); Ernst Steindorff, *Annotation on the Decisions of the European Court in the Dyestuffs Cases of July 14, 1972*, 9 COMMON MKT. L. REV. 502 (1972); F.A. Mann, *The Dyestuffs Case in the Court of Justice of the European Communities*, 22 INT'L & COMP. L.Q. 35 (1973); Hans-Georg Koppensteiner, *International Enterprises Under the Antitrust Law of the European Economic Community*, 9 J. WORLD TRADE L. 287 (1975).

18. *See* Case 89/85, Re Wood Pulp Cartel: A. Ahlström OY v. Commission, 4 C.M.L.R. ANTITRUST SUPP. 901 (1988) (basing the extra-territorial jurisdiction of the EC on the implementation theory, a legal principle derived from international public law and not from company law); *see also* HAWK, *supra* note 15, at 66-68.

to subject non-EC undertakings to EC competition law was in the *Dyestuffs* cases.[19]

In these cases, three price increases were introduced at the same time (1964, 1965, and 1967), at the same rates (respectively 15%, 15%, and 8%), in the same EC Member States (Italy, Belgium, Holland, Luxembourg, and Germany), and by the same ten dyestuffs manufacturers. The problem confronting the Commission was whether to regard the non-EEC undertakings (the Swiss (Ciba, Geigy, and Sandoz), and the British (ICI)) as subject to EC competition law. Finally, after the Commission was convinced that the conduct described above constituted violations of Article 85 of the EEC Treaty, it imposed fines on both the EC and the non-EC undertakings.[20] The arguments of the parties before the ECJ concentrated on the extraterritorial application of EC competition law, basing their arguments more on theories of international law than on theories of company law. The government of the United Kingdom presented an aide memoir calling for the maintenance of a rigid distinction between a subsidiary and its parent company.[21]

The ECJ's final judgment, described by one scholar as anticlimactic,[22] was based on its approval of the Commission's decision, not on theories concerning the extra-territorial application of EC competition law. The ECJ preferred to apply the EUT based on the fact that the non-EC applicants, having no registered offices in the EC, distributed their products within the EC through their wholly-owned EC subsidiaries. The EC subsidiaries actually applied the concerted price increases, and thus according to the Court,

> [t]he 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

19. *See* Case 48/69, Imperial Chem. Indus. Ltd. v. Commission, 1972 E.C.R. 619, 1972 C.M.L.R. 557, 629; Case 52/69, J.R. Geigy AG v. Commission, 1972 E.C.R. 787; Case 53/69, Sandoz AG v. Commission, 1972 E.C.R. 845. Very few cases have attracted such extreme criticism, both negative and positive. *See* Steindorff, *supra* note 17, at 510 (concluding "that the Court's *Dyestuffs* decisions will be a cornerstone of Common Market cartel law."); Mann, *supra* note 17, at 50 (concluding "the only consolation is that the Court is not bound by its own previous decisions. It is to be hoped that it will soon be given the opportunity of undoing the mischief which the judgment in the *Dyestuffs Case* has created.").

20. Decision 69/243, Re Cartel in Aniline Dyes, 1969 C.M.L.R. D23 (Supp.).

21. U.K. Aide Memoir, *in* BRITISH PRACTICE IN INTERNATIONAL LAW 58-60 (E. Lauterpacht ed., 1969).

22. Allen, *supra* note 17, at 58.

> carries out, in all material respects, the instructions given to it by the parent company. . . . In the circumstances the formal separation between these companies, resulting from their separate legal personality, cannot outweigh the unity of their conduct on the market for the purposes of applying the rules on competition. It was in fact the applicant undertaking which brought the concerted practice into being within the Common Market.[23]

It is worth noting that the ECJ, while applying the EUT in its jurisdictional aspect, refused to apply the same theory when the issue of notification is concerned. The ECJ rejected the Commission's argument that by notifying the applicants' subsidiaries, the applicants should be deemed notified because of the economic identity between the parent company and its subsidiaries. The ECJ ruled that when the EUT cannot be applied, the subsidiary has no mandate to bring the documents to the parent company's notice, without the latter's consent.[24]

The second time the ECJ applied the EUT in this context concerned the abuse of a dominant position contrary to Article 86 of the EEC Treaty. The infringement was committed by New York-based Continental Can (a manufacturer of metal packages, packing material, etc.) through its Delaware subsidiary Europemballage. Unlike its parent company, which had no office in the EC, Europemballage had a registered office in Belgium.[25]

The conduct in question was Europemballage's takeover by the Dutch company Thomassen & Drijver-Verblifa (TDV), another canning company. According to the Commission, the takeover, increased Continental Can's dominant position by leaving no room for effective competition in the relevant market. In its judgment the ECJ stated:

> the applicant companies cannot deny that Europemballage, set up on 20 February 1970 by Continental Can, is a subsidiary company of Continental Can. The fact that the subsidiary has its own legal personality cannot rule out the possibility that its conduct may be imputed to its parent company. This is particularly the case where the subsidiary does not determine the market behaviour

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23. *ICI*, 1972 E.C.R. at 662-63, 1972 C.M.L.R. at 629.

24. *See id.*, at 651-52; *see also* Steindorff, *supra* note 17, at 504. Note that the ECJ dismissed the applicant's submission on this point, merely because the parent companies actually had full knowledge of the notification transmitted to their subsidiaries. *See also* Case 374/87, Orkem SA v. Commission, 4 C.M.L.R. 502 (1991) (following a similar line of reasoning).

25. Decision 72/21, Re Continental Can Co., 1972 C.M.L.R. D11 (Supp.).

> autonomously but mainly follows the instructions of the parent company.[26]

The third important case applying the EUT concerned the Italian company Istituto Chemioterapico Italiano (Istituto) and its U.S. parent company Commercial Solvents Corporation (CSC).[27] CSC had a world monopoly in the production of aminobutanol, a raw material used to produce the anti-tuberculosis drug ethambutol. *Istituto* concerned the refusal of CSC to supply its product to the Italian company Laboratoria Chemico Farmaceutico Giorgio Zoja (Zoja), an ethambutol producer.

Previously, Istituto had attempted to merge with Zoja and failed. Until 1970, Istituto was Zoja's supplier of aminobutanol. In that year, Zoja terminated the supply agreement and tried to locate a cheaper supplier, but finally discovered that CSC had stopped the supply of all aminobutanol to the EC market. Zoja then returned to Istituto, but, after checking with CSC, Istituto replied that no aminobutanol was available to Zoja. As a result, Zoja lost its sources of raw material, and brought a complaint to the Commission against CSC and Istituto.

It should also be emphasized that, unlike the subsidiaries in the *Dyestuffs* and *Continental Can* cases, Istituto was not CSC's wholly-owned subsidiary since CSC held only 51% of its voting shares. Nevertheless, by applying the EUT, the Commission decided to fine both the parent and the subsidiary for abuse of dominant position contrary to Article 86 of the EEC Treaty. The ECJ, affirming the decision, stated:

> the conduct of CSC and Istituto has thus been characterized by an obviously united action, which, taking account of the power of control of CSC over Istituto, confirms the conclusions in the Decision that as regards their relations with Zoja the two companies must be deemed an economic unit.[28]

In *Istituto,* the ECJ held that the EUT also can be applied when a certain field of activity is concerned (i.e. CSC and Istituto's relations with Zoja), a conclusion which is regarded as an extension of the theory.[29] *Istituto* also differs from the *Dyestuffs* cases because only the

26. Case 6/72, Europemballage Corp. v. Commission, 1973 E.C.R. 215, 1973 C.M.L.R. 199, 221-22 (annulling the Commission decisions on other grounds).

27. Joined Cases 6 and 7/73, Istituto Chemioterapico Italiano S.p.A. v. Commission, 1974 E.C.R. 223.

28. *Id.* at 254-55.

29. *See* BARACK, *supra* note 11, at 69; Allen, *supra* note 17, at 73.

parent company was fined in *Dyestuffs*, but both Istituto and CSC were fined in *Istituto*.[30] This difference illustrates the inconsistency of the ECJ and the Commission's policies in applying the EUT in this kind of case. After the *Dyestuffs-Continental Can-Istituto* trilogy, both the Commission and the ECJ applied the EUT in this kind of case routinely, sometimes without referring explicitly to the theory.[31]

As mentioned in the beginning of this sub-section, the result of the ECJ decision in *Wood Pulp*,[32] where the jurisdiction of the EC in these kinds of cases was based on the implementation doctrine and not on the EUT, is that the application of the EUT is less likely to be required. The implementation doctrine is derived from international law and not from company law. However, it is possible that in the future the application of the EUT will be required to overcome problems of enforcing decisions on non-EC undertakings with only subsidiaries within the Community.

2. *Cases in Which the Parent Companies Were Fined, Merely Because of Their Control Over Their Subsidiaries*

In this sub-group of cases, EC competition law infringements by subsidiaries are imputed to parent companies solely because the parent controls the subsidiary. Here the EUT is applied as a goal in itself, whereas in the previous sub-group the EUT was used to overcome jurisidictional problems.

In *Central Wine Buyers v. Moët et Chandon*, the Commission was confronted with the British champagne importing company, Moët et Chandon (London) Ltd. (Moët), a wholly-owned subsidiary of the French wine manufacturer and exporter, Moët-Hennessey, imposing export bans on its dealers in the U.K. The Commission held that Moët-Hennessey was responsible for the activities of its subsidiaries. The Commission fined the parent company solely because its subsidiary acted according to the parent's general policy.[33]

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30. *Istituto Chemioterapico Italiano S.p.A.*, 1974 E.C.R. 223.

31. *See* Re United Brands Co., 1 C.M.L.R. D28 (Supp. 1976); Case 27/76 United Brands Co. v. Commission, 1978 E.C.R. 207, 278; Community v. Hoffmann-La Roche, 1976 C.M.L.R. D25, D42 (Supp.); Case 85/76 Hoffmann-La Roche & Co. v. Commission, 1979 E.C.R. 461, 526; *see also* Re Aluminium Imports from Eastern Europe, 1985 O.J.(L 92) 47-49, paras. 14-15; COMMISSION OF THE EUROPEAN COMMUNITIES, SIXTH REPORT ON COMPETITION POLICY, paras. 37-42.

32. Re Wood Pulp, 4 C.M.L.R. 901 (1988). *See supra* note 18 and accompanying text.

33. Cent. Wine Buyers (South Leicester) Ltd. v. Moët et Chandon (London) Ltd., 2 C.M.L.R. 166, 173 (1982).

The Commission applied the same policy in *Re Zinc Producer Group*[34] and in *Re Deere.*[35] The latter decision emphasizes the difference between this sub-group and the previous one. The parent company in *Re Deere* was incorporated in the U.S., but had a registered office in Mannheim, Germany. The EUT was applied implicitly because the parent company absolutely controlled its subsidiaries, not because of any jurisdictional problems.[36]

The EUT was applied explicitly in this context by the ECJ in *A.E.G.*,[37] where the Commission fined the applicant (a parent company of an electronic concern) for discriminatory distribution conditions introduced by its subsidiaries in certain member states. The Court rejected the applicant's protests of the decision by quoting its holding in the *Dyestuffs* case,[38] and by adding that "A.E.G. has not disputed that it was in a position to exert a decisive influence on the distribution and pricing policy of its subsidiaries."[39] Later, after reaching the conclusion that the "decisive influence" was actually used by A.E.G., the ECJ stated "[i]t must therefore be concluded that the conduct of TFR, ATF, and ATBG in restraint of competition are to be ascribed to A.E.G."[40]

In other cases, the application of the EUT produced different results. In *Johnson & Johnson*, the Commission jointly and severally fined both the parent company and its wholly-owned subsidiaries for export bans introduced in the pharmaceutical market by the subsidiaries according to instructions given by the parent. The subsidiaries were fined even though the Commission itself acknowledged in its decision that the latter "are not only subject both in theory and in practice to the general power of Johnson & Johnson to give policy directives, being wholly-owned subsidiaries, but are also dependent on the parent company for the goods involved."[41]

In *Re Benelux Flat Glass Cartel*, the Commission imposed again a double fine on the parent companies and their subsidiaries. All were involved in a Benelux price fixing and market sharing cartel in the flat

34. Re Zinc Producer Group, 2 C.M.L.R. 108 (1985) (fining only the parent companies of subsidiaries involved in a cartel in the zinc market).

35. Re Deere & Co. (National Farmers Union v. Cofabel N.V.), 2 C.M.L.R. 554 (1985) (where the Commission fined the U.S. agricultural machinery producer Deere & Co. for export bans introduced by its subsidiaries according to its instructions in certain member states).

36. *Id.*

37. Case 107/82, Allgemeine Elektricitäts-Gesellschaft AEG-Telefunken AG v. Commission, 3 E.C.R. 3151 (1983) [hereinafter *A.E.G.*].

38. *See supra* notes 19-24 and accompanying text.

39. *A.E.G.*, 3 E.C.R. 3199 (1983).

40. *Id.* at 3200.

41. Eurim Pharm GmbH v. Johnson & Johnson Inc., 2 C.M.L.R. 287, 302-03 (1981).

glass market. The fine, however, was imposed more consistently with the EUT because the Commission fixed the fine imposed on the subsidiaries according to the degree of independence they enjoyed.[42]

In *National Panasonic*, the influence of a parent company over its subsidiary produced a result favoring the subsidiary. *National Panasonic* is an exceptional case, where a fine imposed on a subsidiary introducing export bans was mitigated because the Japanese parent company adopted new regulations to assure the whole group's compliance with EC competition law.[43]

Whether the Commission and the ECJ are consistent in the application of the EUT can be best answered by comparing the cases described above (in which the theory was applied) with cases in which only the subsidiary was fined. In *Deutsche Philips GmbH*, only the subsidiary was fined when the parent company stated that it had instructed the subsidiary to stop its anti-competitive actions in a letter dated May 13, 1968. In fact, the subsidiary did not lift the export bans until October 1972.[44]

In *Michelin*, the Commission fined a Dutch subsidiary of the Michelin group for abusing its dominant position in the Dutch tire market. The subsidiary introduced a bonus system that made its dealers totally dependent. Because the parent company's responsibility was not mentioned in the decision, it can be concluded that only the subsidiary took part in the restrictive practice.[45]

In *Re Sperry*, the Commission again fined a subsidiary for introducing export bans in the agricultural machinery market, even though it was clear that the subsidiary conducted the restrictive practices together with, if not under the orders of, its parent company, Sperry New Holland.[46]

A much closer examination of the subsidiary's independence was made by the Commission in *Sandoz*.[47] The subsidiary alone was fined

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42. Re Benelux Flat Glass Cartel: The Community v. BSN S.A., 2 C.M.L.R. 350, 352, 365 (1985).

43. National Panasonic (U.K.), 1 C.M.L.R. 497 (1983).

44. Re Deutsche Philips GmbH, 1973 O.J. (L 293) 40, 42. Respondent was the German subsidiary of the Dutch company N.V. Philips Gloeilampenfabrieken, Eindhoven. The case concerned price fixing and export bans introduced in the German electric shavers market by the respondent.

45. Bandengroothandel Frieschebrug v. Nederlandsche Banden- Industrie Michelin NV, 1 C.M.L.R. 643 (1982).

46. Re Sperry New Holland, 1985 O.J. (L 376) 2; *see also* COMMISSION OF THE EC, FIFTEENTH REPORT ON COMPETITION POLICY, para. 56 (Commission gives no regard to the problem).

47. Re Sandoz Pf, 1987 O.J. (L 222) 29; *see* Case 277/87, Sandoz PF SpA v. Commission, 1 E.C.R. 45 (1990) (rejecting the subsidiary's application in this case without any further discussion of the subject).

for adding the words "exporting prohibited" to its invoices. The Commission's holding was made after it found that no such instructions were given to the subsidiary by its parent company, and no other member in the group used the offending invoices.[48]

In *Miller*,[49] the ECJ affirmed the Commission's decision[50] to fine the wholly-owned German subsidiary of the U.S. company MCA Records, Inc. The German subsidiary introduced export prohibitions in the light music products market.[51]

In *BMW Belgium SA v. Commission*, the appellant instructed its dealers in Belgium to refrain from selling products to unauthorized dealers, effectively instituting an export ban.[52] The subsidiary simply followed the instructions of its parent company. The Commission, however, imposed a fine only on the subsidiary. Its decision was affirmed by the ECJ. Similarly, in *Musique Diffusion*, the ECJ affirmed the Commission's decision to fine the European wholly-owned subsidiary of the Japanese audio products manufacturer Pioneer for imposing export bans on its dealers.[53]

The Commission provided more extensive reasoning in *Re Polypropylene* where it decided not to impute the anti-competitive conduct of the Norwegian petrochemical company SAGA Petrokejmi to its parent company SAGA Petroleum. The Commission emphasized the subsidiary's freedom of action and stated *inter alia* that:

> Saga Petrokejmi always operated as a separate commercial entity and cannot be considered as forming part of the same economic unit as SAGA Petroleum. By contrast however the subsidiaries of SAGA Petrokejmi in Denmark and the U.K. did form part of the same business and their actions can be imputed to SAGA Petrokejmi.[54]

The EUT issue was raised in the context of export bans in *Re Putz v. Kawasaki*.[55] The arena this time was not parent-subsidiary relations but the relations of subsidiaries among themselves. The Commission

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48. *Id.*

49. Case 19/77 Miller International Schallplatten GmbH v. Commission, 1978 E.C.R. 131. MCA Records Inc. is itself a subsidiary of the U.S. company MCA Inc.

50. Community v. Miller International, 1 C.M.L.R. D61 (Supp. 1977).

51. *Miller*, 1978 E.C.R. 131.

52. Case 32/78, 1979 E.C.R. 2435.

53. Joined Cases 100-103/88, SA Musique Diffusion Française v. Commission, 1983 E.C.R 1825, 3 C.M.L.R. 221.

54. Re Polypropylene, 4 C.M.L.R. 347 (1986). For the decision of the DFI in this case, see *infra* note 65.

55. Putz v. Kawasaki Motors (UK) Ltd., 1 C.M.L.R. 448 (1979).

decided to fine only Kawasaki Motors (U.K.), a wholly-owned subsidiary of the Japanese motorcycle producer Kawasaki, for export bans imposed upon the U.K. subsidiary's dealers at the request of the German Kawasaki Motoren GmbH. Kawasaki Motoren GmbH also is a wholly-owned subsidiary, and it was the principal beneficiary of the export bans.

The unavoidable conclusion from the cases reviewed above is that there is a certain inconsistency in both the Commission and the ECJ case law. In some cases a parent company is fined for the conduct of its wholly-owned subsidiary, while in other similar cases both the parent company and the subsidiary are fined. In still other cases the subsidiary alone is fined even though it enjoys no real autonomy.[56]

C. Cases Concerning the Liability of Successor Undertakings

The issue of succession in competition law can be expressed in three different ways. First, even though a company or a group of undertakings may form a single legal entity, the same activities can be maintained under a different legal form and name. Second, the infringing company, while maintaining the same legal form, may transfer its illegal activities to another undertaking by a transfer of assets. Finally, a company may cease to exist after being absorbed by another undertaking. Each of these sub-groups involves different difficulties and considerations. A separate sub-section is devoted to each.

1. The Issue of Succession Regarding Undertakings Which Change Their Legal Form and Name (Sub-group 2(a))

The appellant in *Suiker Unie v. Commission* was formed in 1970 by a merger of four Dutch sugar companies. The Commission fined the applicant for anti-competitive conduct carried out by the predecessor companies during 1968 and 1969. The companies had been members of an association which took part in a price fixing cartel in some member states' sugar market. The ECJ rejected the appellant's argument against imputing the pre-incorporation infringements by stating that:

> [a]s the applicant assumed all the rights and liabilities of the four cooperatives of the old association, it must be treated as the economic successor both of the old association and of its members, which indeed is what those members intended. The applicant moreover does not deny that the name 'Suiker Unie' always covered the same undertakings, which were run for the most part by the same

56. *See* BELLAMY & CHILD, *supra* note 15, at 517.

> persons and had their registered offices at the same address. It does not even claim that its conduct on the sugar market differed from that of the former association. In these circumstances, so far as the sugar market is concerned, the main feature of the conduct of the applicant and its predecessor was its obvious continuity, which means that the whole of this behaviour must be attributed to the applicant.[57]

The three conditions for the application of the continuity principle set up by the ECJ in *Suiker Unie* were disputed again in *Compagnie Royale*, where agreements containing parallel import bans in the zinc market were at issue.[58] The second applicant in this case, the German company Rheinzink GmbH, contested the imputation to it of infringements conducted before its formation in 1981 by the company Rheinisch Zinkwalzwerk GmbH (RZ). Rheinzink did not deny the existence of the two first conditions set out in *Suiker Unie*,[59] but instead based its argument on the lack of the third condition, continuation of the unlawful conduct. Rheinzink did not continue the anti-competitive acts of RZ.

In contrast to *Suiker Unie*, in *Compagnie Royale* the Commission rejected the necessity of all three conditions and, instead, based its argument on the notion of the economic continuity as the *ratio decidendi* of the *Suiker Unie* case.[60] Advocate General Rozes accepted the Commission's view that the third condition is not essential for imputing the former companies' infringements to the successor company when the two first conditions are fulfilled. Nevertheless, he rejected basing imputation on the notion of economic continuity, by stating *inter alia* that "[s]o wide an interpretation is likely to establish an excessively loose causal relationship between the activities of the undertakings."[61] The ECJ accepted the Commission's economic continuity argument and actually ignored the Advocate General's warning against a wide application of the rule. The ECJ stated that "a change

57. Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73, Coöperatieve vereniging 'Suiker Unie' v. Commission, 1975 E.C.R. 1663, 1926; *see also* Re European Sugar Cartel, 1973 C.M.L.R. D65 (Supp.).

58. Case 29, 30/83 Compagnie Royale Asturienne des Mines S.A. v. Commission, 1984 E.C.R. 1679, 1 C.M.L.R. 688.

59. *Id.* Rheinzink assumed all the rights and liabilities of the former RZ company and kept the same registered office and management as the former RZ. *Id.*

60. *Id.* at 1689; *see also*, Re Rolled Zinc products, 2 C.M.L.R. 285 (1983).

61. *Compagnie Royale Asturienne*, 1984 E.C.R. at 1718. The Advocate General rejected applicant's submission. Referring to the opinion of the advocate general Margas in *Suiker Unie*, the Advocate General in *Compagnie Royale Asturienne* asked "[w]hat would be the real extent of the control exercised by the Commission if an undertaking were able to circumvent article 85 and 86 of the Treaty merely by transforming itself under the rules of national law?" *Id.*

in the legal form and name of an undertaking does not create a new undertaking free of liability for the anti-competitive behaviour of its predecessor, when, from an economic point of view, the two are identical.''[62]

Later, in *Sandoz PF*, the principle of economic continuity was applied by the Commission not only when one company changed its legal form and name to another (*Compagnie Royale*), or when some companies merged into a new one (*Suiker Unie*), but also when a company was separated into a group of new companies. Sandoz PF incorporated after the separation of the former Sandoz SPA Company, and it was fined for the anti-competitive conduct of its predecessor. It should be noted that in this case, the principle of economic continuity was applied without further reasoning.[63]

2. The Issue of Succession Where Companies Transfer Their Anti-Competitive Activities While Maintaining Their Legal Name and Form. (Sub-group 2(b))

The *Navewa-Anseau* case concluded a 1978 agreement by IPTC Belgium S.A. for use of the "NAVEWA-ANSEAU" conformity label for washing machines and dishwashers.[64] The agreement was considered by the Commission to constitute an infringement of Article 85 of the EEC treaty. Later, Bosch acquired assets concerning the distribution of washing machines and dishwashers from IPTC Belgium SA. At Bosch's request, the Commission modified its decision so that Bosch would not be considered as a party to the agreement because Bosch bought the assets in 1980. The Commission therefore decided that IPTC (which maintained its existence even though it ceased its activities in the relevant market), and not Bosch (which merely acquired the former's assets), would be the addressee of the decision concerning the agreement.

The rule that the "economic succession" principle would not be applied in cases that concerned the mere transfer of assets was applied later by the Commission in a series of decisions. All of the decisions concern cartels in the petrochemical industry. The principal difference in the decisions is the products concerned.[65]

62. *Id.* at 1699.

63. Re Sandoz PF, 1987 O.J. (L 222) 29.

64. Community v. Anseau-Navewa, 1 C.M.L.R. 470 (1983).

65. *See* Re Peroxygen Cartel: Community v. Solvay et Cie, 1 C.M.L.R. 481 (1985); Re Polypropylene Cartel: Community v. ICI, 4 C.M.L.R. 347, 400 (1988) (transferring Anic's polypropylene activities to Montepolimeri did not affect the former's liability); Re LdPE Cartel: Community v. Atochem SA, 4 C.M.L.R. 382, 410-11 (1990) (transferring Monterdison's LdPE

The Commission stated in the *PVC* case that it is irrelevant that a cartel member may have sold its PVC business to another company.[66] The purchaser does not thereby become liable for the seller's participation in the cartel; therefore, if the undertaking which committed the infringement continues in existence, it remains responsible despite the transfer.[67]

3. *The Issue of Succession When Companies Are Absorbed by Other Undertakings (Sub-group 2(c))*

The cases in this sub-group involve no change of the corporate form and name. However, the same rigid rule of economic succession is applied here as well as in sub-group 2(a).[68] The cases in sub-group 2(c) involve a reorganization of the European petrochemical industry, and address situations in which companies were absorbed by or merged with other companies in the course of the reorganization. The Commission decided in all these cases to hold the new undertaking liable for the predecessor's conduct, notwithstanding the lack of participation in the unlawful conduct by the new undertaking or the predecessor's share in the new merged undertaking.[69]

Because all the cases mentioned above deal with similar undertakings and conduct, the *Re Polypropylene*[70] case can be used as an illustration. In this case, Saga Petrokejmi (a member of the unlawful cartel), was absorbed by Statoil (another Norwegian undertaking),

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activities to Atochem did not affect the former's liability); Re PVC Cartel, 4 C.M.L.R. 345, 370-71 (1990) (concerning the transfer by DSM of its PVC activity to LYN). The decisions given by the Commission in *Polypropylene*, *LdPE* and *PVC* were appealed by some of the addressees to the CFI. On July 10, 1991, the Court gave a judgment in *Polypropylene* rejecting the above appeals albeit without any discussion of the subject matter of this study. *See* Re Polypropylene, T1/89 - T4/89 and T6/89 - T15/89 (unpublished decision). However, the CFI decided to annul the Commission's decisions in the *PVC* and *LdPE* cases on procedural grounds without any reference to the subject matter. *See* T79/89 - T112/89 (unpublished decision).

66. Re the PVC Cartel, 4 C.M.L.R. 341 (1990).

67. *Id.*

68. *See* WHISH, *supra* note 14, at 216-17; BELLAMY & CHILD, *supra* note 15, at 517-18.

69. *See supra* note 65. Atochem was held liable for PCUK'S Conduct in *Re PVC*, 4 C.M.L.R. at 371 (1990), and to the ATO Chimie's conduct in *Re LdPE*, 4 C.M.L.R. at 412 (1990), and *PVC* at 371. Statoil was held liable for Saga Petrokejmi's conduct in *Re Polypropylene*, 4 C.M.L.R. at 401 and *Re LdPE*, 4 C.M.L.R. at 412, and Respol was held liable to ALCUDIA's conduct in *Re LdPE*, 4 C.M.L.R. at 412, even though the latter was only one of four companies whose merger formed the former.

70. *Re Polypropylene*, 4 C.M.L.R. at 401 (1988). It is worth noting that in this case the Commission refused to apply the economic unit theory and to hold Saga Petrokejmi's parent company, Saga Petroleum, liable for its subsidiary's conduct.

and became an independent division of Statoil. The Commission acknowledged that Statoil did not continue its predecessor's anti-competitive behavior and "that the acquisition by Statoil was not intended to frustrate the application of EEC competition rules."[71] Nevertheless, the Commission imputed Saga Petrokejmi's conduct to Statoil, basing its holding on the existence of the two conditions recognized by the ECJ as sufficient for application of the economic succession principle. It stated that:

> [i]t is not necessary that Statoil be shown to have carried on or adopted the individual conduct of 'Saga Petrokejmi' for the Commission to be entitled to address a decision to it. The determining factor is whether there is an economic and functional continuity between the original undertaking and its successor.[72]

Thus, the economic factor was emphasized again, setting aside other legal considerations such as the good faith of the successor company or the share of the former company in the new one.

D. *Cases Concerning Agreements Between Related Undertakings (Related Undertakings Group)*

A certain confusion arises in these cases as to which theory *should* be applied and which theory *is* applied. Should *it* be the EUT or the opposite theory of the intra-enterprise conspiracy?[73] Because the operation of the EUT in this type of case sets the limits of competition law's application, most of the cases in the Related Undertakings Group consider whether to grant negative clearance to certain intra-group transactions. Negative clearance may be granted directly only by the Commission. However, the issue can be dealt with indirectly by the ECJ under Article 177 of the EEC Treaty in cases where a national court requests a preliminary ruling from the ECJ as to whether a specific transaction falls within the scope of Article 85.

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71. *Id.* at 401 para. 99.

72. *Id.* at 402 para. 100; *see also*, Re LdPE, 4 C.M.L.R. 382 para 53 (1990); Re the PVC Cartel, 4 C.M.L.R. 345 para. 7 (1990). It is worth noting that Statoil did not join the other undertakings who appealed in front of the CFI; therefore, this statement was not discussed by the Court.

73. *See* BARACK, *supra* note 11, at 75-99; *see also* Van Oven, *The Intra-Enterprise Conspiracy Paradox*, *in* 1973 EUROPEAN COMPETITION POLICY (Europa Institute of the University of Leiden ed., 1973) 105-119; Koppensteiner, *supra* note 17; Huie, *supra* note 11. According to Van Oven and Huie, the intra-enterprise conspiracy doctrine was rejected by the U.S. Courts.

1. *The Wholly-Owned Subsidiary*

The first decision in which the Commission granted negative clearance on this issue was the case of *Christiani & Nielsen*.[74] This case involved an agreement obliging the parent company not to operate in Dutch territory, and the subsidiary "not to carry on its activities outside Dutch territory, without the agreement of its parent company."[75] The Commission based its decision on the lack of competition between the companies concerned. It stated:

> [t]he division of markets laid down in the agreement is in the end, only a distribution of tasks within a single economic entity. It could not be expected in this case that one part of this entity, albeit enjoying separate legal personality, should enter into competition with the parent company. Christiani and Nielsen (Copenhagen), even without any contract, would always have the power to determine the behaviour of Christiani and Nielsen (The Hague), of which it holds the whole of share capital.[76]

The Commission applied the EUT in this context a year later in *Kodak*.[77] In its opinion granting negative clearance, the Commission distinguished between the external and the internal relations of the economic unit. The negative clearance to the Kodak companies' distribution agreements was granted only after the agreements were modified to lift any limitation imposed on the distributors' freedom of action within the EC.[78] The Commission decided that the relations between the Kodak companies themselves (the identical sale conditions imposed by them in the various Member States) were not the result of anti-competitive conduct. It stated:

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74. Re Christiani & Nielsen N.V., 3 C.M.L.R. D36 (Supp. 1969) (concerning an agreement between the Danish construction undertaking Christiani & Nielsen (Copenhagen) and its wholly-owned Dutch subsidiary Christiani & Nielsen (The Hague)).

75. *Id.* at D37.

76. *Id.* at D39 para. 13 (criticizing the Commission for basing its first decision dealing with the issue on a case with such rare and extreme facts). *See* Lazar Focsaneanu, *La Concurrence à l'Intérieur des Groupes de Sociétés: Réflexions sur l'Attestation Négative Christiani et Nielsen*, 13 REVUE DU MARCHÉ COMMUN 32, 38 (1970).

77. Re Kodak, 1970 C.M.L.R. 19 (concerning agreements between all wholly-owned subsidiaries of the American photographic manufacturer Eastman Kodak in Europe and its distributors). A press release issued by the Commission (a week after the *Christiani & Nielsen* decision) in *Remington Rand* could create the impression that the Commission changed its mind on the issue, but the case was settled amicably and hence is not of importance to the issue. *See* Koppensteiner, *supra* note 17, at 280; BARACK, *supra* note 11, at 778; Van Oven, *supra* note 73, at 116. For a discussion of this and a similar case (Scott Paper), see H.W. Wertheimer, *Droits des marques et concurrence*, 1970 CAHIERS DE DROIT EUROPEEN 438, 471.

78. Thus, the export bans imposed by the original agreements were modified to apply only to export outside the Community. *Kodak*, 1970 C.M.L.R. 19.

> [w]hen it is established, as is so in this case, that the subsidiary companies in question are exclusively and wholly subject to their parent company, and that the latter in fact exercises its power of control by issuing to them precise instructions, it is impossible for them to behave independently inter se in the areas governed by the parent company. Consequently, the identical nature of the conditions of sale of the Kodak companies in the common market does not result from an agreement or concerted practice either between the parent company and its subsidiaries or between the subsidiaries *inter se*.[79]

The inconsistency between the Commission's reasoning in *Kodak* and in *Christiani & Nielsen* attracted severe criticism from several legal authors. One author wrote "the reasoning in this case [*Kodak*] as compared with the *Christiani & Nielsen* decision presents a startling discrepancy. In the latter case, the lack of independence of the subsidiaries led to the conclusion that no restriction of competition existed and in this case, and that no conspiracy exists."[80]

The difference between the Commission's reasoning in *Christiani & Nielsen* and in *Kodak* created confusion regarding application of the intra-enterprise conspiracy doctrine when intra-group agreements contain restrictions affecting third parties. The reasoning in *Christiani & Nielsen* emphasized the lack of competition between related companies, but left room to apply the theory in these cases. In contrast, *Kodak*'s reasoning excluded any possibility of conspiracy among related companies, and therefore, deliberately and entirely repudiated the intra-enterprise conspiracy doctrine, at least when the subsidiaries are completely dependent.[81]

The first case where the ECJ considered intra-group relations was *Béguelin Import Co. v. S.A.G.L. Import Export*.[82] The Court was

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79. *Id.*, at 21-22 paras. 12-13.

80. Van Oven, *supra* note 73, at 113; *see also* Koppensteiner, *supra* note 17, at 291; BARACK, *supra* note 11, at 79. *But see* Huie, *supra* note 11, at 315 (no real contradiction between the reasoning in *Christiani & Nielsen* and *Kodak* because both consider the decisive factor to be lack of competitiveness between the related undertakings).

81. *See* van Oven, *supra* note 73. The confusion over the Commission's position was aggravated by its observation in Case 22/71, Béguelin Import Co. v. S.A.G.L. Import Export, 1971 E.C.R. 949, 955, that agreements between subsidiary and parent companies "[d]o not constitute agreements between undertakings within the meaning of the provision quoted" in Article 85(1) of the EEC Treaty. This statement is opposed to the Commission's position in Case 15/74, Centrafarm v. Sterling Drug, 1974 E.C.R. 1147, 1159, and in its FOURTH REPORT ON COMPETITION POLICY (1975), published after the above *Centrafarm* decision. There, the Commission's position was that "[t]his does not exempt from the prohibition in Article 85(1) agreements concluded within a corporate group if they have wider implications. For instance, agreements which restrict the scope for non-member undertakings to penetrate a given market." *Id.*

82. Case 22/71, 1971 E.C.R. 949 (brought before the ECJ from the Tribunal of Commerce,

asked to decide the validity of an agreement between Béguelin/France and Oshawa, the Japanese producer of pocket gas cigarette-lighters. The agreement granted Béguelin/France an exclusive dealership for distribution of the Oshawa products in France. A previous agreement between Oshawa and Béguelin/France's parent Béguelin/Belgium had covered both Belgium and France.

As in *Kodak*, the ECJ distinguished in *Béguelin* between internal and external relations of the economic unit. Accordingly, it examined separately the agreements between Béguelin and Oshawa, and the relations between Béguelin/Belgium and Béguelin/France. Whereas the validity of the former were questioned, the Court did not challenge the French subsidiary's exclusive dealership in France. It stated *inter alia* that:

> [A]rticle 85(1) prohibits agreements which have as their object or effect an impediment to competition. This is not the position in the case of an exclusive sales agreement when in fact the concession granted under that agreement is in part transferred from the parent company to a subsidiary which, although having separate legal personality, enjoys no economic independence. Accordingly the relationship between the companies cannot be taken into account in determining the validity of an exclusive dealing agreement entered into between the subsidiary and a third party.[83]

It should be noted that the Court does not deal with the possibility that the intra-group relations themselves, and not the agreements with third parties, restrict third parties' freedom of action. Even among the writers themselves, there is a *debate whether* the above-cited statement constituted a repudiation of the intra-enterprise conspiracy doctrine.[84]

In the *Dyestuffs* cases the Court referred again to inter-enterprise relations.[85] While emphasizing the subsidiary's dependence, the Court stated "where a subsidiary does not enjoy real autonomy in determining its course of action in the market, the prohibitions set out in Arti-

Nice (France) as a reference for a preliminary ruling under Article 177). The case was brought before the French courts following an attempt by Béguelin/France to prevent parallel import to France by S.A.G.L. Import Export and came before the ECJ following the S.A.G.L. Import Export's claim that the exclusive dealership agreement was contradictory to Article 85(1) of the EEC Treaty. *Id.*

83. *Id.* at 959.

84. Van Oven, *supra* note 73, at 114 ("The Court deliberately wanted to leave a possible adoption of the intra-enterprise conspiracy doctrine open."); *see also* BARACK, *supra* note 11, at 82; Ernst J. Mestmäcker, *Concentration and Competition in the EEC*, 6 J. WORLD TRADE L. 615, 629 (1972) ("[T]he Court found the decisive criterion in the impossibility of competition between parent and subsidiary . . . ."). *But see* Koppensteiner, *supra* note 17, at 292.

85. *See supra* notes 19-24 and accompanying text.

cle 85(1) may be considered inapplicable in the relationship between it and the parent company with which it forms one economic unit."[86]

Similar to the Commission in the *Kodak* case, the ECJ in the *Dyestuffs* cases emphasized the dependence of the subsidiaries as the determining factor in applying the EUT. Accordingly, it repudiated any application of the intra-enterprise conspiracy doctrine.[87]

The ECJ in *Centrafarm* was asked by the Dutch Hoge Raad Court to give a preliminary ruling.[88] The case concerned attempts by Sterling Drug Inc., a New York pharmaceuticals manufacturer, to end Centrafarm's parallel import of Sterling Drug's products to the Netherlands from the U.K. and Germany. Sterling Drug argued that the parallel importer's actions infringed on its commercial property. The question presented to the ECJ was whether Sterling Drug's granting of the right to use its trade mark "Negram" to its wholly-owned subsidiaries in the various Member States constituted an agreement falling within the scope of Article 85.

Advocate General Trabucchi's opinion suggested it did, and stated:

> consideration can reasonably be given to the applicability of the prohibition laid down under Article 85 when, instead of being confined to regulating internal relationships, the agreements between the undertakings in a group are designed to raise barriers against third parties, and to block the avenues open to them for trade and competition.[89]

The Court chose to ignore both the Commission and the Advocate General's submissions. Its judgment was based not on Article 85 but on Article 36 of the Treaty. The court based its decision on the submission, made by Article 36, that the protection of commercial property should not be a disguised restriction on trade between Member States. Hence, the holder of such a right may *not* use it to prevent the import into a Member State of a product which was lawfully marketed in another Member State by the owner of the commercial right or by his consent (the Exhaustion Doctrine"). Thus, the patentee may

86. Case 48/69, Imperial Chem. Indus. Ltd. v. Commission, 1972 E.C.R. 619, 662, 1972 C.M.L.R. 557, 629.

87. Koppensteiner, *supra* note 17, at 292 (claiming the doctrine was also repudiated in this case); Van Oven, *supra* note 73, at 115 (sharing the opinion of Koppensteiner).

88. Case 15/74, Centrafarm BV v. Sterling Drug Inc., 1974 E.C.R. 1147, 1180.

89. *Id. See supra* note 81 (stating Commission's opinion in this case).

not use its monopoly to prevent the import of products which were marketed in another Member State by him or with his consent. The Court also added that "[i]n this connection, it is of no significance to know whether the patentee and the undertakings to which the latter has granted licenses do or do not belong to the same concern."[90]

The Court rejected the Advocate General's submissions regarding the applicability of Article 85 to the concession agreement between Sterling Drug Inc. and its subsidiaries. It stated:

> Article 85, however, is not concerned with agreements or concerted practices between undertakings belonging to the same concern and having the status of parent company and 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, and if the agreements or practices are concerned merely with the internal allocation of tasks as between the undertakings.[91]

Therefore, it seems that in *Centrafarm* the ECJ rejected (albeit implicitly) the intra-enterprise conspiracy doctrine, and it applied the EUT in cases in which the subsidiary enjoys no real autonomy.[92]

In two recent preliminary rulings, *Bodson* and *Ahmed Saeed*, the ECJ issued judgments concerning granting exclusive concessions in the funeral services market and scheduled flight tariff agreements.[93] The ECJ repeated the principle stated in *Centrafarm*, but added that the inapplicability of Article 85 to intra-group relations does not exclude the applicability of Article 86. It should be emphasized, however, that this solution can be applied only when the economic unit has a dominant position prior to the anti-competitive conduct. It can not be applied in the vast majority of the cases when such a dominant position does not exist.

In *Hydrotherm*,[94] the economic unit theory was discussed to define the applicability of a block exemption. The case involved agreements

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90. *Centrafarm*, 1974 E.C.R. at 1168. The same reasoning was given by the ECJ in a previous case; however, the ECJ did not mention the economic unit theory. *See* Case 78/70, Deutsche Grammophon Gesellschaft mbH v. Metro-SB-Groβmärkte GmbH & Co. KG, 1971 E.C.R. 487.

91. *Centrafarm*, 1974 E.C.R. at 1167; *see also* Koppensteiner, *supra* note 17, at 291-93.

92. *See* Bellamy & Child, *supra* note 15, at 129 n.98; Hawk, *supra* note 15, at 94; Barack, *supra* note 11, at 85-6; Huie, *supra* note 11, at 319. *But see* Ivo Van Bael & Jean-François Bellis, Competition Law of the EEC 24 (1987) (suggesting that the ECJ left the door open for application of Article 85 in such cases).

93. *See* Case 30/87, Bodson v. Pompes Funèbres des Régions Libérées SA, 4 C.M.L.R. 984, 1015-16 (1989); Case 66/86, Ahmed Saeed Flugreisen and Silver Line Reisebüro GmbH v. Zentrale Zur Bekämpfung Unlauteren Wettbewerbs eV, 4 C.M.L.R. 102, 134 (1990).

94. Case 170/83, Hydrotherm Gerätebau GmbH v. Compact del Dott. Ing. Mario Andrioli & C. sas, 1984 E.C.R. 2999 (brought before the ECJ for a preliminary ruling by the Bundesgerichtshof (Germany)).

between the German company Hydrotherm and Dr. Andreoli, an Italian citizen who controlled Compact and Officine Sant'Adrea. Andreoli granted Hydrotherm an almost world-wide exclusive dealership in light metal radiators developed by the Italian respondents. After an alleged breach of the contract by Hydrotherm, Compact terminated and claimed damages in a German Court. Hydrotherm argued that the agreement was void according to Article 85(2) of the EEC Treaty, because it contained anti-competitive provisions. Compact, however, argued that the agreement falls under the scope of the Regulation 67/67 exemption for certain categories of exclusive dealings.[95] The question of whether the Regulation 67/67 exemption applies to Compact was brought to the ECJ in *Hydrotherm*.

In addition, Article 1(1) of the regulation provides that article 85(1) of the EEC Treaty is inapplicable to agreements to "which only two undertakings are party." The question was whether Dr. Andreoli and his two wholly-owned undertakings could be regarded as "one undertaking" and Hydrotherm the other. The ECJ stated:

> [t]he requirement of Article 1(1) of Regulation No 67/67 is therefore fulfilled if one of the parties to the agreement is made up of undertakings having identical interests and controlled by the same natural person, who also participates in the agreement. For in those circumstances, competition between the persons participating together, as a single party, in the agreement in question is impossible.[96]

Hydrotherm is in the line of cases using intra-group relations as a criterion for the application of EC competition law. This line of cases establishes that lack of competition between the related undertakings, and not the impact of their conduct on third parties, is the decisive element in the operation of the EUT.[97]

In the *Second Metro* case, the ECJ concluded that an economic unit did not exist between the undertakings belonging to the Thomson-Brandt group. In this case the action against the Commission was brought before the Court by a German electrical goods distributor challenging the Commission's decision to grant an exemption to Saba's selective distribution system. The ECJ rejected the petitioner's submission that the activity of the whole Thomson-Brandt group (of which Saba was a member) should be taken into consideration to determine Saba's dominant position. For its reasoning, the ECJ stated

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95. Commission Regulation 67/67 of Mar. 22, 1967, 1967 O.J. SPEC. ED. 10.
96. *Hydrotherm*, 1984 E.C.R. at 3016, para. 11.
97. *But see* Huie, *supra* note 11, at 319.

that no evidence proved that the undertakings in the Thomson-Brandt group "pursue a coordinated marketing strategy in accordance with the directions of their parent company . . . ."[98]

2. *Joint Venture Companies*

In contrast to wholly-owned subsidiary cases, the decisive element in determining whether Article 85 applies in joint ventures cases has been whether competition existed between the parent companies founding the joint ventures. Thus, a negative clearance was granted in cases involving development cooperation agreements where there was no competition between the parent companies, such as the optical products[99] and packaging markets.[100] In contrast, however, a negative clearance was denied where joint ventures were formed by parent companies competing in the same market, such as compound fertilizer[101] or the cinema market,[102] when the effect of the joint ventures could be nothing but a restriction of competition. Neither the EUT nor the intra-enterprise conspiracy doctrine was even discussed in the joint venture cases.

It may be claimed that the EUT cannot be applied in joint venture cases because there is no company which is wholly-owned and controlled by another undertaking.[103] However, if the control criterion is decisive, a joint venture is not different from a wholly-owned subsidiary merely because it is controlled by two or more undertakings instead of one.[104] The argument that the joint venture cases deal only

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98. Case 75/84, Metro-SB-Großmärkte GmbH & Co. KG v. Commission, 1 C.M.L.R. 118 (1987).

99. Re Optical Fibers, 1986 O.J. (L 236) 30. Though the Commission in this case granted a negative clearance to the joint ventures themselves, it indicated that competition could exist between the joint ventures by stating that no competition existed between the parent companies. *Id. See* Valentine Korah, *Critical Comments on the Commission's Recent Decisions Exempting Joint Ventures to Exploit Research that Needs Further Development*, 12 EUR. L. REV. 18 (1987).

100. Re Odin Developments Ltd., 4 C.M.L.R. 832 (1991).

101. Re Floral Düngemittelverkaufs-Gesellschaft mbh, 2 C.M.L.R. 285 (1980) (fining three French fertilizer manufacturers for establishing a joint venture company to concentrate distribution in Germany).

102. Re Application of United Int'l Pictures BV (UIP), 4 C.M.L.R. 749 (1990) (negative clearance denied but exemption under Article 85(3) granted to joint venture agreement between film companies establishing motion picture distribution company); *see also* ASHURT MORRIS CRISP ET AL., JOINT VENTURES IN EUROPE 1-12 (1991).

103. *See* BELLAMY & CHILD, *supra* note 15, at 129.

104. VALENTINE KORAH, AN INTRODUCTORY GUIDE TO EEC COMPETITION LAW AND PRACTICE 25 (4th ed. 1990) ("It may be that a joint venture amounts to a single undertaking, even if subject to control by more than one parent."). *But see* BARACK, *supra* note 11, at 90 (joint venture is a "distinguishable third person"); *see also* 2 HANS SMIT & PETER HERZOG, THE LAW OF THE EUROPEAN ECONOMIC COMMUNITY: A COMMENTARY ON THE EEC TREATY 3-169 (Dennis Campbell ed. 1992) (actually supporting the Commission's position).

with transactions between the parent companies themselves, and therefore not with relations between related companies, is unacceptable. In *Re Optical Fibers*, the Commission discussed both the relations between the parent companies and the joint ventures, and the relations between the joint ventures themselves.[105] The confusion following the cases in the Related Undertakings Group is increased by the case law concerning joint venture companies.

E. Conclusions

This section reviewed the most important cases and the main trends in ECJ and Commission case law applying the EUT. While there is some coherence in the definition of the theory, its application in both the Subsidiary Violations and Related Undertakings Groups is inconsistent. In the Subsidiary Violations Group, similar cases were treated so differently that sometimes only the parent was fined; sometimes only the subsidiary was fined; and sometimes both were fined. The inconsistency in the Related Undertakings Group cases is found in applying the EUT whenever a parent-subsidiary relationship exists, and in not applying the EUT in joint ventures cases. There is also uneasiness over application of the EUT in the Successor Undertakings Group to successor absorbing companies, and its use in the Related Undertakings Group to exclude the application of Article 85 in cases where third parties' freedom of action was restricted by intra-group agreements.[106]

III. LIFTING THE CORPORATE VEIL BY EC COMPETITION LAW: THE APPLICABLE CONDITIONS

Section 3 defines and analyzes the conditions which were set by the EC institutions in the application of the economic unit theory (EUT). The actual conditions are compared with conditions recommended in the legal literature, and the result is criticized.

A. A Common Directing Mind and Will

1. The Subsidiaries' Lack of Autonomy (Subsidiary Undertakings and Related Undertakings Groups)

a. General

Most legal writers agree that the most important reason to apply the EUT is the subsidiaries' lack of autonomy in an economic unit.[107] The

105. Re Optical Fibers, 1986 O.J. (L 236) 30.

106. Hence, parent-subsidiary company agreements were mentioned as a way to avoid the applicability of Article 85. *See* SJ BERWIN & CO, COMPANY LAW AND COMPETITION 57-58 (1992); *see also*, KORAH, *supra* note 104, at 26.

107. *See* Focsaneanu, *supra* note 76, at 34; van Oven, *supra* note 73, at 111; Allen, *supra*

members of the economic unit, albeit having separate legal entities, actually have the same directing mind and will, center, ego, and brain.[108] Therefore, external anti-competitive actions of the economic unit may be imputed to the parent company which embodies the whole unit's mind, will, center, ego, and brain. In contrast, intra-group actions and agreements are regarded as no more than intra-enterprise conduct, and consequently fall outside the scope of competition law.

In contrast, the argument that the only decisive criterion should be lack of competition between the members of the economic unit, and not control by the parent company,[109] is far from convincing. The lack of competition is a result of the parent company directing the entire conduct of its subsidiaries. Indeed, potential competition always exists between the members in the economic unit,[110] but it is avoided by absolute control.

It has been suggested that the subsidiary should be regarded as an "intelligent agent" who should resist its parent company's illegal orders. According to this view, the anti-competitive conduct should be imputed to the parent company only when the subsidiary is nothing but an "innocent agent."[111] This argument is not convincing because the EUT, which applies to one economic entity having the same "mind and brain," should be distinguished from agency theory.[112] It is unrealistic to expect the people directing the conduct of the subsidiary to refuse to comply with orders that they themselves had given to the subsidiary in their capacity as officials or managers of the parent company.

The subsidiaries' lack of autonomy should be absolute and should include all the fields of action. Otherwise, imputing the subsidiaries'

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note 17, at 58, 65, 68; BARACK, *supra* note 11; SMIT & HERZOG, *supra* note 104, at 3-163; Koppensteiner, *supra* note 17, at 311; Steindorff, *supra* note 17, at 506; A. Assant, *Les ententes anticoncurrentielles au sein d'un groupe: etude comparee de droit francais, communautaire et american* [Antitrust Intracorporate Conspiracies: A Comparative Study of French, EEC and American Laws], 1 REVUE DE DROIT INT'L DES AFFAIRES 121, 129 (1989); HAWK, *supra* note 15, at 94. *But see* Huie, *supra* note 11.

108. RUPERT CROSS & PHILIP JONES, AN INTRODUCTION TO CRIMINAL LAW 108 (7th ed. 1972); van Oven, *supra* note 73, at 117 ("not the persons who actually carry out the actions which are prohibited by virtue of Article 85 should be regarded as the performers, but rather the persons who decide whether the actions are to take place and thus are responsible for them"). Competition law is not criminal law, but analogies from criminal law are appropriate because fines are imposed on undertakings. *See* BARACK, *supra* note 11, at 69-73; *see also* Steindorff, *supra* note 17, at 507; Case 374/87, Orkem SA v. Commission, 4 C.M.L.R. 502 (1991).

109. *See* Huie, *supra* note 11, at 320, 325.

110. Focsaneanu, *supra* note 76, at 35.

111. Steindorff, *supra* note 17, at 507.

112. *See* BARACK, *supra* note 11, at 73.

anti-competitive conducts to the parent company, as in the *Istituto* case, will be only an application of the "joint action" theory.[113] Finally, the practice of the institutions of the European Community of fining both the parent company and the subsidiary, jointly and severally, even though the subsidiary was under the total control of the parent, is inconsistent with an adequate application of the EUT. If the only basis for fining the parent company is to impute the subsidiary's conduct to the parent (arguing that multiple undertakings are a single entity) how can the subsidiary be fined at the same time?[114]

The "double fine" practice is especially inadequate where it affects the interests of the subsidiary's minority shareholders. The reasoning that minority (as well as majority) shareholders should be responsible for the conduct of the company contradicts the EUT rationale; that is, the control exercised by the parent company (majority shareholder) paralyzes the will and the decision-making capacity of the subsidiary.[115]

One may conclude that the minority shareholders in these kinds of cases suffer from a double disadvantage. They lack the ability to direct the conduct of the company, yet they are subject to the fine imposed on the company. Thus, in those cases we are facing a rare and undesirable situation in which both the offender and the victim are punished.[116] It is, therefore, quite regrettable that the EC institutions have ignored the damage done to the minority shareholders of totally dependent subsidiaries when a double fine is imposed.

b. Defining "Control"

Control is difficult to define;[117] a precise definition of the control exercised over the subsidiaries by the parent company is crucial to

113. It can be inferred from the ECJ's reasoning in *Istituto* that the economic unit between Istituto and its parent company CSC existed only as far as their relations with ZOJA are concerned. *See* Joined cases 6 and 7/73, Istituto Chemioterapico Italiano S.p.A. v. Commission, 1974 E.C.R. 223, para. 41; *see also* Allen *supra* note 17, at 73.

114. *See* Allen, *supra* note 17, at 73 (similar criticism).

115. *But see* Steindorff, *supra* note 17, at 507.

116. F.A. Mann, *The Doctrine of International Jurisdiction Revisited After Twenty Years*, 3 R.C.A.D.I. 56, 61 (1984) (recognition by French courts of the interests of minority shareholders of such dependent subsidiaries, albeit in different circumstances). In some member states, minority shareholders may sue the majority shareholders or the directors in either a shareholders' derivative action or by arguing oppression of minority shareholders. These causes of action may not exist in all the member states.

117. Indeed, as one author has commented,

> [c]ontrol is often difficult to ascertain: friendly, or even heated discussions may have taken place between the head office and local managers and been resolved without any use of a veto by either side. Those concerned may not know exactly where control lies — an outside cartel authority would have the greatest difficulty proving it.

Korah, *supra* note 17, at 252.

avoid uncertainty in applying the EUT. Two criteria have been employed by European Community institutions and legal writers in defining control. First, the structural/managerial test is met if the parent company holds more than 50% of the subsidiary's capital, the parent company has power to appoint representatives to the subsidiary's board of directors, and the parent company has exercised that power.[118] Second, the functional/operational test is met if the parent company exercises actual influence over its subsidiaries on a daily basis.[119] While the functional/operational test has been embraced by most legal writers, the structural/managerial test has been widely and severely criticized. Critics of the latter test assert that it is both inadequate and insufficient.

The structural/managerial test is inadequate for two reasons. First, it conflicts with widely accepted basic principles of company law. For example, majority shareholders should not abuse their power, and directors should act only to the benefit of the company.[120] Second, the test can lead to an inconsistent application of EC competition law because it cannot be applied in Member States that expressly forbid either abuse of power by the majority of shareholders, or contractual obligations depriving the general meeting of its autonomous power to appoint directors.[121]

The test is insufficient because control can be exercised in many companies with a wide spread of capital by very small groups of shareholders. In other cases, contractual or other arrangements secure the subsidiary's autonomy and prevent even a majority shareholder from exercising undue influence on the subsidiary.[122]

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118. One may speak separately about the structural test with respect to capital and about the managerial test with respect to the board of directors. In this study the combined test is used for its efficiency.

119. *See* Bentil, *supra* note 17, at 64-65; *see also* BARACK, *supra* note 11, at 56-60. Barack refers to a third test: "[t]he extent to which the parent company was actually influencing the specific prohibited conduct of the subsidiary." *Id.* at 35. This test is not analyzed here because it is used only to substantiate the functional/operational test.

120. *See* Koppensteiner, *supra* note 17, at 295 (test should not be applied in cases falling in the third group, "otherwise an illegal situation would be accepted as the basis for an antitrust exemption"); BARACK, *supra* note 11, at 57.

121. *See* BARACK, *supra* note 11, at 57-59 (regarding the Italian statutory provision assuming control of the majority shareholders discussed in *Istituto*); *see also* Focsaneanu, *supra* note 76, at 36-38 (regarding the inapplicability of the test in states like France and Belgium whose legislation forbids the existence of wholly-owned subsidiaries). But Focsaneanu's argument is based merely on the facts of *Christiani & Nielsen*. Meanwhile, the test was applied in the *Istituto* case over a 51% subsidiary as well. *See* BARACK, *supra* note 11, at 59.

122. *See* BARACK, *supra* note 11, at 56; Koppensteiner, *supra* note 17, at 313 ("[E]ven in the cases of 100 percent ownership, it is perfectly conceivable that the parent chooses not to use its

The functional/operational test, or the "actual control" test, has been accepted by legal writers.[123] The actual control test is more compatible with the basic principles of company law and practice than is the structural/managerial test.

Posit that the applicable test should be cumulative, combining both tests.[124] The structural/managerial test alone is insufficient, but nevertheless essential. It should be followed by a proof of actual influence, because actual control can be exercised upon a company by licensors and other kinds of contractors.[125] A certain capital (structural) and managerial linkage is required between the members of the economic unit to avoid a far too extreme extension of the applicability of the EUT and to establish a clear distinction between the economic group and cartels.[126]

The percentage holding of shares deemed sufficient to substantiate a test of control is uncertain. Until now the minimum holding for the EUT test was no less that 51%. But in future cases (subject to a determination of actual control on the basis of case-by-case scrutiny), the structural/managerial control test also could be applied in cases where minority shareholders exert total control over the company.[127]

The actual control test can be substantiated by evidence of the subsidiary's inability to direct its conduct independently from its parent company. Accordingly, the fact that the two companies did not actually separate the activity of their general meetings, boards of directors, financial units, and other indicia of separate entities can be used to substantiate allegations of actual control.[128]

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ultimate authority"). Further, as Gower notes,

> the obvious test - holding a majority of the shares - [is] both too narrow and too wide. It is too narrow because control can be exercised without a majority shareholding, for example through voting rights which need not be commensurate with shareholding and which may be entirely divorced from it. It is too wide in that a majority holding will not confer control if the shares held are non-voting shares or if the votes are weighted in favour of another class.

GOWER, *supra* note 5, at 118 (citations omitted) (alteration in original); *see also* SMIT & HERZOG, *supra* note 104, at 3-169; VAN BAEL & BELLIS, *supra* note 92, at 24; Griffin, *supra* note 7, at 381-82, 393.

123. Mann, *supra* note 17, at 48-49; Koppensteiner, *supra* note 17, at 297; BARACK, *supra* note 11, at 57.

124. BARACK, *supra* note 11, at 57.

125. *See* Focsaneanu, *supra* note 76, at 36.

126. *See* Mestmäcker, *supra* note 84, at 631 (claiming that in many cases it is almost impossible to distinguish between concerns and cartels).

127. *See* van Oven, *supra* note 73, at 118; Huie, *supra* note 11, at 325; BARACK, *supra* note 11, at 90; Allen, *supra* note 17, at 69. This is why it is submitted that Dietz's proposal to set a *de minimis* rule of shareholding should not be followed. *See* Dietz, *supra*, note 17, at 746; *see also* Council Regulation 4064/89 (on the control of concentrations between undertakings (the Merger Regulation) Article 5(4)(b)).

128. *See* BARACK, *supra* note 11, at 56-58; *see also* Griffin, *supra* note 7, at 389.

The combined test was applied, albeit by virtue of circumstantial evidence in the *Dyestuffs* and *Continental Can* cases,[129] as well as in a long line of other cases both in the Subsidiary Violations[130] and the Related Undertakings Groups.[131] However, in other cases, close scrutiny was absent, and the EUT was applied merely because a wholly-owned subsidiary was involved.[132]

c. The Burden of Proof

One of the most difficult problems concerning the definition of control exercised by the parent company over its subsidiaries is the burden of proof. Can the corporate veil be lifted merely on basis of presumptions? Two different approaches can be distinguished.

The first is called the Presumption Approach. The mere fact that a company is a wholly or mainly owned subsidiary creates the presumption that it is under the absolute control of its parent company. The burden of proof is shifted. For cases in the Subsidiary Violations Group, the burden to prove that an economic unit actually did not exist shifts to the related companies. For cases in the Related Undertakings Group, the burden shifts to the Commission.

The second is called the Examination Approach. The entity claiming that the corporate veil should be lifted bears the burden of proving that actual control is exercised. Control cannot be presumed; therefore, each case must be examined independently.

The Presumption Approach was expressly applied by Advocate General Warner in the *Istituto* case.[133] It was rejected by the ECJ, but

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129. *See* BARACK, *supra* note 11, at 62; Bentil, *supra* note 17, at 65.

130. *See, e.g.*, Re Deutsche Philips GmbH, 1973 O.J. (L 293) 40, 42; Re Benelux Flat Glass Cartel: The Community v. BSN S.A., 2 C.M.L.R. 350, 352, 365 (1985); Community v. National Panasonic (UK) Ltd., 1 C.M.L.R. 497 (1983); Re Polypropylene, 4 C.M.L.R. 347 (1986).

131. *See, e.g.*, Case 170/83, Hydrotherm Gerätebau GmbH v. Compact del Dott. Ing. Mario Andreoli & C. sas, 1984 E.C.R. 2999; Case 75/84 Metro-SB-Großmärkte GmbH & Co. KG v. Commission, 1 C.M.L.R. 118 (1987) [hereinafter Metro II].

132. *See, e.g.*, Community v. Hoffmann-La Roche, 1976 C.M.L.R. D25, D42 para. 74 (Supp.); Case 85/76, Hoffmann-La Roche & Co. v. Commission, 1979 E.C.R. 461, 526; Re the Zinc Producer Group, 2 C.M.L.R. 108 (1985); Case 107/82, Allgemeine Elektricitäts-Gesellschaft AEG-Telefunken AG v. Commission, 1983 E.C.R. 3151. A similar problem arises in cases in which, without reasoning, wholly-owned subsidiaries alone were fined. *See, e.g.*, Re Sperry New Holland, 1985 O.J.(L 376) 2; Case 19/77, Miller Int. Schallplatten GmbH v. Commission, 1978 E.C.R. 131; Commission v. Miller International, 1 C.M.L.R. D61 (Supp. 1977).

133. Istituto Chemioterapico Italiano S.p.A. v. Commission, 1974 E.C.R. 223, 264.

> Unless that presumption is rebutted, it is proper for the parent and the subsidiary to be treated as a single undertaking for the purposes of Articles 85 and 86 of the EEC Treaty; and that the presumption can only be rebutted if it is shown affirmatively, by those concerned to rebut it, that the subsidiary in fact conducted its business autonomously.

Id.

was implicitly adopted elsewhere. For example, both the Court and the Commission applied the EUT merely because the undertakings involved wholly-owned subsidiaries.[134]

Many legal writers have heavily criticized the Presumption Approach, concluding it is incompatible with the basic legal principle according to which the burden of proof in criminal (or quasi-criminal), as well as in civil cases, lies on the plaintiff. The Presumption Approach is especially criticized when the corporate veil is lifted in order to impute the subsidiary's conduct to its parent company.[135] Similar reasoning leads to the conclusion that this approach does not apply to the Related Undertakings Group cases as well. Those seeking to show that their prima facie anti-competitive conduct falls outside the scope of EC competition law should bear the burden of proving that they constitute a single economic unit. The approach was also criticized as creating an almost irrebuttable presumption because the lack of control is very difficult to prove.[136] Adopting this approach may actually lead to reliance on the pure structural/managerial test of control.

The ECJ and the Commission adopted a modified version of the Examination Approach, which infers actual control on the basis of slender (even circumstantial) evidence. For example, in the *Dyestuffs* case, a telex message related to the 1964 price increase was sent by the non-EC applicants to their EC subsidiaries. This single message was enough to convince the ECJ that control also was exercised over the subsidiaries in the 1965 and 1967 price increases.[137] This approach has been described as "a departure from any rigid formula of proof that might otherwise be required to find agency."[138] The approach was applied later by the ECJ in the *Istituto* case, where circumstantial evi-

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134. *See supra* note 132 and accompanying text.

135. *See* Koppensteiner, *supra* note 17, at 312-13.

> [I]t is explicitly submitted that the burden of proof lies with the prosecuting authority or—in a civil law litigation—with the plaintiff. The actual exercise of the parent's power of control must be shown by those who request the veil to be lifted. For even in the cases of 100 percent ownership it is perfectly conceivable that the parent chooses not to use its ultimate authority.

Id.; *accord* BARACK, *supra* note 11, at 68-9; Allen, *supra* note 17, at 69-70. *But see* Korah, *supra* note 17, at 252; Griffin, *supra* note 7, at 393-95.

136. *See Istituto Chemioterapico*, 174 E.C.R. 223 (confession by the Advocate General in his submissions that the presumption is almost irrebuttable).

137. *See* Case 48/69, Imperial Chem. Indus. Ltd. v. Commission, 1972 E.C.R. 619, 1972 C.M.L.R. 629.

138. *See* Allen, *supra* note 17, at 59; Mann, *supra* note 17, at 49 ("The text of these messages can nowhere be found — not in the decision of the Commission, nor in the speech of the Advocate General, nor in the judgment of the Court. No such messages were proved to have been sent in 1965 and 1967."); *see also* BARACK, *supra* note 11, at 67; Griffin, *supra* note 7, at 403-04.

dence was enough to prove that CSC exercised total control over Istituto in their relations with Zoja. The circumstantial evidence included, but was not limited to, CSC's decision to sell required raw material only to Istituto, the purchase by Istituto of all the nitropropane which was left in the market, and Istituto's unsuccessful attempt to merge with Zoja.[139]

The primary weakness of the ECJ's application of the Examination Approach is that it produces practical outcomes similar to those generated when the widely criticized and explicitly rejected "Presumption Approach" is applied.[140] Therefore, it is quite comforting that this way of application was not followed in other cases in which a higher standard of proof was used.[141]

d. Conclusion

The test for whether a subsidiary is controlled by a parent should be cumulative. It should combine the structural/managerial test with the functional test. In contrast, some of the cases indicate that the mere existence of a subsidiary is enough to establish control by the parent. The standard of proof required to substantiate the existence of control should be based on the Examination Approach. The way the Examination Approach has been applied by the ECJ in some of the cases, however, does not differ substantially from the Presumption Approach. In these Examination Approach applications, the circumstantial evidence was enough to substantiate control.

In light of the confusion created by both ECJ and Commission case law on this subject, the ruling of the ECJ in *Metro-SB-Großmärkte GmbH & Co. KG v. Commission*[142] (*Second Metro*) is worth noting. The Court in this case rejected Metro's submission that the activity of the entire Thomson-Brandt group should be considered to determine Saba's dominant position in the electric goods market.

> [I]n the first place, it must be remarked that, as against the clear and precise information supplied to the Court by the Commission, Metro

139. *Istituto Chemioterapico*, 1974 E.C.R. 223; *see* Allen, *supra* note 17, at 73 ("nature of the evidence remains inferential and circumstantial").

140. However, much as both the Advocate General and the Court may have been more concerned with the actual exercise of control by a parent company over its subsidiary as the essential test for determining the non-autonomous character of the subsidiary, the decisions of the Court . . . seem to indicate that, even the ability or the chance of a parent company being able to exercise such control over its subsidiary would suffice for the purposes of treating both of them as constituting a single economic unit.

Bentil, *supra* note 17, at 65.

141. For example, all those cases with a strict examination of the parent-subsidiary relations led to imposing a fine on the subsidiary alone, hence the inapplicability of the EUT.

142. Case 75/84, 1 C.M.L.R. 118; *see supra* note 98 and accompanying text.

> has not adduced any evidence which would enable the Court to find that the undertakings in the Thomson-Brandt group are not only linked at the level of capital but also pursue a coordinated marketing strategy in accordance with the directions of their parent company or with a plan agreed between themselves. In the absence of such evidence, the Court must proceed on the basis that so far as the distribution of its products are concerned SABA is independent of the parent company and of the other undertakings in the group.[143]

The ECJ in this case clarified its position by expressly adopting the combined criterion based on the facts of each case and by imposing the burden of proof on the litigant claiming the corporate veil should be lifted. *Second Metro* thereby affirmed the Examination Approach.[144]

2. *Successor Undertakings: The Identity Principle*

The control criterion cannot be applied to cases belonging to the Successor Undertakings Group; therefore, an alternative is required. The identity criterion is the substitute proposed here. The identity criterion has as its focus the identity between the undertaking that carried out anti-competitive conduct, and its successor to whom the conduct is imputed.[145] The identity criterion embodies the same reasoning as the control criterion, namely that infringements of competition law should be imputed to whoever possesses the directing mind and will. Conversely, in related-companies situations, the parent company possesses the directing mind and will of the whole group. In succession cases, the directing mind and will is transferred to the successor undertaking.

It seems, therefore, that the identity criterion was properly applied in both the first sub-group (containing undertakings only changing their legal form and name, where the principle of economic succession

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143. *Id.* at 166, para. 84. *See* Huie, *supra* note 11, at 320. Huie embraced both the *Hydrotherm* and the *Second Metro* judgments:

> [T]he two recent decisions represent a retreat from *AEG-Telefunken*, the high-water mark of the Court's 'SEU' [Single Economic Unit] language. Rather than presuming that a wholly-owned subsidiary always follows the parent's policy, the Court will examine the circumstances of each case to determine whether a parent and its subsidiaries compete with each other . . . .

Id.

144. Inferring these conclusions from the ECJ's judgment could be challenged because the Court reached its conclusions based on information supplied to it by the Commission, in this case the litigant opposing lifting the corporate veil. However, it seems that this information was no more than a secondary consideration in the Court's decision to reject the submission.

145. *See supra* note 15 and accompanying text.

was applied), as well as in cases comprising the second sub-group (containing undertakings only transferring their anti-competitive activities, where the principle was not applied). In the former sub-group, there is an absolute identity between the former undertaking and its successor. In the latter sub-group, no such identity exists. The uneasiness as to the policy of the EC institutions in this context concerns only the third sub-group of succession cases. The third sub-group contains the absorption (or take-over) cases where infringements carried out by the companies absorbed were imputed to the takeover company.[146]

It seems that this policy concentrates merely on the notion of economic succession, ignoring the fact that economic succession does not necessarily comprise an absolute continuity and total identity between the former undertaking and its successor.[147]

Such an absolute continuity and total identity does not exist where the absorbing undertaking takes no part in the anti-competitive conduct of the former company, and where the acquisition is not intended to frustrate the application of EC competition rules. In criminal law,[148] courts do not accept an argument that a deceased murderer's legal successor should be executed because a murder was committed and justice requires an execution. Similarly, the argument that the Commission and Courts must penalize a successor undertaking because the offender ceased to exist should be viewed with skepticism.

It is quite acceptable to apply the economic succession rationale in cases where absorbing undertakings do not act in good faith, but absorb the infringing undertakings to frustrate the application of EC competition law.[149] The situation is different, however, when absorbing undertakings have no connection with the pertinent infringements.[150]

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146. *See supra* notes 68-72 and accompanying text.

147. *See* Case 29, 30/83, Compagnie Royale Asturienne des Mines S.A. v. Commission, 1984 E.C.R. 1679, 1718, 1 C.M.L.R. 688 (warning against a strict application of the notion of economic succession).

148. *See supra* note 108 and accompanying text.

149. Case 86/398, Re Polypropylene Cartel: The Community v. ICI plc, 4 C.M.L.R. 347 (1988).

150. *See* GOWER, *supra* note 5, at 132-33 (citing Willis v. Ass'n of Universities of the British Commonwealth, 1965 QB 140 (C.A.)). In form, the landlords are a limited company which is being wound up, and a new chartered corporation has been created. In substance, however, there is continuity. The phrase alter ego undoubtedly lacks precision for most purposes, but for the present purpose it is a fair description of the landlords in their new guise of the chartered corporation as successors of the landlords in their old guise of the limited company. Note that the English law recognized economic succession mainly in cases belonging to the first sub-group, where companies merely changed their legal form and name.

B. Preventing Anti-Competitive Circumstances

1. General

The condition discussed in the previous sub-section is an essential pre-condition for applying the doctrine of lifting the corporate veil. Another factor to be considered when applying the doctrine in competition law is the prevention of anti-competitive circumstances. Legal scholars debate about the weight attributable to this factor. Prevention of anti-competitive circumstances can not be considered the decisive element. The EUT cannot exist absent the other basic conditions for its application.[151] However, the EUT should not be applied in a manner prejudicial to the goal of preventing anti-competitive market conditions.

2. The Subsidiary Violations Group: Does Applying the EUT Promote Competition?

This group of cases did not provoke much discussion about the condition of pro-competitive outcomes.[152] In rare agreement, legal scholars share the belief that the only possible outcome of lifting the corporate veil in this group is terminating or sanctioning anti-competitive conduct. The important notion of efficiency should be addressed in this context. Pro-competitive conditions can only develop in an economic and legal environment which allows undertakings to conduct their business with a maximum degree of efficiency and freedom. The application of the EUT should not limit excessively the activities of enterprises nor should it limit efficiency. Freedom to operate efficiently is, of course, subject to legal requirements such as those set by competition law.

Automatically imputing a subsidiary's anti-competitive conduct to the parent company can lead to deterring international businesses from operating through independent autonomous subsidiaries within the European Community. International concerns may be forced to

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151. *But see* Huie, *supra* note 11, at 324-25 ("Control alone does not turn affiliated companies into a 'single economic unit.' . . . The Court should continue to focus its decisions upon impermissibly anti-competitive behavior instead of percentages of ownership.") The author's verdict about the control criterion is acceptable, but the same is true about the criterion discussed in this sub-section. Hence, the two conditions discussed in this section should be fulfilled simultaneously.

152. *But see* Allen, *supra* note 17, at 50 (criticizing the ECJ's judgment in the *Dyestuffs* case: "one might only imagine the effects a doctrine affording a broader jurisdiction in a situation where there is a foreign defendant which has no subsidiaries acting within the community, yet, in that event there would arise new problems of enforcement as well as of personal service."); *see also* Steindorff, *supra* note 17, at 507-508.

adopt the centralized, inefficient, and therefore anti-competitive strategy of acting through dependent branches.[153] This may also produce anti-competitive results by eliminating the number of autonomous businesses acting in the market.[154] A possible solution to the dilemma can be found in imputing anti-competitive conduct to a parent company only when the parent exercises absolute control over its subsidiaries. Thus, the paradox of creating anti-competitive conditions by applying competition law can be avoided.

3. *The Related Undertakings Groups: The Intra-Enterprise Conspiracy*

The prevention of anti-competitive conduct as a condition for the application of the EUT is a highly sensitive issue as far as intra-group relations and agreements are concerned. Applying the corporate veil doctrine may narrow the applicability of competition law. Therefore, satisfaction of the condition is particularly important for this group of cases.

Given this background, the intra-enterprise conspiracy doctrine has emerged. Competition law should apply to every intra-enterprise agreement, notwithstanding the dependence of the subsidiaries and the good faith of the contracting parties.[155] Neither the Commission nor the ECJ ever mention the theory, but choose instead to exclude intra-enterprise agreements from the scope of competition law by defining them as mere allocations of tasks within the economic unit. Legal methods other than the intra-enterprise conspiracy doctrine are applied to overcome external anti-competitive applications.[156]

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153. *See* Mann, *supra* note 17, at 49. Application of the EUT to successor undertakings of the second group also may deter international concerns from absorbing losing and inefficient undertakings. However, opposition to the EUT as applied to this group could result in fewer actors in the market, which is contrary to a basic principle in competition law.

154. *But see* Case 89/85, Re Wood Pulp Cartel: A. Ahlström OV v. Commission, 4 C.M.L.R 901 (1988) ("The producers in this case implemented their pricing agreement within the common market, so it is immaterial in that respect whether or not they had recourse to subsidiaries, agents, sub-agents, or branches within the Community in order to make their contacts with purchasers within the Community.") Note, however, that competitive conditions in markets differ in important ways between a structure where companies act through branches and where they act through subsidiaries. Subsidiaries enjoying full independence from parent companies foster competitive markets, in contrast to mere branches directed from the central office.

155. *See supra* note 73 and accompanying text.

156. In some cases the ECJ and the Commission chose to concentrate on the agreements conducted by the members of the economic group with third parties. *See, e.g.*, Re Kodak, 1970 C.M.L.R. 19; Case 22/71, Béguelin Import Co. v. S.A.G.L. Import Export, 1971 E.C.R. 949. In cases where external agreements did not exist, Articles 36 or 86 of the EEC treaty were applied. *See* Case 15/74, Centrafarm BV v. Sterling Drug Inc., 1974 E.C.R. 1147; Case 30/87, Bodson v. Pompes Funèbres des Régions Libérées SA, 4 C.M.L.R. 984 (1989). It can be submit-

The Commission's decisions have been patterned to distinguish between two types of intra-enterprise agreements. Contracts allocating tasks within the economic unit are distinguished from contracts limiting third parties' freedom of action and creating anti-competitive circumstances in the market.[157] However, every intra-enterprise agreement may have an anti-competitive impact on third parties. As Professor Koppensteiner states:

> As a consequence of the *Christiani and Nielsen* situation, for instance, potential customers outside the Netherlands are prevented from buying from *Christiani and Nielsen*, The Hague. Assuming price differentials for the Articles in question this might very well affect the competitive position of third enterprises.[158]

Application of the intra-enterprise conspiracy doctrine discriminates between international enterprises doing business as branches and those doing business as subsidiaries. Anti-competitive branch arrangements escape the limits of competition law, whereas totally dependent subsidiaries may be limited by the EC's competition authorities.[159]

The only possible solution to this problem may be an *ad hoc* determination of whether the intra-enterprise agreement influences third parties.[160] In *Christiani & Nielsen*, for example, the EUT should have been applied if there were no substantial price differences between the Netherlands and the other Member States. In such circumstances, it is hard to imagine any non-Dutch customer wishing to buy from the Dutch company. If Dutch prices were considerably lower than those in the other Member States, the theory should not have been applied. When price differentials exist, anti-competitive agreements limit EC non-Dutch customers' freedom of action, and thus, it affects trade between member states.

Such a limited application of the intra-enterprise conspiracy doctrine may indeed discriminate between undertakings operating in the

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ted, however, that the theory was applied implicitly as far as joint ventures are concerned. *See supra* notes 99-105 and accompanying text; *see also* Huie, *supra* note 11, at 307 (submitting that the American courts ignored the theory as well).

157. *Centrafarm* (Commission submission and Advocate General's observation in the case); COMMISSION OF THE EUROPEAN COMMUNITIES FOURTH REPORT ON COMPETITION POLICY (1975) (Commission position).

158. *See* Koppensteiner, *supra* note 17, at 293-294.

159. *See* BARACK, *supra* note 11, at 86-87; van Oven, *supra* note 73, at 109; Koppensteiner, *supra* note 17, at 294; *see also* BARACK, *supra* note 11, at 91 (suggesting the problem can be avoided by applying the theory also to relations between independent branches); van Oven, *supra* note 73, at 107 (an intra corporate conspiracy doctrine was rejected in the U.S. by supporters of the intra-enterprise conspiracy doctrine).

160. *See also* Huie, *supra* note 11, at 327.

EC through branches and those operating through subsidiaries. Nevertheless, such discrimination is an outcome of the undertaking's decision to pursue its activities in that corporate form, since "those who have chosen the benefits of incorporation must bear the corresponding burdens . . . ."[161] Applying the EUT in the Subsidiary Violations Group when there is no proof that the subsidiaries are totally dependent can induce undertakings to prefer operating through dependent branches instead of independent subsidiaries.[162] Consequently, market competition could be reduced. In contrast, there is no such danger in not applying the theory to the Related Undertakings Group because the subsidiaries involved are nevertheless dependent.[163]

It seems, therefore, that when intra-enterprise agreements can create an anti-competitive outcome, Article 85 should apply, notwithstanding the fact that the subsidiaries involved are totally dependent. If Article 85 is not applied, the application of the EUT will lead to results totally adverse to its purpose of eliminating anti-competitive conduct. The solution to the intra-enterprise conspiracy problem should not be based on an *a priori* application of the EUT or the intra-enterprise conspiracy doctrine, but on a case by case examination.

4. *Conclusions*

The institutions of the European Community have not devoted enough attention to this condition in either the Subsidiary Violations or the Related Undertakings Group. An *a priori* imputation of anti-competitive conduct to parent companies in the Subsidiary Violations Group may deter international undertakings from carrying on business in the EC through independent subsidiaries instead of dependent branches. The total rejection of the intra-enterprise conspiracy doctrine as far as wholly-owned subsidiaries are concerned may lead to excluding anti-competitive conduct from legitimate sanctions because it is outside the scope of EC competition law.

IV. THE SUGGESTED MODEL

A. *Presentation of the Model*

In an article severely criticizing the application of the EUT in both the EC and the U.S., the author states "[i]t can be suggested with

161. GOWER, *supra* note 5, at 138. *But see* SMIT & HERZOG, *supra* note 105, at 3-169 ("[T]his view gives too great weight to legal happenstance."); Assant, *supra* note 107 (another proposed solution is to grant negative clearance and apply instead Art. 86 of the EEC treaty); Griffin, *supra* note 7, at 379.

162. *See supra* notes 152-154 and accompanying text.

163. It should be stressed that the EUT cannot be applied where independent subsidiaries are concerned because in these cases the condition of full control is not met.

some confidence that outside the U.S. and the EEC it will be difficult to find support for piercing the veil where there is no misuse of the corporate structure."[164] One does not have to accept the author's harsh conclusions regarding the EC's practice, but the unavoidable conclusion is that the basic requirements of lifting the corporate veil doctrine were not always strictly maintained by the EC case law. This final section suggests a model for the application of the EUT by the EC competition law. The suggested model strikes a balance between the fundamental principles of both company law and competition law.

The suggested model comprises the following two conditions. First, the enterprises belonging to the economic unit share the same directing mind and will, center, ego, and brain. This means as far as the Subsidiary Violations and the Related Undertakings Groups are concerned, the subsidiaries involved in the anti-competitive conduct are totally dependent on their parent company, and they enjoy no autonomy whatsoever in carrying on their business. This applies to cases in which both parent companies and their subsidiaries are involved. It also applies to cases in which only subsidiaries, but all belonging to the same concern, are involved. For cases in the Successor Undertakings Group, the application of this condition means that there should be an absolute continuity and total identity between the former undertaking and its successor. Second, application of the EUT should not create anti-competitive circumstances in the relevant market.

These conditions reflect the reconciliation between company law and competition law. The first condition reflects the basic principle of company law: the corporate veil will be lifted only when the "corporate personality is being blatantly used as a cloak for fraud or improper conduct."[165] Complementing the first condition, the second condition prevents the application of the EUT to prejudice competition law's main purpose.

B. Application of the Model

The control condition should be applied in both the Subsidiary Violations and the Related Undertakings Groups on the cumulative basis of the structural and managerial test as well as the functional and operational test. The former test distinguishes between related companies situations, and other situations in which one undertaking has the power to direct the activities of another (like in a cartel situation). Therefore, the structural and managerial test prevents an exces-

164. Mann, *supra* note 116, at 56-65.
165. GOWER, *supra* note 5, at 222.

sive application of the EUT. The functional and operational test serves as a safeguard against application of the EUT when the subsidiaries enjoy full independence despite another undertaking holding most of their shares' capital.

The control condition should be satisfied only when the parent company holds an amount of the subsidiary's share capital which allows the parent not only to appoint its representatives to the subsidiary's board of directors, but also to exercise actual influence on the subsidiary's whole activity to the extent that the subsidiary is economically nothing but a branch operation. The cumulative test should be substantiated by the Examination Approach,[166] and not on the almost irrebuttable presumption that (wholly-owned) subsidiaries always follow their parents' orders.

The party claiming that the corporate veil should be lifted bears the burden of proving the existence of total control.[167] That party must establish that the subsidiary was under the parent's total control in conducting all of its activities and not only in limited areas. In some cases, circumstantial evidence may satisfy the above requirement. For example, simultaneous messages sent by the parent to its subsidiaries, followed by all subsidiaries' increasing prices, suggest total control. However, the same messages hardly substantiate control when prices are increased some years after the messages are sent.[168]

A parent company's control over its subsidiary is not applicable where a successor undertaking is concerned. For cases in the Successor Undertakings Group, the identity between the offending undertaking and its economic successor is used to determine whether the former undertaking's conduct should be imputed to the successor. When the parent undertaking merely changes its name and form, a clear relationship exists and liability can be imputed to the successor.[169] In contrast, where assets are transferred or a takeover has occurred, liability cannot be imputed. The new company has not inherited the "guiding will and mind" of the former company.[170] It would be unfair to im-

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166. The examination approach entails a close scrutiny of the conduct of both the parent company and its subsidiaries. *See supra* notes 132-136 and accompanying text (discussing how such an examination should be conducted).

167. Depending on the circumstances, the Commission may lift the corporate veil to enforce the EUT, a plaintiff in a Subsidiary Violations Group case may allege violation of EC competition law, or an undertaking may seek application of the EUT in a Related Undertakings Group case.

168. *See* Mann, *supra* note 17, at 48 (criticizing the ECJ's approach in the *Dyestuffs* cases).

169. *See supra* notes 57-63 and accompanying text.

170. *See supra* note 108 and accompanying text.

pute the anti-competitive conduct of the absorbed undertaking to the absorbing company.[171]

Applying the first condition will prevent sanctioning both the parent and its subsidiaries when the existence of total control is substantiated. To impose double fines in these cases is inconsistent with the notion of control as creating a single economic unity between the related undertakings. The practice also harms minority shareholders of the subsidiary.[172]

The imposition of a fine on a parent company for the anti-competitive conduct of its independent subsidiaries contradicts the application of the second condition as well. Parent companies might be led to restrict their subsidiaries' former autonomy by restructuring all activities in the EC as branches or totally dependent subsidiaries. Market efficiency and competitiveness could be reduced because there would be fewer operating entities. Instead of a plurality of actors specializing in individual products or territories, there would be a relatively small number of undertakings. Furthermore, each undertaking could be directed from a center outside the EC. The resulting markets would be less efficient and less competitive.[173]

The second condition should lead to application of the EUT to intra-enterprise agreements only when they have no external anti-competitive effect. Market allocation and price fixing agreements where prices for the same product differ substantially between member states should not escape the application of Article 85, even if the agreements are between members of an economic unit.[174]

C. *Conclusions*

One European legal writer has suggested U.S. unfair competition laws as the model which should be adopted by the EC.[175] The view

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171. *See supra* notes 68-72, 145-150 and accompanying text. While in cases where assets are transferred one cannot speak of succession because the offending undertaking maintains its legal existence, the economic succession principle was rejected in these cases, albeit applied in cases of absorption.

172. *See supra* notes 114-116 and accompanying text.

173. *See supra* notes 152-154 and accompanying text. A risk exists, however, that having many related companies in the market may impede competition because such companies would conclude anti-competitive agreements among themselves. This risk may be avoided by correctly applying both the first and the second conditions as far as agreements between related companies are concerned. That is, apply the EUT only when the subsidiaries are totally controlled and the agreement is not anti-competitive, as well as when no anti-competitive outcomes are created.

174. One should not confuse Article 85 with Article 86 when considering an economic unit not necessarily with a dominant position. Here, the issue is legally separated companies engaged in restricting trade between member states by using the EUT as a shelter against the requirements of Article 85.

175. Van Oven, *supra* note 73, at 118-119.

expressed in U.S. law was expressed by an American judge almost a century ago:

> [A] corporation will be looked upon as a legal entity as a general rule . . . but, when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons.[176]

Hopefully, the proposed model follows the spirit of these words.[177] The model seeks to advance the full enforcement of competition law while minimizing its impact on the basic principle of a company's separate legal entity.

176. United States v. Milwaukee Refrigerator Transit Co., 142 F. 247, 255 (7th Cir. 1905); *see also* PENNINGTON, *supra* note 1, at 48 (passage quoted also represents English law).

177. The quoted passage resembles the position adopted by the ICJ 65 years afterwards. *See Barcelona Traction*, 1970 I.C.J. at 39-40.