Child collusion a parent’s responsibility – Sanctioning the parent company in terms of South African Competition Law

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Introduction

Amongst the current issues and challenges in South African Competition Law enforcement is the uncertainty about whether parent companies could be held liable for cartel infringements committed by their subsidiaries. Whilst the recent case law seems to suggest that the courts have not considered the principle of “parent/group liability” favourably, there also does not seem to be a definitive position from the courts on the application of this principle. For example, in Pioneer3, the Competition Tribunal (“Tribunal”) declined to adopt the Competition Commission’s (“Commission”) proposed penalty calculation based on the group’s turnover. In Loungefoam4, the Competition Appeal Court (“CAC”) rejected the Commission’s reliance on the concept of single economic entity to hold the parent company liable. In turn, in RMS5, although the Tribunal briefly mentioned the approach by the European competition authorities of fining parent companies, it did not fully explore the application of the principle of “parent/group liability”. The question that arises is whether the scheme of the South African Competition Act No. 89 of 1998 (as amended) (“Competition Act”) permits the imputation of liability to parent companies, and if so how and when liability may be attributed to holding companies. In analysing the application of this principle in the South African context, the paper will also consider the position of the European competition authorities and concludes on the suggestion for specific guidelines on this principle.

One is reminded that the principle of maximum deterrence is imperative in determining the appropriate level of a penalty to levy against a firm. Therefore, in line with the principles of proportionality and equality, the Tribunal in terms of section 59 of the Competition Act has the discretion to impose penalties in order to achieve effective deterrence. It is noted that the imposition of an administrative penalty for a contravention of competition rules is

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3 3 Competition Commission v. Pioneer Foods (Pty) Ltd 15/CR/FEB07 and 50/CR/MAY08 at paragraph 137
4 Loungefoam (Pty) Ltd and others v Competition Commission and others; In re Feltex Holdings (Pty) Ltd v Competition Commission and others and two related review applications [2011] 1 CPLR 19 (CAC)
5 Competition Commission v. Avenge Africa Limited t/a Steeledale, Reinforcing Mesh Solutions (Pty) Ltd, Vulcania Reinforcing (Pty) Ltd & BRC Mesh Reinforcing (Pty) Ltd 84/CR/DEC09
considered alongside effective enforcement of these rules in seeking to uncover clandestine cartel conduct and punish those firms involved and discourage other firms from even engaging in such conduct. In its fining guidelines, the European Commission has the discretion to,

“...impose fines on undertakings or associations of undertakings where, either intentionally or negligently, they infringe Article 81 (now Article 101) or 82 (now Article 102) of the Treaty...In exercising its power to impose such fines, the Commission enjoys a wide margin of discretion within the limits set by Regulation No 1/2003...the Commission must ensure that its action has the necessary deterrent effect...Accordingly, when the Commission discovers that Article 81 or 82 of the Treaty has been infringed, it may be necessary to impose a fine on those who have acted in breach of the law. Fines should have a sufficiently deterrent effect, not only in order to sanction the undertakings concerned (specific deterrence) but also in order to deter other undertakings from engaging in, or continuing, behaviour that is contrary to Articles 81 and 82 of the EC Treaty (general deterrence).”

Similarly, the Office of Fair Trading (“OFT”) guidance as to the appropriate amount of penalty (“OFT guidelines”) sets out that,

“Under sections 36(1) and 36(2) of the CA98, on making a decision that an undertaking has infringed the Chapter I or the Chapter II prohibition or Article 101 or 102 of the TFEU, the OFT may require the undertaking concerned to pay a penalty in respect of the infringement...The OFT has a discretion to impose financial penalties and intends, where appropriate, to impose financial penalties which are severe, in particular in respect of agreements between undertakings which fix prices or share markets, other cartel activities...The OFT considers that these are among the most serious infringements of competition law...There are two aspects to the deterrence objective. First, there is a need to deter the undertakings which are subject to the decision from engaging in future anti-competitive activity (often referred to as 'specific deterrence'). Second, there is a need to deter undertakings at large which might be considering activities contrary to any of Article 101, Article 102, the Chapter I or Chapter II prohibitions from breaching the law (often referred to as 'general deterrence').”

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6 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (2006/C 210/02)

7 OFT 423 September 2012
The effective enforcement of competition law rules requires that firms are discouraged from engaging in nefarious conduct such as cartel. The imposition of administrative penalties is an important tool in disincentivising firms from engaging in cartel conduct. Therefore the question of who ought to be held liable for the payment of administrative penalties is in an important question in seeking to achieve maximum deterrence and effective enforcement of competition law rules; the subject of which will form part of this paper.

**Principle behind parent-subsidiary liability – competition law**

The competition law principles behind the imputation of such liability derives from the development of European competition jurisprudence and understanding of the economic unit in that,

“…Community competition law is based on the principle of the personal responsibility of the economic entity which has committed the infringement. If the parent company is part of that economic unit, which,…may consist of several legal persons, the parent company is regarded as jointly and severally liable with the other legal persons making up that unit for infringements of competition law. Even if the parent company does not participate directly in the infringement, it exercises, in such a case, a decisive influence over the subsidiaries which have participated in it. It follows that, in that context, the liability of the parent company cannot be regarded as strict liability.”

The important determinant is the possession and ability to exercise control and/or decisive influence over the subsidiary by virtue of the fact that, *inter alia*, the parent company holds 100% of the shareholding of the subsidiary and therefore,

[the] subsidiary does not autonomously determine its conduct on the market but mostly applies the instructions given to it by the parent company, having regard in particular to the economic, organisational and legal links which unite those two legal entities. In such a situation, since the parent company and its subsidiary form part of a single economic unit and thus form a single undertaking for the purpose of Article 101 TFEU, the Commission may address a decision imposing fines to the parent company without being required to establish its individual involvement in the infringement.”

**Current legal framework**

8 *Akzo Nobel* decision at paragraph 77
9 *Eni SpA v. European Commission* Case C-508/11 P at paragraph 46 Judgement of 8 May 2013
Definition of a firm

The concept of the attribution of liability to the parent company is not novel in the South African Competition Law. It has been considered, albeit briefly, by the courts. However, the debate that arises is whether the scheme of the Competition Act permits the imputation of liability to parent companies, and if so how and when liability may be attributed to holding companies. A simultaneous look at the case law indicates how the courts have touched on this concept from a competition law perspective.

A number of sections of the Competition Act may be considered for purposes of determining the applicability of the parent liability principle within the Competition law framework.

In the authors’ view, the contention probably starts with the definition of a firm. Section 1(1)(xi) of the Competition Act defines the firm as including “a person, partnership or a trust”. In the European Union (“EU”), an undertaking, the equivalent of a “firm” under the South African Competition Act, is described as an “entity engaged in an economic activity, regardless of its legal status and the way in which it is financed.” In particular, in the context of the principle of group liability, an undertaking is recognised as,

“designating an economic unit even if in law that economic unit consists of several natural or legal persons, and that when such an economic entity infringes the competition rules, it is for that entity, according to the principle of personal responsibility, to answer for that infringement.”

This “economic unit” approach could also be transposed to the definition of the “firm” under the South African Competition Law. According to the economic unit principle, different legal entities may be regarded as,

“one entity if the control mechanisms and structure of the relations between these entities imply that competition between these parties is excluded, i.e. they behave as one single party”.14

10 Competition Act 89 of 1998, as amended – section 1(1)(xi)
11 ArcelorMittal – EU case – Judgment of the Court dated 29 March 2011 (para 95)
12 ArcelorMittal – EU decision (referring to Case C-90/09P General Quimica and Others v Commission [2011] ECR I-0000, paragraphs 34 to 36 and the case law cited)
In fact, this principle provides the basis for a defence against the applicability of section 4(1) of the Competition Act on “inter-company agreement within a group that otherwise would be regarded as anticompetitive”. In this regard, section 4(5) excludes section 4(1) from operating against firms that are part of a single economic entity. It stipulates that an agreement between, or concerted practice engaged in by, firms within a single economic entity does not fall foul of the provisions of section 4(1).

The section 4(5) provisions appear to be based on the presumption of control and/or decisive influence between a parent and its wholly-owned subsidiary. However, section 4(5)(b) extends this presumption to a constituent of firms similar to a parent and its wholly-owned subsidiary. Thus, the imputation liability in terms of single economic entity could potentially apply to a parent and its less-than-wholly-owned subsidiary, subject of course to evidence indicative of the possession and exercise of control and/or decisive influence analogous to that between parent and its wholly-owned subsidiary. The CAC in Loungefoam, however, did not accept the reliance on section 4(5) for purposes of attaching liability to the parent company. In its decision on an application brought by the Commission for leave to appeal its judgment to the Supreme Court of Appeal (“SCA”), the CAC specifically stated the following on the use of section 4(5) to attribute liability on parent company:

“That section only applies to exempt the firms forming a single economic entity from liability under section 4(1) for conduct as between themselves. Once the conduct involves third parties the section becomes irrelevant and all the participant firms are liable to be held to have contravened s 4(1) and be liable for penalties that such conduct attracts. The section does not provide any basis for making a holding company liable for administrative penalties imposed on its subsidiaries. That does not mean that a holding company may not in certain circumstances be held liable for prohibited anti-competitive conduct by its subsidiary – (...) – only that it cannot be held liable under s 4(5)(b).”

14 Ibid
16 Section 4(1)(b) of the Competition Act prohibits an agreement or concerted practice by competitors, or a decision by an association of firms, if it involves fixing prices or a trading condition, dividing markets or collusive tendering (which practices are commonly known as cartel offence or collusive conduct).
17 Loungefoam (Pty) Ltd and others v Competition Commission and others; In re Feltex Holdings (Pty) Ltd v Competition Commission and others and two related review applications [2011] 1 CPLR 19 (CAC) – paragraph 66
18 Ibid
The authors’ reading of the above is that although the CAC refused to accept the use of section 4(5) for purposes of attributing liability to a parent company, it accepted that under certain circumstances, a parent company may be held liable for payment of the fine for an infringement committed by its subsidiary.

Notwithstanding the above, a critical reading of the section 59 provisions of the Competition Act may warrant the application of parent liability for the conduct of its subsidiary. In this regard, section 59(1)(a) stipulates that:

“The Competition Tribunal may impose an administrative penalty only for a prohibited practice in terms of section 4(1)(b) (...).”

Further, section 59(2) states that:

“An administrative penalty imposed in terms of sub-section (1) may not exceed 10% of the firm’s annual turnover in the Republic and its exports from the Republic during the firm’s preceding financial year.”

During the court proceedings in the Pioneer case, the Commission indicated that it intended to seek a penalty of 10% of Pioneer’s total group turnover, as opposed to the turnover of Pioneer’s baking division in the Western Cape.\(^{19}\) The Tribunal, however, decided against this prayer and found that it had adopted an appropriate approach in relation to the penalty.\(^{20}\) The Tribunal found that Pioneer, on the basis of its conduct vis-à-vis the investigation, was to be subjected to the highest penalty that the Tribunal was entitled to levy.\(^{21}\) However, the Tribunal accepted that the evidence indicated that the collusion in respect of the Western Cape lasted for a period of time shorter than the contravention in the National/Inland region. Accordingly, Pioneer was ordered to pay an administrative penalty of 9.5% of its division, Sasko’s 2006 bread turnover for the Western Cape, and 10% of Sasko’s 2006 national bread turnover less that of the Western Cape.\(^{22}\)

In RMS, the Tribunal in setting out the methodology to follow in determining an appropriate penalty recognised the EU approach in fining parent companies for contravention by

\(^{19}\) Competition Commission v Pioneer Foods (Pty) Ltd (15/CR/Feb07 – 50/CR/May08)

\(^{20}\) Pioneer at para 137

\(^{21}\) Pioneer at para 172

\(^{22}\) Pioneer at para 173 and 174
controlled subsidiaries, in appropriate cases. The Tribunal noted that parent companies will generally have a greater total turnover than the affected turnover of a subsidiary.\(^{23}\)

With the above in mind, there is an argument that nothing in the Competition Act precludes the imputation of liability for an administrative penalty in terms of section 59 on the broader meaning of the firm which would be the single economic entity as defined in section 4(5). Although section 4(5) primarily seeks to exclude the application of section 4(1) to agreements between firms constituting a single economic entity, nothing in the Act precludes the application of section 4(5) from the application of section 59 to include the firm as a single economic entity. Therefore if a complaint is properly initiated against the group or the single economic entity for conduct perpetuated by the wholly-owned subsidiary and thus included for purposes of imputing liability vis-à-vis the infringement and/or liability in terms of the administrative penalty, there is nothing in principle, under the Competition Act nor in South African jurisprudence which suggests that such imputation cannot extend to the entire economic unit for purposes of section 59.

*The “firm” and section 59 Competition Act*

The writers' are of the position that arguably “constituent firms within a single economic entity means that they constitute a firm for purposes of the Act, including section 59 of the Act.”\(^{24}\) Therefore, “the firm” that could be liable for payment of a penalty under section 59(2) could be the parent company, under certain circumstances, if it is accepted that a firm is an economic unit which consists of several legal persons, and thus forming a single economic entity. In its application for leave to appeal to the SCA against the decision of the CAC in the *Loungefoam* matter, the Commission argued that the definition of “firm” for purposes of section 59 includes:

- All constituent firms in a single economic entity as those constituent firms are regarded as a firm; or
- The parent company which controlled and directed the constituent firms in the single economic entity, treating them as its divisions, in their collusion with a third party.\(^{25}\)

\(^{23}\) Competition Commission v Aveng and others – 84/CR/Dec09 (RMS case) paragraph 151
\(^{24}\) Competition Commission's Application for Leave to appeal to the Supreme Court of Appeal against the CAC judgment in Loungefoam (3 June 2011), paragraph 7.1
\(^{25}\) Competition Commission's Application for Leave to appeal to the Supreme Court of Appeal against the CAC judgment in Loungefoam (3 June 2011) – paragraph 7.2
The above is in line with a broad reading of what constitutes the firm. Consequently, if one accepts that a firm is an economic unit which consists of several legal persons, and thus forming a single economic entity, the “firm” referred to in section 59(2) would also include the parent company.

There is a dissenting view to the reading of section 59 in seeking to attach liability to a parent company, for infringements undertaken by its subsidiary. This view holds that

“the language of section 59(1)(a) and (b) indicates that only the perpetrator of a prohibited practice may be saddled with an administrative penalty. Accordingly, the Tribunal does not have jurisdiction to impose penalties on parties other than the ones who engaged in the prohibited practices.”

This view further argues that “the Act does not envisage or provide for any order being made against anyone who is not a respondent before the Tribunal.” The contention here is that there must be an initiation against the parent company before liability for an administrative penalty can be imposed against it. This view argues that section 1(1)(xxix) defines “respondent” as “a firm against whom a complaint of a prohibited practice has been initiated in terms of this Act.” Accordingly, “there is no way, other than by a referral, to expose anyone to the final adjudicatory process of the Tribunal or to an order by the Tribunal to pay a penalty.” The problem with this view is that it fails to recognise that the definition of “respondent” equally does not extend to say “and against whom an administrative penalty may be levied in terms of section 59(2) of the Act.” It is also interesting to note that section 59(2) does not refer to 10 % of the “respondent’s annual turnover”, but instead refers to “the firm’s annual turnover”. This is an important point when seeking to understand parent liability/group liability principle under the scheme of the Competition Act, and in particular section 59(2).

Another debated point is whether there must be an initiation against the parent company in order to impute liability for payment of an administrative penalty. In Loungefoam the CAC found that only the firm against which complaints were levelled, i.e. in a complaint initiated by the Commission, could be held liable under the Competition Act given the scheme of the

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26 CAS’s heads of argument dated 23 May 2011 - CC v RMS AND CAS (Joinder application – 84/CR/Dec09)
27 Ibid, and also in Commission’s replying affidavit – para 7.1.a
28 CAS’s heads of argument dated 23 May 2011, in Joinder application – CC v RMS and CAS (84/CR/Dec09) – para 13.2.1(a)
29 Ibid
The effect of the decision is that a parent company that controlled a wholly owned subsidiary during the period of the contravention cannot be held liable for its infringement under the Act, unless the parent company itself faced a complaint initiated against it for its part in the alleged contravention.31 Without a critical interrogation of this position, as a matter of legal principle, one can accept the position to the extent that it leaves open the possibility of the attribution of liability on a parent company, in appropriate circumstances where a complaint has in fact been initiated against a parent company of a wholly owned subsidiary involved in cartel conduct.

However, the difficulty with the above is that there is a further argument that the parent company may not be in a horizontal relationship with its subsidiaries and the subsidiaries’ competitors which are the actual perpetrators. Therefore, there is an absence of jurisdictional facts to initiate a complaint under section 4(1) against the parent company. Arguably, the “mere corporate control of the subsidiaries cannot bring the parent company into a horizontal relationship, as contemplated under section 4 of the Competition Act, with its subsidiaries and its competitors. In other words, “the Act simply does not extend to the conduct of a party which exercises corporate or even factual control or a significant influence over another party which transgresses section 4 of the Act.”32 This begs the question as to which section of the Competition Act can be relied upon to bring the parent company before the Tribunal in seeking to impute liability upon it for the infringement of its subsidiary.

There is a further argument that the Tribunal does not have jurisdiction to make an order that a penalty imposed on one party be recovered from another party.33 However, section 27(1)(d) of the Act confers on the Tribunal general powers for it to make any ruling or order necessary or incidental to the performance of its functions under the Act. An order imposing the liability for the payment of an administrative penalty on the parent company is arguably an order that is necessary or incidental to the performance of the Tribunal’s functions.34 In circumstances where the subsidiary was, during the period relevant to the cartel conduct, wholly owned or controlled by the parent company, it would be competent for the Tribunal to impose the liability for payment of an administrative penalty on the parent company.35 This is the case, especially if the parent company had significant influence or control over the subsidiary, or knew of the subsidiary’s participation in cartel conduct. Other instances

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30 Para 66.
31 Commission’s heads of argument in joinder application, CC v RMS and CAS, dated 23 May 2011
32 CAS’s heads of argument dated 23 May 2011, in Joinder application – CC v RMS and CAS (84/CR/Dec09) – para 13.2.2 (i)
33 Commission’s reply – para 7.1.b.
34 Commission’s reply – para 9
35 Commission’s reply – para 9.1
include where the subsidiary’s revenue accounts form a large portion of the parent company’s revenue (for instance, 50%), in which case the parent company’s commercial policy would be strongly aligned to that of the subsidiary.\textsuperscript{36}

In terms of the argument is that there is no provision in the Competition Act which exposes one party to an order to pay a penalty imposed on another party on the ground that the former “had a significant influence or control” over the latter\textsuperscript{37}, a wide interpretation of the firm, in line with the scheme of the Act would permit this type of imputation of liability on parent company. This is also supported by the courts’ observation on that particular principle.

\textit{Merger provisions and the Company Act}

The provisions of the Competition Act dealing with administrative penalties for cartel infringements cannot be viewed in isolation. Section 12 of the Competition Act sets out the instances of control in the determination of whether a merger has occurred. A merger, in terms of section 12(1)(a) is said to have occurred where, “\textit{one of more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another firm}”. Effectively, two firms cease to be distinct and separate but rather come under one controlling mind and form a single economic entity, even if they are separate juristic persons of limited liability. The implications of limited liability of separate juristic persons will be discussed further below. There is argument to be made that the determination of single economic unit for \textit{ex ante} merger regulation purposes is distinct from those of cartel conduct and imputation of liability \textit{ex post}. This however does not necessarily detract from the principle of control in terms of competition rules. Even the Companies Act of South Africa recognises the presumption of control of a holding company over its subsidiary, which control can be rebutted,

“\textit{if the person can show that, in respect of that particular matter, there is sufficient evidence to conclude that the person acts independently of any related or inter-related person}.”\textsuperscript{38}

\textsuperscript{36} Commission’s reply – para 9.4.
\textsuperscript{37} CAS’s heads – para 13.2.2.(i)
\textsuperscript{38} Section 2 of the Companies Act No. 71 of 2008 states, 
\textit{For the purpose of subsection (1), a person controls a juristic person, or its business, if –} 
\textit{(a) in the case of a juristic person that is a company –} 
\textit{(i) that juristic person is a subsidiary of that first person, as determined in accordance with section 3(1)(a); or} 
\textit{(ii) that first person together with any related or inter-related person is –}
Effectively, this gives the Tribunal discretion, within the boundaries of competition law and the rule of law, to impute liability on the firm as a single economic unit and thus imputing the liability of payment of the administrative penalty on the parent company as the legal person which exercised control and/or decisive influence over the subsidiary which committed the competition law infringement.

The principle of separate legal entities with limited liability is also followed in South Africa in terms of company law and disregarded only when the separation is abused.

“…the determination to disregard the distinctness provided in terms of a company’s separate legal personality appears in each case to reflect a policy based decision resultant upon a weighing by the court of the importance of giving effect to the legal concept of juristic personality, acknowledging the material practical and legal considerations that underpin the legal fiction, on the one hand, as against the adverse moral and economic effects of countenancing an unconscionable abuse of the concept by the founders, shareholders, or controllers of a company, on the other. The courts have shown an acute appreciation that juristic personality is a statutory creation and that ‘their separate existence remains a figment of law, liable to be curtailed or withdrawn when the objects of their creation are abused or thwarted’.”

Reference to an unconscionable abuse that warrants disregard for the distinct and separate juristic person with limited liability relates to the principle of piercing or lifting the corporate veil. Therefore in order to pierce the corporate veil and disregard the distinct juristic personality of the limited liability subsidiary and impute its wrongdoing on the parent company, Lord Neuberger, in the Supreme Court of Appeal of the United Kingdom, referring to Munby J in Ben Hashem stated that,

(aa) directly or indirectly able to exercise or control the exercise of a majority of the voting rights associated with securities of that company, whether pursuant to a shareholder agreement or otherwise; or
(bb) has the right to appoint or elect, or control the appointment or election of, directors of that company who control a majority of the votes at a meeting of the board;

(b) ...
(c) ...
(d) that first person has the ability to materially influence the policy of the juristic person in a manner comparable to a person who, in ordinary commercial practice, would be able to exercise an element of control referred to in paragraph (a), (b) or (c)

39 Stephen Malcolm Gore N.O. v. 37 Others N.N.O (in their capacities as the liquidators of 41 companies comprising King Financial Holdings Ltd (in liq.) and its subsidiaries) Case No. 18127/2012
“it is necessary to show both control of the company by the wrongdoer(s) and impropriety, that is, (mis)use of the company by them as a device or façade to conceal their wrongdoing...”\textsuperscript{40}

The principles of company law and common law developed through the piercing or lifting of the corporate veil, to some extent is shrouded in mystery. South African jurisprudence seems less reluctant to pierce the corporate veil where there appears “unconscionable abuse of the juristic personality of the company as a separate entity” and is reflected arguably in the codification of the piercing or lifting of the corporate veil in section 20(9) of the Companies Act. Binns-Ward J stated further that the principle in section 20(9) of the Companies Act will be applied in South Africa “where justice requires it, and not only when there is no alternative remedy”\textsuperscript{41}. It is accepted that applying the principle of piercing or lifting the corporate veil is onerous and courts are reluctant to disregard the separate legal entity unless one can show, inter alia, “both control of the company by the wrongdoer and impropriety in the sense of a misuse of the company as a device or façade to conceal wrongdoing”\textsuperscript{42}.

The clandestine nature of cartel conduct and proof of its existence is burdensome and is reflected in, inter alia, the employment of leniency policies as a form of amnesty for whistle-blowers that assist in uncovering cartels. Moreover, the unique character of competition law jurisprudence is also indicative of this in order to send a clear signal of maximum deterrence for conduct which harms consumers. The challenge in seeking civil damages following an adverse finding of cartel conduct may mean that principles such as the piercing of the corporate veil may be necessary in order to hold the parent company liable for civil damages due to conduct by its subsidiary especially where there is no finding of liability against the parent if competition law applies the strict definition of a separate juristic person of limited liability. Section 65 of the Competition Act does give provision for seeking civil damages but it is a provision that has not been widely used in South Africa and perhaps is a reflection of difficulty in seeking civil damages. This is much unlike the US where there is recourse for cartel conduct in the form of administrative penalties, criminalisation and civil damages, all three of which are vigorously employed.

\textbf{International jurisprudence}

\begin{itemize}
\item \textsuperscript{40} VTB Capital plc v. Nutritek International Corp & Others [2013] EWCA Civ 808
\item \textsuperscript{41} Ibid footnote 31
\item \textsuperscript{42} Supra
\end{itemize}
European competition authorities can determine the maximum statutory limitation of a penalty to equate to 10% of total worldwide turnover. Conversely, as discussed above, under the South African Competition Act, section 59(2) refers only to the firm’s annual turnover without expanding on what constitutes the firm and consequently which turnover is amenable in determining the administrative penalty. In terms of European competition caselaw, an “undertaking” (or a firm in terms of South African competition law) is set to include an economic unit. According to the Michelin decision, the Court of First Instance (“CFI” now known as the General Court),

“…Community competition law recognises that different companies belonging to the same group form an economic unit and therefore an undertaking within the meaning of Articles 81 EC and 82 EC if the companies concerned do not determine independently their own conduct on the market”.

As referred to above, this definition of economic unit is analogous to section 4(5)(a) and (b) of the Competition Act.

Therefore, for purposes of determining what constitutes a firm or undertaking under South African and European competition rules, a broad definition is applied. There is fluidity to the definition of the firm. The implications of this broad and fluid definition of an undertaking is that, as held by the European Court of Justice (“ECJ”) in the Akzo Nobel decision,

“…the conduct of a subsidiary may be imputed to the parent company in particular where, although having a separate legal personality, that subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company…having regard in particular to the economic, organisational and legal links between those two legal entities…the parent company and its subsidiary form a single economic unit and therefore form a single undertaking for the purposes of case-law…Thus, the fact that a parent company and its subsidiary constitute a single undertaking within the meaning of Article 81 EC enables the Commission to address a

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43 See paragraph 1.12 of the OFT guidelines
44 Michelin v. Commission Case T-203/01 Judgement of 30 September 2003
See also footnote 8 of the OFT guidelines:
"The term 'undertaking' is not defined in the TFEU or the CA98, but its meaning has been set out in EU law. It covers any natural or legal person engaged in economic activity, regardless of its legal status and the way in which it is financed. It includes companies, firms, businesses, partnerships, individuals operating as sole traders, agricultural cooperatives, associations of undertakings (for example, trade associations) non profit-making organisations and (in some circumstances) public entities that offer goods or services on a given market. A parent company and its subsidiaries will usually be treated as a single undertaking if they operate as a single economic unit, depending on the facts of each case."
decision imposing fines to the parent company, without having to establish the personal involvement of the latter in the infringement. In the specific case where a parent company has a 100% shareholding in a subsidiary which has infringed the Community competition rules, first, the parent company can exercise a decisive influence over the conduct of the subsidiary and, second, there is a rebuttable presumption that the parent company does in fact exercise a decisive influence over the conduct of its subsidiary. 45

First, when one considers the above in terms of the policy objective of maximum deterrence of cartel conduct, the extension of liability to the parent company for infringements undertaken by its subsidiary are compelling in that,

“The group liability rule has a significant deterrent effect since attributing liability to the parent company lifts the ceiling of the maximum fine to 10% of the combined group’s worldwide turnover (rather than the much smaller turnover of the individual subsidiary involved in the infringement). Any private damages actions can be directed at the parent company as well as the subsidiary, and furthermore, the strict rules on recidivism set out in the Commission’s Fining Guidelines will apply to the group”.46

Second, when one considers the above in reference to section 59(2) of the Competition Act, there is a plausible argument that the Tribunal may impose an administrative penalty for a prohibited practice that does not “exceed 10% of the firm’s annual turnover in the Republic” in terms of the group turnover of the firm and not just the turnover of wholly-owned subsidiary which was directly engaged in cartel conduct. Therefore, in applying the broad meaning to the definition of a firm, arguably a penalty can be levied against the parent company for the contravention of competition rules by its wholly-owned subsidiary. It is the economic unit or the single economic entity that is liable for the penalty as a constituent of firms which form, effectively, a single firm.

Contrary to the position held in Europe, the United States of America (“US”) holds no such presumption of liability on the parent company for the conduct of the subsidiary company unless one applies the principle of piercing or lifting the corporate veil. Souter J, in the Appeals Court decision of United States v. Bestfoods et al (“Bestfoods decision”) held that,

45 Akzo Nobel NV & Others v. Competition Commission of the European Communities Case C-97/08 P Judgement of 10 September 2009 at paragraphs 58 – 61
46 Richard Burnley Group Liability for Antitrust Infringements: Responsibility and Accountability World Competition Law and Economics Review Wolters Kluwer at page 598
“It is a general principle of corporate law deeply “ingrained in our economic and legal systems” that a parent corporation (so-called because of control through ownership of another corporation’s stock) is not liable for the acts of its subsidiaries…” the exercise of ‘control’ which stock ownership gives to stockholders…will not create liability beyond the assets of the subsidiary. That ‘control’ includes the election of directors, the making of by-laws…and the doing of all other acts incident to the legal status of stockholders. Nor will a duplication of some or all of the directors or executive officers be fatal.”

This position is the antithesis of antitrust jurisprudence in Europe which defines an undertaking with more fluidity than just looking at the form and rather considers,

“economic entities which consist of a unitary organisation of personal, tangible and intangible elements, which pursue a specific aim on a long-term basis and contribute to the commission of an infringement of the kind referred to in that [Article 101TFEU] provision”.

The latest construction settlement process certainly indicates the pervasiveness of cartel conduct in South Africa. In order that maximum deterrence is effected, holding parent companies liable for the conduct of their subsidiaries which they controlled and exercised that control over may be one of the tools to achieve maximum deterrence. This is so especially where nothing in our Competition Act prevents a broad interpretation of the firm. Moreover, this will make compliance programmes an even more effective tool in the arsenal of maximum deterrence given that parent companies would be likely to enforce competition law compliance throughout the corporation to minimise exposure of large administrative penalties as well as the implications of recidivism.

**Conclusion**

The principle of “parent liability” is an important one, when thought of in the context of seeking to achieve maximum deterrence and effective enforcement of competition law rules. However, the application of this concept does not come without challenges, one of which is whether the Competition Act permits the imposition of liability on the parent company for the payment of the administrative penalty, due to a cartel infringement by its subsidiary.

The CAC in *Loungefoam* precluded reliance on section 4(5) to impute liability on the parent company. However, sections 1 and 59 of the Competition Act, dealing with the definition of

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47 United States v. Bestfoods et al Case No. 97-454 judgement of 8 June 1998
48 Ibid footnote 38 at page 597
a firm and the imposition of the administrative penalty, indicate that the principle of attribution of liability to the parent company is recognised, albeit under certain circumstances. This was also recognised by the CAC. In addition, merger provisions in the Competition Act, as well as the recognition, in the Companies Act, of a presumption of control of a holding company over its subsidiary support the concept of “parent liability”. This is also supported by foreign jurisprudence which may be considered in interpreting or applying the Competition Act.\(^49\)

There is however the question around the initiation of a complaint against the parent company, and how it could properly be before the Tribunal in order to attach the liability of a penalty against it. Although the point seems to have been settled by the current jurisprudence,\(^50\) this debate in the context of the “parent liability” cannot be closed without considering section 27 of the Competition Act,\(^51\) which empowers the Tribunal to make an order necessary or incidental to the performance of its functions. This could include an order against the parent company.

It is the authors’ view that there is a case for the presumption of parent liability when the subsidiary is wholly-owned by the parent company. This position is consistent, in principle, with the aims of the Competition Act in, inter alia, effective enforcement and maximum deterrence. Moreover it is in line with the broad application of the Competition Act as well as international precedent which the South African competition authorities look to in seeking to apply the Act.\(^52\) What is left is to test whether the competition authorities would be willing to consider the validity of this principle in South Africa. Notwithstanding the principle of presumed liability, it would be helpful if the Competition authorities could develop guidelines on the application of the principle of “parent liability” in instances where the subsidiary is partly owned, has ceased to trade or is not in a position to pay the fine.

\(^{49}\) Section 1(3) of the Competition Act.
\(^{50}\) Woodland, Yara/Omnia, Loungefoam
\(^{51}\) As well as Rule 45 of the Tribunal’s rules
\(^{52}\) Section 1(3) of the Competition Act