

THE CONCEPT OF SINGLE ECONOMIC ENTITY

Introduction

The idea of the European Union is not only related with political and economic unity but also requires unity in the field of law. Therefore in any part of the Union, there are numerous legal initiatives. As an example and also as an explanation, the Treaty of Rome, which is known as one of the founding documents of the European Union involves a myriad of regulations in lots of different fields and Competition is one of them. After some revisions, the Treaty of Rome was renamed as the Treaty on the Functioning of the European Union by the Lisbon Treaty.¹ However, neither Article 81 of the Rome Treaty nor Article 101 of the TFEU could clarify what an undertaking is. Due to that situation, the basic elements of the competition could not be known by practitioners. This obscurity had definitely caused problems about applications of competition rules on undertakings. Therefore, the European Commission and courts try to fill that legal gap.² To illustrate, the Court of Justice held that in **Höfner and Elser v Macrotron GmbH**³ case: *“the case of an undertaking encompasses every entity engaged in an economic activity regardless of the legal status of the entity and the way in which it is financed”*⁴ While this information is evaluated, it is really clear that any types of entities can be defined as an undertaking if it has a link with economic activity. At that point, legal status and financial sources are insignificant.

Undertakings can take different names: firm, enterprise or business. The definition of undertaking is highly important to detect the violation of Article 101/1. The legal gap on the definition of undertaking creates a problem for group agreements. Due to the grammatical

¹ R Whish and D Bailey, *Competition Law* (7th edn, Oxford 2012) 49

² Wouter Wills, ‘The Undertakings as Subject of EC Competition Law and Imputation of Infringements to Natural and Legal Persons’ [2000] *European Law Review* 25

³ Case C-41/90 Höfner and Elser v Macrotron ECR [1991] ECR I-1979

⁴ R Whish and D Bailey, *Competition Law* (7th edn, Oxford 2012) 84

interpretation of the abovementioned article, the Commission had enjoined the group agreements from claiming violation of the article by undertakings.⁵

The aim of this article is to show the significance of definition on undertakings and to discuss the single economic entity doctrine according to the cases. As it is well known, both of these points are linked with each other and in a field lack of clear rules and codes, the European Union competition cases are unique sources to enable adequate information about what an undertaking and the single economic entity doctrine mean.

The Single Economic Entity Doctrine

To prevent grammatical interpretation and application and also to create a more detailed explanation for undertakings, the Single Economic Entity doctrine was developed. Pursuant to that doctrine, distinct legal personalities are not obstacles for belonging to the same group and having the status of parent and subsidiary companies.⁶

According to the Single Economic Entity doctrine, Article 101/1 does not apply to agreements which are conducted by the same economic entity. As a subsidiary, the company is not independent to take action in the market without management of the parent company; the subsidiary company cannot be accepted as an undertaking in terms of economy.

The scope of the Single Economic Entity doctrine was expanded in ***Europemballage and Continental Can v Commission***⁷ case which stated that *'the circumstances that a subsidiary is considered as a separate legal entity does not suffice the possibility that the parent organization is not held liable for conduct of the subsidiary, especially where the subsidiary does not reveal its market behaviour autonomously, but in essential does follow the directives of the parent company.'*

⁵ T.V. McNamara, 'Defining a Single Entity For Purposes of Section 1 of the Sherman Act Post Copperweld: A Suggested Approach' [1985] San Diego Law Review 22

⁶ A Jones and B Sufrin, *EU Competition Law* (4th edn, Oxford 2010) 134

⁷ Case C-6/72 *Europemballage and Continental Can v Commission* [1973]

Having a Legal Entity and Independence

At first, **Christine & Nielsen**⁸ case determines that having different legal entities is not adequate to assert violation of Article 101/1. In addition to the determination of legal entities, the economic independence and freedom of action of subsidiary companies should be analysed well case by case. As an example, in the abovementioned case, the court adjudicated after consultations that a subsidiary is not a different legal entity and the agreements between them refer to a division of work in the same and single legal entity.⁹

In the awards of the European Court of Justice, there is no consistent jurisprudence about the doctrine. In one of the earlier awards, **Consten&Grundig**¹⁰, the Court of Justice noticed that Article 101/1 cannot be applicable in any time for group agreements managed by single economic entities. However, then, other awards have changed the application and some conditions and contradictions were checked to fall within Article 101.¹¹ To cite an example, in **Beguelin**¹² case, the Court held that if there is no economic independence for subsidiary, it also implies lacking of competition between different undertakings. Therefore, the violation of Article 101/1 is not possible.¹³

In its applications, the Commission has renewed many times that with an acceptance of the Single Economic Entity Doctrine, violations of parent and subsidiary companies should be held as an infringement of parent company. **Geigy, Sandoz** and **ICI** case can be called as an example of this approach. In all of these cases, parent companies which are established outside the Community designate the price policies of subsidiaries and as producers they

⁸ Case C-165/12 Christine&Nielsen v Commission [1969]

⁹ Aytül Tokatlı, *The Concept of Single Economic Entity Donctrine in Competiton Law* (1st edn, Turkish Competition Authority 2009) 45

¹⁰ Case C-56 and 58/64, Consten and Grundig v Commission [1966]

¹¹Wouter Wills, 'The Undertakings as Subject of EC Competition Law and Imputation of Infringements to Natural and Legal Persons' [2000] *European Law Review* 25

¹² Case C-22/71, Begulein Import Co v. S.A.G.L. Import Expert [1971]

¹³ Aytül Tokatlı, *The Concept of Single Economic Entity Donctrine in Competiton Law* (1st edn, Turkish Competition Authority 2009) 46

find a chance to implement their agreements on marking up within the Community via subsidiaries. And in all cases, sanctions were applied for parent companies.¹⁴

On the other hand, in **Centrafarm**¹⁵ case, to evaluate agreements between the companies which belong to the same economic entity and which could be named as a parent and subsidiary, searching policy of the subsidiary company in terms of being independent or not in the market bears vital importance. If the subsidiary company is not independent in the market, Article 101/1 cannot be applicable. That award also contributes to the interpretation of **Beguelin** case by adding a new condition. Pursuant to that award, in addition to economic independence condition, also group activities have to be duties of same group which imposed by group agreement.¹⁶

The **Beguelin** case with this new condition has huge significance as duties in the same group refer to workers particularly. At that point, workers become remarkable. In every company, all the workers and assets fulfil the duties given by the management systems. Therefore, one of the distinctive characteristic of companies is having an influence on managing the workers and assets of the company.¹⁷ Because, having an influence on the subsidiary's workers can clarify the situation about the independence of subsidiary and this affects the subject of the violation.

Indeed, all of the evaluations about independence of the subsidiaries source from one of the main norms of law which gains currency again: there should be parallel relation between the authority and the responsibility. According to the norm, to give responsibility to subjects of the problems, at first, their authorities on the problems should be checked. If a company cannot make its own decision in the market, sanctions for violations cannot be applicable for that company. The mean of decisive influence also can be defined as

¹⁴ Oğuzkan Güzel, *The Concept of Undertaking and Association of Undertakings in Competition Law* (1st edn, Turkish Competition Authority 2003) 40

¹⁵ Case C-15/74, *Centafarm v Sterling Drug* [1974]

¹⁶ Aytül Tokatlı, *The Concept of Single Economic Entity Doctrine in Competition Law* (1st edn, Turkish Competition Authority 2009) 46

¹⁷ Wouter Wills, 'The Undertakings as Subject of EC Competition Law and Imputation of Infringements to Natural and Legal Persons' [2000] *European Law Review* 25

destroying authority of subsidiary company in making of the decision. Therefore, responsibility, namely sanctions cannot be attributed to subsidiaries.

The *Viho* Judgement

Furthermore, the European Court of Justice, in its well-known case, ***Viho Europe BV v. Commission***,¹⁸ confirmed that subsidiary and its owner parent company with 100 percent constitute a single economic unit. Therefore, any type of the agreements and arrangements between them could not be labelled as distinct undertakings and they did not fall within the remit of Article 101/1. Thus, the Court of Justice has renewed again the activities of parent and subsidiary companies. If they constitute internal allocation of the functions of a single enterprise and not the collusive action required to trigger Article 101.¹⁹

In addition to the evaluations of the Court of Justice, the Commission, in its ***Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements*** held that “*when a company exercises decisive influence over another company they form a single economic entity and, hence are part of the same undertaking*”²⁰

At that point, particularly in the light of ***Viho*** case, it is thorny to determine the boundaries of the doctrine. A lot of different cases like ***Viho*** focus on whether or not the companies constitute an economic unit. Additionally, having an adequate freedom of action to be considered as a different entity is a question of degree and will be based on a number of factors. To give an example, domination of the parent company on its subsidiary regarding managing, investment and taking profit has a fateful effect on detecting the boundaries of the Single Economic Entity doctrine.

As in ***Viho***, the existence of presumption is clear. This presumption is rebuttable and it shows that the subsidiary is not independent and the influence of the parent company is

¹⁸ Case C-73/95 P *Viho v Commission* [1996] ECR I-5457

¹⁹ A Jones and B Suftrin, *EU Competition Law* (4th edn, Oxford 2010) 135

²⁰ R Whish and D Bailey, *Competition Law* (7th edn, Oxford 2012) 94

seen. However, contrary to **Viho** case, if the parent company is not wholly owned, the main requirement of clarifying the doctrine is that the parent company must have an effect on the decisions of the subsidiary. To exemplify, the case of **Gosme/Martell-DMP**²¹, with an agreement which was concluded by a parent company and its 50 percent owned joint venture company designed to foreclose parallel export, fell within the scope of Article 101/1. This is because the company which is jointly owned by the parent company operates autonomously to a large extent.²²

As it is explained above, detecting of the control on subsidiary is a significant point. However, also the types of the control should be criticised in detail. Because how the parent companies control the subsidiaries also draws the boundaries of the Single Economic Entity doctrine. The control means the power of the managing and styles of using that power. To determine the control issue regarding the doctrine, the Commission held a case which is known as an jurisprudence: **ZOJA/CSC-ICI** and by virtue of that case, CSC conducts the ICI through using force of capital ratio in plenary assembly and voting power. Thanks to these tools, CSC has rights on auditing the balance sheet of ICI, appointing manager for ICI and thus, it determines road map for activities of ICI with 51 percent of capital power. The Commission also takes into account that CSC, in its annual consolidated financial statements, implies the ICI as a subsidiary in European market. With all of these arguments, in decision, both of the companies evaluated qua single economic entity although they have distinct legal entities.²³

This comment of the Commission also proves that having all shares of the subsidiary is not an obligation for the parent company in order to claim the existence of the parent company's control on the subsidiary. Besides, the situations in which the parent companies have less than 50 percent of all shares do not mean that there is no control of parent companies on subsidiaries. One of the interesting cases about that point is

²¹ Case C-185/23 Gosme/Mertel - DMP [1991]

²² A Jones and B Suftrin, *EU Competition Law* (4th edn, Oxford 2010) 135

²³ H Eryuva and M Coskun, 'The ZOJA/CSC-ICI v Commission Case' [1998] Ankara Bar Review 2

Trefileurope/Comission and according to that case the Court of Justice held that having 25 percent of all shares is not adequate to control the whole company when the other partners' shares are considered. However, that evaluation is not precise because the most significant point to settle the case is the independent behaviour ability of the subsidiary. This is a key question of the case.²⁴

Moreover, legal structure also has significance in terms of examining the control issue as there are two types of the group: by an agreement or sharing ownership in legal entities. The agreement method is not widespread as much as sharing ownership yet. If the connection between companies is really hard because of the agreement, the Commission could rarely interpret them as a single economic entity. For example, distributorship agreements can be evaluated in this scope. In **BMW**²⁵ case, some branches of the BMW were interpreted under the BMW, as a single economic entity.

As it is well known, in the applications of the competition law, an undertaking or a group of undertakings refer to a company. To illustrate, in **Hoffman La Roche**, although there are nine legal entities, the control of the Roche is clear in terms of economic unity. However, contrary to the **Roche**, BMW Belgium, which is owned by BMW Munich with 100 percent, is evaluated as an independent undertaking. Hereunder, group companies should be analysed in terms of their markets and on a case by case basis.²⁶

The abovementioned cases point out the application of the doctrine. However, there are numerous cases to show the circumstances to which the doctrine is not applicable. As an example, in **Ijselcentrale**²⁷ case, the claim that four Dutch electricity generating companies and their joint venture were controlled by a single economic entity was rejected by the Commission. Thanks to that rejection, also the applicability of Article 101 could not be

²⁴ Oğuzkan Güzel, *The Concept of Undertaking and Association of Undertakings in Competition Law* (1st edn, Turkish Competition Authority 2003) 39

²⁵ Case C- 46/33 BMW Belgium v Commission [1978]

²⁶ Oğuzkan Güzel, *The Concept of Undertaking and Association of Undertakings in Competition Law* (1st edn, Turkish Competition Authority 2003) 41

²⁷ Case C-28/32 Ijselcentrale v Commission [1991] ECR I-1992

prevented. Because, these companies have distinct legal personalities and they are not controlled by a single head quarter. They are capable of managing themselves independently. However, if a parent company loses its control over its subsidiary by being sold off or by an agreement, they could be subject of the Article 101.²⁸

Parent and subsidiary company is the most obvious example of the doctrine. But also principal and agent relationship and contractor and sub-contractor statuses are analogous.²⁹

Agency Agreements and Single Economic Entity Doctrine

A principal and his agent have a relationship like the relationship between a parent and subsidiary. Therefore, this relation may be characterized as an economic unity. Thus the application of the Article 101 could be impossible.³⁰ The European Court of Justice also analyses this scenario. In this assessment, the European Court of Justice has dealt with the level of risk assumed by the parties to the contract, particularly, by distributors. The ECJ, in the **CEPSA Estaciones de Servicio SA**³¹ case, concluded that the risk must be examined case by case and the real economic situation must be taken into account more than the legal categorisation of the contractual relationship.

Article 102

The doctrine is also related to the application of Article 102 which is known as ex Article 82. This article has a link with Section 4(1) (a) of the Competition Act. Because, existence of prohibition about abusing of dominant position by one or more undertakings within the internal market or to the extent that it affects the trade between the European

²⁸http://cci.gov.in/images/media/ResearchReports/Applicability%20of%20Competition%20Law%20Principles%20on%20Public%20Sector%20Undertaking_An%20analysis%20of%20CCI%20Orders%20and%20other%20jurisdictions.pptx.pdf> Accessed on 03 January 2015

²⁹R Whish and D Bailey, *Competition Law* (7th edn, Oxford 2012) 92

³⁰A Jones and B Sufrin, *EU Competition Law* (4th edn, Oxford 2010) 139

³¹Case C-279/06 CEPSA Estaciones de Servicio SA v LV Tobar e Hijos SL [2008]

member states. The meaning of that article is equal to Article 82 of the Treaty Establishing the European Community (TEC).

All in all, if undertakings are still the subject of the violation of Article 102, the doctrine is still valid in order to detect undertakings exactly to enforce sanctions.

Consequences of the Doctrine

Arrangements between entities which are in the same economic entity cannot refer to an agreement or concerted practice between undertakings. Therefore, these types of entities are accepted as only one party for an agreement. Moreover, in terms of the liability of undertakings, the doctrine enables that companies can be held responsible for the acts of other entities even if they have not participated in the infringement. The meaning of “other entities” is parent company for subsidiaries and subsidiary company for parents. As an example, in ***Akzo Nobel NV and Others v. Commission***³² case, the Court of Justice pointed out that the parent company and its subsidiary form a single economic unit and because of that it is a single undertaking. Thus, *“that undertaking within the meaning of the Article 101 enables the Commission to address a decision imposing fines to the parent company, without having to establish the personal involvement of the latter in the infringement.”* In those situations, it is sufficient for the Commission to show evidence for proving that the subsidiary is owned by the parent company with 100 percent in order to theorise decisive effect of the parent upon the commercial policy of the subsidiary. According to the case, the parent company is jointly and severally liable for the payment of the fine which is imposed on its subsidiary. However, if the parent company can present sufficient proof to clarify that the subsidiary makes its decision itself and independently, the liability of the parent company can be removed.³³

In some conditions, if the subsidiary is unable to pay the fine imposed, the competition authority can be disposed to attribute the responsibility to the parent company.

³² Case C-97/08P, *Akzo Nobel NV and Others v. Commission* [2009]

³³ A Jones and B Sufirin, *EU Competition Law* (4th edn, Oxford 2010) 138

The *ICI v. Commission* case is an example in which the Commission used the doctrine to impose liability on the parent company as the parent company operates the agreement and causes the breach outside of the European Union. At that point, the argument of the applicant is that the Commission was not empowered to impose that fine on the parent company because all of the actions which are the subject of the case were taken outside of the European Union. However, controlling subsidiaries outside of the European Union for the European market is an adequate evidence for the European Court of Justice to reject this claim. The main point of the rejection is the lack of autonomy or independency for the subsidiary. Thanks to that implementation, the doctrine can enable the application of the competition rules also for companies which remain outside of the jurisdiction. In addition to these, it should be noted that, in some circumstances where the parent company has a decisive influence on its subsidiary but it has no effect on the infringement; the liability cannot be imputed on the parent company. However, from another perspective, it can be reasonable to impose liability on the parent company due to lacking of the control on its subsidiary to prevent the infringement.³⁴ This example refers to the effect of the doctrine clearly in terms of the managing power of parent companies on subsidiaries.

Another consequence of the doctrine is that determining a proper level for the fine is a significant point. Pursuant to that level, the fine to be imposed by the Commission should not be more than 10 percent of the total turnover of each undertaking which are participating in the infringement in the preceding business year. In addition to that point, in some cases, if both parent and subsidiary companies are the subject of the breach, liability from the fine is binding for both of them jointly and severally according to Council Regulation 1/2003, Article 23.³⁵

³⁴ A Jones and B Suftrin, *EU Competition Law* (4th edn, Oxford 2010) 139

³⁵ A Jones and B Suftrin, *EU Competition Law* (4th edn, Oxford 2010) 139

Conclusion

The Single Economic Entity doctrine is a basic concept to evaluate what an undertaking is. As it is stated above, defining the concept of undertaking is a fundamental necessity to find the subject of the violation. Although there are no precise boundaries to define undertakings, under favour of the aforementioned cases, it becomes easier to interpret the undertakings more clearly. Detecting boundaries of definition of the undertaking by criticising the cases is particularly significant for application of Article 101 and also for Article 102.

By and large, all the cases imply the same point in terms of finding right and relevant company to call as a violator. That point is the relation between parents and subsidiaries. Because, the influence of parent company on its subsidiary underlies the doctrine. This influence causes lacking of independence for subsidiary company at the decisive moment. Lacking or existence of the independence affects boundaries of the definition of undertakings, by this way, subject of the violations and sanctions.

As it is shown in detail, the doctrine solves a significant problem in terms of dividing and detecting subjects of the sanctions and it is occurred and improved with jurisprudence. In addition to cases which are shared above, to constitute a better understanding about the doctrine, there should be much more detailed and consistent awards to establish excellent jurisprudence.

BIBLIOGRAPHY

Primary Sources

Conventions

Treaty on European Union (TEU) – Articles 81 & 82

Treaty on the Functioning of the European Union (TFEU) – Articles 101 & 102

Case Laws

Akzo Nobel NV and Others v. Commission (Case C-97/08) [2009]

Begulein Import Co v. S.A.G.L. Import Expert Case (Case C-22/71) [1971]

BMW Belgium v Commission (Case C- 46/33) [1978]

Centafarm v Sterling Drug Case (Case C-15/74) [1974]

CEPSA Estaciones de Servicio SA v LV Tobar e Hijos SL Case (Case C-279/06) [2008]

Christine&Nielsen v Commission (Case C-165/12) [1969]

Consten and Grundig v Commission (Case C-56 and 58/64) [1966]

Europemballage and Continental Can v Commission (Case C-6/72) [1973]

Gosme/Mertel – DMP Case (Case C-185/23) [1991]

Ijsselcentrale v Commission (Case C-28/32) [1991] ECR I-1992

Klaus Höfner and Fritz Elser v. Macrotron GmbH Case (Case C-41/90) [1991] ECR I-1979

Viho v Commission (Case C-73/95 P) [1996] ECR I-5457

Secondary Sources

Books

Güzel O. *The Concept of Undertaking and Association of Undertakings in Competition Law* (Turkish Competition Authority 2003)

Jones A. Sufrin B. *EU Competition Law* (Oxford Publication Press 2010)

Satya P. *Applicability of Competition Law Principles On Public Sector Undertakings: An Analysis for CCI Orders and Other Jurisdictions*, 2013

http://cci.gov.in/images/media/ResearchReports/Applicability%20of%20Competition%20Law%20Principles%20on%20Public%20Sector%20Undertaking_An%20analysis%20of%20CCI%20Orders%20and%20other%20jurisdictions.pptx.pdf

Tokatlı A, *The Concept of Single Economic Entity Donctrine in Competiton Law* (Turkish Competition Authority 2009)

Whish R. Bailey D. *Competition Law* (Oxford Publication Press 2012)

Journals and Reviews

Eryuva H. and Coşkun M. '*The ZOJA/CSC-ICI v Commission Case*' Ankara Bar Review 1998/2

McNamara T.V. '*Defining a Single Entity For Purposes of Section 1 of the Sherman Act Post Copperweld: A Suggested Approach*' San Diego Law Review 22, 1985

Wills W. '*The Undertakings as Subject of EC Competition Law and Imputation of Infringements to Natural and Legal Persons*' European Law Review 25, 2000