NORDIC & EUROPEAN COMPANY LAW

LSN Research Paper Series

No. 15-02

Groups of companies in the case law of the Court of Justice of the European Union

By Professor Karsten Engsig Sørensen Dr.jur., Department of Law, Aarhus University

Consortium members:

Department of Law, Aarhus BSS, Aarhus University, Denmark
FOCOFIMA - Faculty of Law - University of Copenhagen, Denmark
Department of Commercial Law - Jönköping International Business School, Sweden
Department of Private Law - Faculty of Law, University of Oslo, Norway
Faculty of Law - University of Turku, Finland
Department of Law – University of Southern Denmark, Denmark

Groups of companies in the case law of the Court of Justice of the European Union

By Professor Karsten Engsig Sørensen Dr.jur., Department of Law, Aarhus University

Despite the fact that there has only been limited harmonisation of the rules on groups of companies in the EU, the Court of Justice of the European Union has often had to rule on cases involving groups of companies. The Court must make such rulings when considering how to treat groups of companies under Union law, including whether to treat a group as a single enterprise or as several companies. This article analyses the Court's approach to groups in various areas of Union law with a view to establishing when and under what circumstances a group will be treated as a single enterprise. The Court has also had to consider whether national rules on groups of companies comply with the fundamental Treaty rules on freedom of movement. The latter part of this article analyses how the Court can be expected to examine whether national rules on groups discriminate against or impose restrictions on cross-border groups of companies.

1. Introduction

Several attempts have been made to harmonise the Member States' company law rules on groups of companies, but so far these attempts have not been fruitful.[1] However there is some harmonisation of certain aspects of groups of companies, such as the rules on consolidated accounts, the rules on takeover bids and the rules on the acquisition by a company of its own shares in a group of companies. While these rules are important, they by no means constitute Union harmonisation of the law on groups of companies.

Nevertheless, in several cases the Court of Justice of the European Union (the 'Court') has had to address issues involving groups of companies. *First*, it has had to consider groups of companies when interpreting and applying Union law. The fundamental question for the Court is whether a group of companies should be seen as a single enterprise (the 'enterprise approach'), or whether each company in the group should be seen as an individual entity (the 'entity approach'). Since the Court has used the enterprise approach on several occasions, this can be seen as a judge-made concept of a group of companies or judge-made regulation of

[1] The Commission has previously tried to get the Ninth Company Law Directive adopted, which would have contained comprehensive regulation of groups of companies, based on German law; see further in Stefan Grundmann: *European Company Law: Organization, Finance and Capital Markets*, 2nd edition, 2012, Intersentia, pp. 762-766. More recently the Commission has given notice that it will put forward a proposal to recognise the interests of groups of companies, but the content of this initiative is not yet known; see Commission Action Plan, COM(2012) 740, p. 15. A proposal has also been made for a new corporate form: Single-member private limited liability companies – *Societas Unius Personae* (SUP), see COM(2014) 212.

groups of companies.[2] The aim of this article is to examine the extent to which and the circumstances in which the Court is inclined to use the enterprise approach.

Second, the Court has had to consider what demands Union law makes on national laws on groups of companies. Such examination has been based on the Treaty rules on freedom of movement. The case law sets certain limits on how the Member States can arrange their rules on the cross-border regulation of groups of companies.

In the following each of these problems is examined separately.

2. Groups of companies and the application of Union law: the enterprise approach or the entity approach?

Questions are frequently referred to the Court on the interpretation of primary and secondary Union law where it must rule on how to treat groups of companies. Typically in these cases Union law does not expressly provide for how to deal with problems involving groups of companies.[3] Thus, in these cases the Court has greater freedom to decide how groups should be dealt with under Union law, including in particular whether to adopt the enterprise approach. In some cases it is to the advantage to the undertaking to use the enterprise approach, in other cases it is a disadvantage.

When the Court regards a group as a single enterprise this effectively means that there is a 'piercing of the corporate veil'.[4] This problem is much discussed in national company law[5]

[2] See Erik Werlauff, 'Group and Community – the European Court's Development of an Independent Community Law Concept of the Group and its Significance for National Company Law', *European Company Law*, 2008, pp. 201-206.

[3] However in competition law there is often more or less explicit regulation of groups. See e.g. the Merger Control Regulation (Regulation (EC) No 139/2004), where there are definitions of 'control' and of 'undertakings concerned', both of which are intended to include groups of companies. There are also definitions of groups elsewhere in EU competition law, e.g. in several group exemptions; see the definition of 'connected undertakings' in Article 1(2) of Regulation (EU) No 1218/2010. There is also a definition of 'group' in Directive 2013/34/EU which enters into force in July 2015 replacing the Seventh Company Law Directive (Directive 83/349/EC). Moreover there are a number of directives on taxation concerning groups of companies, some of which govern transactions between parent companies and their subsidiaries and some of which concern certain restructurings of groups; see in particular Directive 2009/133/EC (the Merger Tax Directive) and Directive 2011/96/EC (the Parent-subsidiary Directive).

Finally, the Court has had to interpret the meaning of 'subsidiaries' in Article 49 TFEU; see e.g. Case C-251/98 *Baars*, para. 22; Case C-436/00 *X and Y*, para. 67; Case C-208/00 *Überseeing*, para. 77; Case C-464/05 *Geurts*, para. 16; and Case C-360/06 *Bauer Verlag*, para. 27.

Where legislation specifically regulates a group as a single enterprise, the legislator also uses the enterprise approach. It seems that such an approach can be traced back to the USA in 1933, under the Roosevelt administration; see Phillip I. Blumberg, 'The Transformation of Modern Corporation Law: The Law of Corporate Groups', *Connecticut Law Review*, 2005, pp. 605-616.

[4] The terminology seems to differ. Sometimes piercing or lifting the veil is used broadly to refer to the situation where a company is not treated as a separate entity, corresponding to what is meant here. Sometimes the term refers more narrowly to the situation where a company's limited liability is pierced. Sometimes piercing the veil without setting aside limited liability is called 'identification'; see e.g. Karen Vandekerckhove: *Piercing the*

but, as stated, no company law harmonisation has prompted the Court to deal with this as a company law problem.[6] But the problem of piercing the veil (or identification) is also relevant in other areas of law where it is necessary to determine the nature of a subject that has a right or is subject to an obligation. Should a group be seen as a single enterprise or as a number of separate entities?[7] In fact, while in most jurisdictions the veil is seldom pierced in company law cases, it may be easier to pierce the veil in cases dealing with other areas of the law.[8] Whether or not the corporate veil is pierced will normally depend on the wording and purpose of the specific legislation, as well as the willingness of the courts to pierce the veil and use the enterprise approach. An empirical analysis of case law in the USA indicates that the veil is often pierced in order to fulfil the purpose of a legislative act.[9] There does not appear to be a similar analysis of Union case law, so it is necessary to analyse the case law of the Court.

For the purpose of this analysis the following section will examine the cases in various areas of Union law where the Court has had to decide whether to treat a group of companies as one enterprise or as several separate entities. The focus is on cases in situations where there are two or more companies. By searching the terms 'group of companies' and 'parent company' in the case reports of the Court, I have been able to identify several cases covering a wide range of topics and have selected those that most clearly address the choice between the enterprise approach and the entity approach. The aim has been to examine enough cases to be able to give a picture of how the Court approaches groups of companies when interpreting Union legislation.

2.1. Competition law

Corporate Veil, 2007, Wolters Kluwer, pp. 13-14 and 380-527. Piercing/lifting the veil may mean that the legal status of a company is disregarded vis-à-vis its shareholders (e.g. its parent company), whereas there may be 'reverse' piercing of the veil when it results in a shareholder being identified with their company. The broader term of 'enterprise liability' is also sometimes used to refer to wider piercing when several companies are treated as one; see Stephen M. Bainbridge: *Corporation Law and Economics*, 2002, Foundation Press, pp. 165-171.

[5] See e.g. the comparative analysis in Mads Andenas & Frank Wooldridge: *European Comparative Company Law*, 2009, Cambridge University Press, pp. 480-490; and Karen Vandekerckhove: *Piercing the Corporate Veil*, 2007, Wolters Kluwer.

[6] The Court briefly touched on the problem in Case C-81/09 *Idryma Typou*, where it held that the First Company Law Directive (now Directive 2009/101/EC) does not prevent shareholders sometimes being made liable for the obligations of a company. The Court also briefly touched on the issue of piercing the veil and company law in C-501/11 P *Schindler Holding* but, as explained in footnote 25, it dismissed the issue as not being relevant in competition law.

[7] See the multifaceted treatment of this subject in Yuri Biondi, A. Canziani & T. Kirat (eds): *The Firm as an Entity; Implications for economics, accounting and the law*, Routledge, 2007.

[8] A similar point is made by Erik Werlauff in 'Group and Community – the European Court's Development of an Independent Community Law Concept of the Group and its Significance for National Company Law', *European Company Law*, 2008, pp. 201-206, at p. 205.

[9] On this, see the analysis in Jonathan Macey & Joshua Mitts, 'Finding Order in the Morass: The Three Real Justifications for Piercing the Corporate Veil', *Cornell Law Review*, 2014, pp. 99-155.

Competition law is the area of law where there is clearly the most comprehensive case law on groups of companies. The Court has addressed the question of what constitutes an 'undertaking' for the purposes of the competition rules, and it has often chosen an enterprise approach. This has had several consequences. First, agreements entered into between companies within the same group of companies have been found to fall outside the scope of Article 101 TFEU. Next, State aid given by Member States to companies within a group must be regarded as aid to a single enterprise, and that an assessment of whether an undertaking has a dominant position pursuant to Article 102 TFEU must take account of the market position of the whole enterprise. Last but not least, since this consequence has given rise to most cases, it means that companies in a group can be liable for fines imposed on other companies in the group – typically a parent company is liable for its subsidiaries.

The Court generally appears to use the same enterprise approach to the different aspects of competition law referred to above. However, the Court has accepted that the concept of the enterprise approach used in relation to State aid law can differ from the concept applied in other areas.[10]

The Court early adopted a practice whereby the concept of an enterprise can cover several companies in a group.[11] Many of the cases concerned groups with one or more subsidiaries, and it was ruled that the group should be treated as a single enterprise since it constituted an economic entity within which the subsidiaries had no effective autonomy to establish their own market policy.[12] The Court has also accepted that companies that are controlled by the same person (sister companies) can constitute a single enterprise.[13]

The condition for a group to be considered an economic entity is that there is a situation in which one company is controlled by another (or several companies are controlled by the same person or company). Control will normally be based on ownership of a majority shareholding, but in principle a minority shareholding can also give control provided special

[10] Case C-480/09 P *AceaElectrabel Produzione SpA*, para. 66.

[11] For a review of the cases see Aitor Montesa & Ángel Givaja, 'When Parents Pay for their Children's Wrongs: Attribution of Liability for EC Antitrust Infringements in Parent-Subsidiary Scenarios', *World Competition*, 2006, pp. 555-574; Okeoghene Odudu & David Bailey, 'The Single Economic Entity Doctrine in EU Competition Law', *Common Market Law Review*, 2014, pp. 1721-1758; Richard Burnley, 'Group Liability for Antitrust Infringements: Responsibility and Accountability', *World Competition*, 2010, pp. 595-614; Laura La Rocca, 'The controversial issue of the parent company liability for the violation of EC competition rules by the subsidiary', *European Competition Law Review*, 2011, pp. 68-76; Alison Jones, 'The boundaries of an undertaking in EU Competition Law', *European Competition Journal*, 2012, pp. 301-331; Bernardo Cortese in B. Cortese (ed.): *EU Competition Law: Between Public and Private Enforcement*, 2014, Wolters Kluwer, pp. 73-93; Paul Hughes, 'Competition law enforcement and corporate group liability – adjusting the veil', *European Competition Law Review*, 2014, pp. 68-87; and Bettina Leupold, 'Effective enforcement of EU competition law gone too far? Recent case law on the presumption of parental liability', *European Competition Law Review*, 2013, pp. 570-582.

[12] See, among others, Case C-73/95 P *Viho Europe*, para. 51; Case 66/86 *Ahmed Saeed Flugreisen*, para. 35; and Case 30/87 *Bodson*, para. 19.

[13] See Case 170/83 *Hydrotherm*.

rights are linked to the minority shareholding that go beyond the usual rights of a minority.[14] Finally, the Court has opened up the possibility that joint venture partners who share joint control of a joint venture can be found to exercise control. It does not matter that joint venture partners normally only have negative control (i.e. the right to block decisions), as the Court's view is that what matters is whether one or more joint venture partners in fact exercise significant control over the joint venture.[15]

It is not sufficient that control *can be* exercised; control must *in fact* be exercised.[16] However, the Court has ruled that if a company either directly or indirectly owns all or nearly all the share capital of a company, there is a presumption that it exercises control.[17] This presumption appears to be relatively strong, since it is difficult for a parent company to prove that it does *not* exercise control.[18] The Court has ruled that the presumption cannot be rebutted merely because it can be shown that the parent company has not held a board meeting or a general meeting. The fact that no formal decision has been taken to influence the subsidiary is not evidence that control has not been exercised since control can be exercised informally, for example by means of personal contacts between the companies.[19] Thus it is the economic reality and not the company law rules that are decisive for whether the presumption can be rebutted.[20]

---

[14] See Case T-132/07 *Fuji Electric*, para. 183**.**

[15] See Case T-314/01 *Avebe*; Case T-132/07 *Fuji Electric*; and Case C-77/08 *Dow Chemical*. This practice seems to have been accepted by the Court in Case C-179/12 P *Dow Chemical*. In the area of State aid, this was established by the Court in Case C-480/09 P *AceaElectrabel Produzione SpA.* For further on the problems relating to joint ventures, see Samantha Mobley, D. Mourkas & G. Murray, 'Parent liability for joint venture parent: the courts' "El du Pont" and "Dow Chemical" judgments in conflict with optimal compliance incentives', *European Competition Law Review*, 2014, pp. 499-508.

[16] The fact that the emphasis is on whether control is in *fact* exercised rather than on whether it *can* be exercised results in a legal situation that is unsatisfactory in a number of respects. Among other things it means that a parent company that wants to ensure that Article 101 TFEU does not apply to agreements with its subsidiary has an incentive to exercise control over it. Since, such control will normally limit competition, on this point the enterprise concept acts as an incentive for anti-competitive conduct. For a discussion of this problem see Wouters P.J. Wils, 'The undertaking as subject of EC competition law and the imputation of infringements to natural or legal persons', *European Law Review*, 2000, pp. 99-116.

[17] Case C-97/08 P *Akzo Nobel NV*, para. 60; and Case C-179/12 P *Dow Chemical*, para. 56. In Case C-36/12 P *Armando Álvarez* the Court applied the presumption where the parent company owned 98.6 % of the share capital.

[18] For a critical view of this, see Okeoghene Odudu & David Bailey, 'The Single Economic Entity Doctrine in EU Competition Law', *Common Market Law Review*, 2014, pp. 1721-1758, at pp. 1751-52; Bettina Leupold, 'Effective enforcement of EU competition law gone too far? Recent case law on the presumption of parental liability', *European Competition Law Review*, 2013, pp. 570-582; and Richard Burnley, 'Group Liability for Antitrust Infringements: Responsibility and Accountability', *World Competition*, 2010, pp. 595-614, at pp. 602-4. However, the Court has insisted that the presumption can be rebutted; see Case C-97/08 P *Akzo*; and Case C-501/11 P *Schindler Holding*, para. 109. According to the judgment in the *Akzo* case, para 77, the liability of the parent company cannot be regarded as strict liability and there is thus no conflict with the principle of personal responsibility. According to the judgment in the *Schindler Holding* case, the fact that the presumption can be rebutted means that there is no conflict with Article 6 of the European Convention on Human Rights on the right to a fair trial.

[19] See Case C-440/11 P *Stichting*.

[20] See likewise the Opinion of Advocate General J. Kokott in Case C-440/11 P *Stichting*, paras 71 et seq.

Other than where the presumption applies, the authorities must prove that control is exercised. However, in many cases it seems sufficient for there to be indications that control can be exercised and that it need not be proved that one company in a group has taken specific decisions at the prompting of another. The Court has thus required an assessment to be made of whether control is exercised having regard in particular to 'the economic, organisational and legal links' between two legal entities.[21] This opens the way for a very broad definition of a group of companies, where a number of circumstances can be taken into account in assessing whether there is a single enterprise. Among other things the Court has taken into account whether there is an overlap of personnel in the management of the parent company and the subsidiary.[22] If, at group level, a 'compliance programme' has been drawn up to prevent breaches of the competition rules by the group, the Court has taken this as indicating that there is a group policy and that the parent company intervenes in the conduct of the subsidiary.[23] These two examples show that the General Court and the Court of Justice appear to be satisfied with indications that control is possible (and possibly also likely) without requiring more concrete evidence that control is actually exercised. However, there have also been cases in which the Court has based its decisions on more concrete indications of the exercise of control.[24]

The reasons for regarding a group of companies as a single enterprise seem mainly to be that competition law focuses on market conduct. What matters is whether an entity behaves as a single enterprise. Private law considerations, including whether one or more legal entities are involved, are thus less important.[25] Another consideration seems to be the effectiveness of the rules. If it were possible to get round the competition rules by splitting an undertaking up into different legal entities, it would be very easy to avoid the rules.[26] The Court has expressed consideration for the effectiveness of the competition rules as follows:

> 'The purpose of the presumption of actual exercise of decisive influence is, in particular, to strike a balance between, on the one hand, the importance of the objective of combatting conduct contrary to the competition rules, in particular to Article 101 TFEU, and of preventing a repetition of such conduct, and, on the other hand, the importance of the requirements flowing from certain general principles of EU law such

[21] Case C-97/08 P *Akzo Nobel NV*, para. 58.

[22] Case C-480/09 P *AceaElectrabel Produzione SpA*, para. 51.

[23] Case C-501/11 P *Schindler Holding*, paras 113-114.

[24] For an overview of the circumstances that have been taken into account in practice, see e.g. Richard Burnley, 'Group Liability for Antitrust Infringements: Responsibility and Accountability', *World Competition*, 2010, pp. 595-614, at pp. 608-11.

[25] In case C-501/11 P *Schindler Holding*, paras 101-102, the Court stressed that the authors of the Treaties chose to use the concept of an 'undertaking' to designate the perpetrator of an infringement of competition law and not the concept of a company, firm or legal person, signaling that company law rules are not relevant. For this reason the Court found that it was not relevant to examine whether the liability of parent companies in competition law cases infringes the company law principle of limited liability.

[26] Case C-480/09 P *AceaElectrabel Produzione SpA*, para. 50.

> as the principle of the presumption of innocence, the principle that penalties should be applied solely to the offender, the principle of legal certainty and the principle of the rights of the defence, including the principle of equality of arms. It is for that reason, among others, that, as is clear from the consistent case-law cited in paragraph 56 above, the presumption is rebuttable.'[27]

Presumably some consideration for enforceability also lies behind these observations. By extending liability to a parent company (including a parent company located in the EU), the competition rules are given greater impact. The same is the case if a fine based on 10 % of turnover is calculated on the total turnover of the group rather than on the turnover of a single company.[28]

Thus the primarily focus of competition law on market conduct and consideration for the effectiveness of the rules seem to be the reasons why the Court is ready to treat a group of companies as a single enterprise. The Court has given a broad and relatively open definition of an enterprise. According to the case law there will be a single enterprise when a company in a group of companies is subject to the control of other parts of the group; due to the formulation of the presumptive rule and the kind of evidence required, in practice this is a clear possibility. Thus, in competition law the Court has unquestionably been inclined to apply the enterprise approach.

2.2. Public procurement law

If an undertaking tenders for a public procurement contract it can be asked to provide evidence of its economic, financial and technical capacities. If the undertaking is a limited company that is part of a group of companies, it may wish to refer to other companies in the group as evidence of its ability to meet the meet the minimum requirements. The Public Procurement Directive clearly allows for referring to the capacities of other group companies for fulfilling minimum requirements.[29] However it could be argued that that it is unnecessary in a group of companies to have to provide evidence of the ability to call on the resources for a company in the group. Nevertheless in Case C-5/97 *Ballast Nedam Groep NV* the Court ruled that the procuring authority was entitled to demand evidence that the parent company could in fact call on the resources of its subsidiary.[30] This judgment appears to be based on the entity approach.

---

[27] Case C-521/09 P *Elf Aquitaine*, para. 59.

[28] See Richard Burnley, 'Group Liability for Antitrust Infringements: Responsibility and Accountability', *World Competition*, 2010, pp. 595-614, at p. 598.

[29] See Articles 47 and 48 of Directive 2004/18/EC. For the same reason, national law cannot prohibit tenderers from referring to the capacities of others when making a bid; see Case C-94/12 *Swm Costruzioni 2 SpA*.

[30] See para. 12 of the judgment. This case was followed by Case C-176/98 *Holst Italia SpA*, which essentially came to the same result, though while Ballast Nedam Groep NV sought to rely on its subsidiary's resources, Holst Italia SpA sought to rely on its parent company's resources.

The purpose of following a procurement procedure is to ensure that there is a measure of competition. If several companies within the same group of companies submit tenders, one can question how much competition this generates. This why, in Italy, rules were introduced whereby companies in the same group were excluded from participating as separate tenderers in the same procurement. This provision was challenged in Case C-538/07 *Assitur Srl*. The Public Procurement Directive provides for grounds for excluding tenderers, but these did not cover the ground for exclusion used in this case. However the Court accepted that Member States can lay down substantive rules aimed at ensuring compliance with the principles of equal treatment and transparency. Such rules must be proportionate, and the Court did not find that this was so in this case. An irrebuttable presumption that tenders submitted by companies in the same group influence each other would be contrary to the proportionality principle, as it would not give those companies the opportunity to demonstrate that there was no real risk of distorting competition.[31] The Court went on to state, in paragraphs 31 and 32 of its judgment:

> ‘It should be pointed out in this connection that groups of undertakings can have different forms and objectives, which do not necessarily preclude controlled undertakings from enjoying a certain autonomy in the conduct of their commercial policy and their economic activities, inter alia, in the area of their participation in the award of public contracts. Moreover, as the Commission pointed out in its written observations, relationships between undertakings in the same group may be governed by specific provisions, for example, of a contractual nature, such as to guarantee both independence and confidentiality in the drawing-up of tenders to be submitted simultaneously by the undertakings in question in the same tendering procedure.
>
> Against that background, the question whether the relationship of control at issue influenced the respective content of the tenders submitted by the undertakings concerned in the same public procurement procedure requires an examination and assessment of the facts which it is for the contracting authorities to carry out. A finding of such influence, in any form, is sufficient for those undertakings to be excluded from the procedure in question. However, a mere finding of a relationship of control between the undertakings concerned, by reason of ownership or the number of voting rights exercisable at ordinary shareholders’ meetings is not sufficient for the contracting authority to automatically exclude those undertakings from the procedure for the award of the contract, without ascertaining whether such a relationship had a specific effect on their conduct in the course of that procedure.’

In its reasoning the Court seems to be very open to the idea that that the competitive conduct of a group of companies may not necessarily be coordinated. The Court even seems to be ready to accept that contractual obligations between companies in the same group can prevent coordination of competitive conduct. For this reason the Court requires purchasing authorities to examine whether companies in the same group do in fact coordinate their activities. In

[31] Para. 30 of the judgment.

principle this is no different from the approach of the Court in the area of competition law (see above), but there is no presumptive rule and the burden of proof of the existence of coordination seems to be higher than in corresponding competition cases.

Altogether it seems that in this area the Court is to some extent open to adopting an enterprise approach. But even though the goal here is to ensure competition, the Court seems less inclined to adopt such an approach than in the case of competition law.

2.3. Labour law

In Case C-234/98 *Allan*, the Court had to rule on whether Directive 77/187/EEC on safeguarding of employees' rights in the event of transfers of undertakings (the Transfer of Undertakings Directive) should apply to the transfer of an undertaking within a group of companies. There had been a transfer of employees between two wholly-owned subsidiaries in a group, and these employees believed they were entitled to protection under the Directive. The companies had differing terms of employment but were otherwise fully integrated in the group; they had the same board members and the same premises and shared administrative functions. The Court's starting point was that it was clear that the Directive was intended to cover any legal change in the person of the employer. Thus the Court found that the Directive applied to a transfer between two subsidiaries in the same group of companies since they constituted distinct legal persons, each with specific employment relationships with their employees. It made no difference that the companies had the same ownership, the same management and the same premises and that they were engaged in the same works.[32]

In this case the group referred to the concept of a single undertaking (enterprise approach) which the Court had applied in competition law, particularly referring to Case C-73/95 P *Viho* which concerned the application of Article 101 TFEU to agreements between entities within a group of companies. However, the Court pointed out that the enterprise approach is specific to competition law, since agreements entered into within a group of companies are not agreements between autonomous parties and thus cannot restrict competition pursuant to Article 101 TFEU.[33] The Court went on to state in paragraph 20:

> 'Nothing justifies a parent company's and its subsidiaries' uniform conduct on the market having greater importance in the application of the Directive than the formal separation between those companies which have distinct legal personalities. That outcome, which would exclude transfers between companies in the same group from the scope of the Directive, would be precisely contrary to the Directive's aim, which is, according to the Court, to ensure, so far as possible, that the rights of employees are safeguarded in the event of a change of employer by allowing them to remain in employment with the new employer on the terms and conditions agreed with the transferor'.

[32] Para. 17 of the judgment.

[33] Paras 18-19 of the judgment.

The judgment thus clearly declines to transfer the concept of an enterprise from the area of competition law to this area of law. Unlike competition law, the Transfer of Undertakings Directive does not focus on market conduct but on the formal fact that two subsidiary companies are different legal persons.

In Case C-242/09 *Albron Catering BV*, the Court had to decide on a situation in which all employees of the Heineken group were employed by a central employer which posted the employees to the group's operating companies in the Netherlands. One employee had been posted to a catering company in the group for 20 years until the catering undertaking was transferred to Albron in 2005. Following the ruling in the *Allen* case referred to above, the different companies in the Heineken group could not be considered as a single employer. Thus the question arose as to whether the company that had conducted catering activities until it was transferred could be regarded as a transferor within the meaning of the Directive. Normally employees who are placed by a temporary employment agency will not be protected if the undertaking to which they have been allocated is transferred while they are working there. However, the Court found that a non-contractual employer to which an employee has been permanently posted can be considered a transferor for the purposes of the Directive, even if there is an entity in the group with which the employee is linked by a contract of employment. This meant that the transferred employees had a right to continue their employment on the same terms with Albron and that they did not have to accept the continuation of their employment with Heineken (whereby they could be posted to another operating company in the group). In this judgment the Court maintained the principle that a group cannot be regarded as one employer. A specific solution was found for employees who are permanently posted. Such permanently posted employees will probably mostly be found in groups but can in principle be found in other contexts. Thus the judgment seems adhere to the view that a group of companies consists of several legal entities, i.e. it adhered to the 'entity approach'.

A number of cases have concerned the application of the Collective Redundancies Directive to groups of companies. The first was Case C-449/93 *Rockfon*, which was a reference from Denmark for a preliminary ruling concerning then Directive 75/129/EEC. The Directive required companies that were contemplating making collective redundancies to consult the employees. Rockfon AS was part of the Rockwool group which, at that time, employed more than 5,000 people around the world. Rockfon AS decided to dismiss 24-25 of its total of 162 employees. Rockfon AS failed to consult its employees in advance, and the SID trade union claimed on behalf of the employees that this was a breach of the Directive. The Directive requires employers (establishments) with more than 300 employees to consult employees if dismissing more than 30 employees; establishments with between 100 and 300 employees must consult if dismissing more than 10 % of their employees. This meant that if the relevant employer was Rockfon AS there had been a breach of the Directive, but if the relevant employer was the whole Rockwool group, there was no obligation to consult and thus no breach of the Directive. Rockfon AS argued that it could not be considered an establishment for the purposes of the Directive as it did not have independent management. In determining how the concept of an establishment should be interpreted, the Court started from the basis that: 'the sole purpose of the Directive is the partial harmonization of collective redundancy procedures and that its aim is not to restrict the freedom of undertakings to organize their activities and arrange their personnel departments in the way which they think best suits their needs'.[34] Next, the Court found that the Directive used various terms for those with a duty to consult, including: establishment, undertaking, work centre, local unit or place of work. The Court then ruled that the purpose of the Directive was to afford greater protection to workers in the event of collective redundancies.[35] Thereafter, in paragraph 30 of the judgment, the Court stated:

> 'Two observations may be made in that respect. First, an interpretation of the term "establishment" like that proposed by Rockfon would allow companies belonging to the same group to try to make it more difficult for the Directive to apply to them by conferring on a separate decision-making body the power to take decisions concerning redundancies. By this means, they would be able to escape the obligation to follow certain procedures for the protection of workers and large groups of workers could be denied the right to be informed and consulted which they have as a matter of course under the directive. Such an interpretation therefore appears to be incompatible with the aim of the Directive.'

On this basis the Court concluded that the term 'establishment' must be interpreted as designating the unit to which workers made redundant are assigned to carry out their duties, and it was not essential 'for the unit in question to be endowed with a management which can independently effect collective redundancies.'[36] The judgment shows that the Court maintains that a group of companies consists of a number of individual employers. In this case the interpretation is best in accordance with the purpose of the Directive, since the entity approach gives the best protection to employees.

In Case C-44/08 *Akavan*, the Court had to consider the subsequent Directive 98/59/EC on collective redundancies. The case concerned the dismissal of 450 employees who worked in a factory in Finland. The factory was operated by FSC, which was a subsidiary of Fujitsu Siemens Computer BV. In December 1999 the management of the parent company decided it was necessary to close the factory. FSC's board took its decision to do so on 1 February 2000. FSC's board was primarily composed of the group's directors and the chair of the company was the deputy chair of the board of the parent company. The plaintiffs argued that the obligation to consult pursuant to the Collective Redundancies Directive applied in connection with the parent company's decision in December 1999. The Court reasoned that the obligation to consult applies to employers, i.e. the natural or legal person with an employment relationship with the employee. An undertaking which controls the employer,

[34] Para. 21 of the judgment.

[35] Para. 29 of the judgment.

[36] Para. 32 of the judgment.

even if it can take decisions which are binding on the employer, does not have the status of employer.[37] Thus in this case the obligation to consult was that of FSC, as employer, even though the decision had effectively been made earlier by the parent company. Thus, FSC should consult in connection with its implementation of the decision to close the factory. The Court added that it is 'not the purpose of Directive 98/59, any more than it was of Directive 75/129, to restrict the freedom of such a group to organise their activities in the way which they think best suits their needs'.[38] Finally, the Court added that the Directive was not intended to bring about full harmonisation of national systems of worker representation in undertakings.[39]

These judgments clearly show that in labour law cases the Court does not view a group of companies as a single enterprise, but respects the fact that groups consist of separate legal persons (the entity approach). In two cases – *Allan* and *Rockfon AS* – the Court stated that this approach best accorded with the purpose of the directives concerned. But in two other cases it seems that employees would have had better protection if the Court had used the enterprise approach. However, in the first case, *Albron*, the Court solved the problem by treating permanently posted employees as equivalent to employees of the company where they in fact worked, while in the second case, *Akavan*, the Court maintained its view that a group of companies is not an establishment, even if this means that employees' protection is less effective. However, in this case too the Court stated that the result was in accordance with the aim of the Directive, since it was not intended to restrict the freedom of groups to organise their activities as they think best.

2.4. Commercial agents

In Case C-348/07 *Turgay Semen*, the Court had to interpret Directive 86/653/EEC on self-employed commercial agents. Turgay Semen was lessee of a petrol station owned by Deutsche Tamoil GmbH. In connection with the termination of the contract Turgay Semen believed that the compensation he was entitled to should not only reflect the advantages which the lessor had derived from the contract, but also the advantages gained by other companies in the lessor's group of companies, in particular the advantages gained by Deutsche Tamoil's Libyan parent company from being able to sell fuel. According to Article 17 of the Directive, a commercial agent is entitled to compensation if and to the extent that they have brought the principal new customers or significantly increased the volume of business with existing customers. The Court found that the Directive was intended to ensure the security of commercial transactions and legal certainty and that in principle this purpose precluded taking into consideration benefits accruing to third parties, unless this is agreed contractually between the principal and the commercial agent. Thus benefits accruing to other companies in the lessor's group should not be taken into consideration.

[37] Paras 57-59 of the judgment.

[38] Para. 59 of the judgment.

[39] Para. 60 of the judgment.

In this judgment a group of companies was not found to be a single enterprise. The entity approach was supported on the basis of interpretation in line with the aim of the Directive.

2.5. VAT

When determining the relevant tax subject in VAT law, the Court seems to base its approach on the private law definition of legal entities.[40] This means that in principle the individual companies in a group are recognised as tax subjects, but in some cases involving groups of companies the Court has been prepared to derogate from this.[41]

In Case C-260/95 *DFDS*, the Court had to rule on whether the Danish company DFDS A/S was subject to VAT in the United Kingdom in respect of package tours sold on its behalf by its English subsidiary, DFDS Ltd. Under the VAT Directive then in force, a travel agent was subject to VAT in the Member State where the taxpayer had 'established his business or has a fixed establishment'. DFDS A/S had entered into an agency agreement with its English subsidiary under which DFDS Ltd was to act as the central booking office for travel arrangements sold in the UK and Ireland. Since DFDS A/S did not have other activities in the UK, the question arose as to whether the English subsidiary could be regarded as the established place of business or a fixed establishment of the Danish company. The British tax authorities believed this was the case and that therefore DFDS A/S was subject to payment of VAT in the UK on the package tours sold by the English subsidiary. Against this, DFDS A/S argued that it was subject to VAT in Denmark (where such services were exempt from VAT), since it had its principal place of business there. The Court started by noting that consideration of the actual economic situation is a fundamental criterion for applying the common VAT system.[42] Whether there was an obligation to pay VAT in the UK depended on whether DFDS A/S actually had an establishment in the UK. To determine this it was first necessary to ascertain whether the subsidiary could be said to have acted independently of DFDS A/S when acting as its sales agent. The Court did not believe this was the case and stated in paragraph 26:

> 'The fact, mentioned by the VAT Tribunal, that the premises of the English subsidiary, which has its own legal personality, belong to it and not to DFDS is not sufficient in itself to establish that the subsidiary is in fact independent from DFDS. On the contrary, information in the order for reference, in particular the fact that DFDS's subsidiary is wholly owned by it and as to the various contractual obligations imposed on the subsidiary by its parent, shows that the company established in the United Kingdom merely acts as an auxiliary organ of its parent.'

---

[40] See e.g. Case C-23/98 *J. Heerma*; and Case C-210/04 *FCE Bank*.

[41] This situation is discussed by Dennis Ramsdahl Jensen, 'Subjektafgrænsning i det fælleseuropæiske momssystem – En trist rejse fra FCE Bank til Crédit Lyonnais', *Nordic Tax Journal* 2014:1, pp. 102-122.

[42] See para. 23 of the judgment.

Since DFDS Ltd had the staff and facilities to constitute a 'fixed establishment' within the meaning of the Directive, the Court was of the view that the Danish company was required to pay VAT in the UK. In the present context it is interesting that the Court did not recognise that the subsidiary was an independent legal entity but applied instead the enterprise approach. This was in a situation in which the subsidiary represented the parent company and where the economic reality was that the subsidiary was part of the parent.

There was another interesting decision in Case C-425/06 *Part Service*. Two companies in the same group of companies were engaged in leasing cars. One of the companies leased cars in return for leasing payments, while the other company insured the cars in return for payment of insurance premiums. The leasing payments were subject to VAT, while the insurance transactions were exempt from VAT. The tax authorities argued that the agreements should be treated as a single contract even though there were two contracts in private law. The tax authorities were of the view that there was a clear risk of the leasing payments being artificially lower and the insurance premiums being artificially higher in order exploit the fact that the latter were VAT exempt. The Court started by stating that a number of services that are formally separate can constitute a single transaction when they are not independent of each other. This can be the case if two services are so closely connected that it would be artificial to divide them.[43] The Court identified a number of circumstances in the case that pointed in this direction, the first of which was the fact that the two companies participating in the leasing belonged to the same group of companies.[44] The Court was of the view that if there was such a close connection, there could be abuse within the meaning of the Sixth VAT Directive.

This case concerned tax avoidance, and the Court's reasoning indicates that one factor that can be evidence of abuse is that the operators involved in a number of closely connected transactions belong to the same group of companies. In addition to being members of the same group, several other elements in the case pointed towards abuse, so the case does not establish that the mere fact that two or more companies in the same group enter into a number of transactions is enough for a finding of abuse. The judgment does, however, indicate that an enterprise approach may be called for where companies in a group are involved in abuse of Union law.

2.6. Jurisdiction

Case 218/86 *SAR Schotte GmbH*, concerned the EEC Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (the 'Judgments Convention'). The German undertaking SAR Schotte GmbH had supplied some perfumery products to the French company Parfums Rothschild SARL. The latter claimed that the products supplied were faulty and therefore refrained from paying for them. SAR Schotte GmbH denied that the products were faulty and brought proceedings against the

[43] Para. 51.

[44] See para. 57 of the judgment.

French company before a German court where it claimed payment of its unpaid invoices. Under the Judgments Convention the starting position is that a company should be sued in the jurisdiction where the company has its seat, but an exception is made in Article 5(5) of the Convention whereby it is also possible to sue an undertaking in the courts of a country in which the company has a branch, agency or other establishment. As stated, in this case proceedings were brought in Germany. The French company did not directly have a branch etc. in Germany, but its parent company, Rothschild GmbH, was situated in Germany. The German parent company had been involved in the negotiations for the sales contract and its performance. On this basis SAR Schotte GmbH argued that the German parent company constituted a branch of the French company for the purposes of jurisdiction. By way of introduction, the Court noted that the case concerned two companies with the same name and the same management. Moreover, one of the companies carried out business on behalf of the other and acted as its representative, even though it did not have a dependant status as in the normal case of an agent or branch etc.[45] Both the manner in which the German company acted and the letters which the company sent to SAR Schotte GmbH were calculated to give the plaintiff the impression that the parent company acted as a place of business for the French company. Hence the Court stated in paragraph 15:

> ‘In such a case, third parties doing business with the establishment acting as an extension of another company must be able to rely on the appearance thus created and regard that establishment as an establishment of the other company even if, from the point of view of company law, the two companies are independent of each other.’

Because of the way it appeared to third parties, the Court accepted that one company in a group was acting on behalf of another. Such an appearance of representation meant that the German parent company was considered as constituting a branch of its subsidiary. The judgment adopted an enterprise approach, and in this case the Court based its reasoning on the appearance of representation. Appearance of representation can in principle also arise between independent companies. However the Court attached considerable importance to the fact that the companies were in the same group of companies, which indicates that finding such appearance of representation is more likely in groups of companies than elsewhere.

In Case 220/88 *Dumez France SA*, the Court declined to apply the enterprise approach. Some French parent companies with subsidiaries in Germany believed that some German banks had caused the subsidiaries losses. The French parent companies brought proceedings in the French courts against the German banks, even though they were based in Germany. The French companies argued that there was jurisdiction in France because France was the place where the damage had been caused; see Article 5(3) of the Judgments Convention. In other words, the French companies argued that the loss suffered by their subsidiaries had effectively occurred to them as parent companies. This argument was based on an enterprise approach, ignoring the fact that they were separate companies. However, the Court did not accept this argument and ruled that the losses of the parent companies were only an indirect

[45] See para. 14.

consequence of the losses in their subsidiaries. Since the purpose of the rules on jurisdiction was to ensure that disputes should come before the courts located in a place closely connected with the dispute, Article 5(3) can only give the right to bring proceedings where the direct loss occurred. The Court thus maintained that the subsidiaries were separate legal entities and applied the entity approach.

2.7. Insolvency proceedings

According to Regulation (EC) No 1346/2000 on insolvency proceedings, jurisdiction in insolvency proceedings is in the territory where the debtor's main centre of interests is situated. In the case of a company, in the absence of proof to the contrary, the place of its registered office is presumed to be its main centre of interests; see Article 3(1). Thus, the starting point is that insolvency proceedings against companies belonging to a cross-border group of companies take place in the different jurisdictions where the companies have their registered offices. Sometimes this may be impractical and some scholars have argued that it should be possible to have collective proceedings in one Member State against companies belonging to the same group even though the companies have their registered offices in different Member States. Measures have been taken in some Member States to achieve this.[46] The Court could achieve this by interpreting the Regulation so that all companies in a group could be found to have the main centre of interests in the same Member State. However, there has not been such use of the enterprise approach in the case law hitherto, and the Court appears to favour the entity approach.

This was the situation in Case C-341/04 *Eurofood IFSC Ltd*. Eurofood IFSC Ltd. was an Irish wholly owned subsidiary of the Italian company Parmalat SpA. Its main role was to secure financing facilities for companies in the Parmalat group. At the beginning of 2004 insolvency proceedings were initiated in Ireland against Eurofood IFSC Ltd., but shortly thereafter insolvency proceedings against the company were also started in Italy (where insolvency proceedings had already been initiated the parent company Parmalat SpA). The Court was asked for a preliminary ruling on whether the Irish courts or the Italian courts had jurisdiction. What determined the decision was whether Eurofood IFSC Ltd. had its main centre interests in the place of its registered office in Ireland or in the place of its parent company's registered office in Italy. The Court stated that the debtor's main centre of interests was the place where the debtor regularly administers their interests and is therefore ascertainable by third parties.[47] The presumption that a company has its main centre of

---

[46] See Rolf Dotevall in Niels Fenger et al. (eds): *Festskrift til Erik Werlauff*, 2012, p. 117 ff.; Irit Mevorach, 'Appropriate Treatment of Corporate Groups in Insolvency: A Universal View', *European Business Organization Law Review*, 2007, pp. 179-194; Irit Mevorach, 'The "home country" of multinational enterprise group facing insolvency', *International and Comparative Law Quarterly*, 2008, pp. 427-448; Marina Matousekova, 'Private international law answers to the insolvency of cross border groups: comparative analysis of French and English case law', *International Business Law Journal*, 2008, pp. 141-163; and Arie Van Hoe, 'Enterprise Groups and their Insolvency: It's the (Common) Interest, Stupid!', *European Company and Financial law Review*, 2014, pp. 200-213.

[47] See para. 32, where the Court referred to recital 13 of the Regulation.

interests in the place of its registered office 'can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which locating it at that registered office is deemed to reflect.'[48] This is not particularly clearly expressed, but it must mean that the presumption that a company has its main centre of interests at its place of registration can only be derogated from if some other main place of business is ascertainable by third parties. The Court accepted that there could be a derogation from the presumption in the case of 'letterbox' companies, but it ruled that 'the mere fact that its [the subsidiary's] economic choices are or can be controlled by a parent company in another Member State is not enough to rebut the presumption laid down by the Regulation.'[49]

The Court was thus relatively resistant to an interpretation whereby a group of companies should be seen as a single enterprise with its main centre of interests in the same place. According to the Regulation, what is decisive is how the situation appears to third parties. The fact that a parent company's control of a subsidiary is not apparent to outsiders and is therefore not in itself enough to move the main centre of interests of the subsidiary. The Court only allowed that a 'letterbox' company, which has neither employees nor activities in the place where it is registered, can be treated as having its main centre of interests located other than in its place of registration. Thus, only under entirely exceptional circumstances will the Court adopt an enterprise approach.

This was confirmed in Case C-191/10 *Rasteilli Davide*, where insolvency proceedings were initiated against a French company in the French courts. The creditors argued that the proceedings should be extended to include an Italian company because the activities of the two companies had been intermixed. To start with the Court found that the Regulation did not contain rules to allow insolvency proceedings against one debtor to be extended to cover another debtor. It was possible for a national court to extend insolvency proceedings to cover another debtor if that other debtor also has its main centre of interests in the same jurisdiction. However, the Court did not find that the intermixing of activities in itself meant that the companies had the same main centre of interests; see paragraphs 37-38:

> 'With regard to the situation, referred to in the second question, where the property of two companies is intermixed, it is apparent from the explanations provided by the French government that, to characterise such a situation, the national court uses two alternative criteria drawn, respectively, from the existence of intermingled accounts and from abnormal financial relations between the companies, such as the deliberate organisation of transfers of assets without consideration.
>
> As has been submitted by the French, Netherlands and Austrian governments and by the European Commission, such factors are in general difficult to ascertain by third parties. Furthermore, intermixing of property does not necessarily imply a single centre

[48] Para. 34.

[49] Para. 36.

> of interests. Indeed, it cannot be excluded that such intermixing may be organised from two management and supervision centres situated in two different Member States.'

By focusing on how the situation appears to third parties and how the companies were managed, the Court rejected the argument that the two companies had the same main centre of interests merely because the assets of two companies were intermixed.

These two cases seem to make it less likely that a cross-border group of companies can be subject to collective insolvency proceedings in one Member State. It will presumably be the exception that a subsidiary company will appear to third parties as being managed by the parent company since the control exercised in groups of companies is not particularly visible to outsiders. It will only be where the subsidiary acts in the name of the parent company or otherwise appears to be the extended arm of the parent company (see Case 218/86 *SAR Schotte GmbH* in the proceedings paragraph) that it would be natural to find that the companies have the same main centre of interests. The Court's approach indicates that it is not normally inclined to see a group of companies as a single enterprise, and therefore the case law seems indicative of an entity approach.

2.8. Parallel imports

In Case C-539/13 *Merck Canada Inc*., the Court had to interpret the 2003 Act of Accession to the European Union, applicable to the new Member States that entered the Union in 2004. There was special regulation of parallel imports of patented pharmaceutical products from the new Member States to the old Member States, to allow holders of patents or supplementary protection certificates (SPCs) to take measures against parallel imports where it had not been possible to obtain a patent or SPC in the new Member State prior to its accession. Any person intending to import or market a pharmaceutical product protected in the importing Member State was required to inform the 'holder or beneficiary of such protection'. In the specific case Merck Canada Inc. was the holder of a patent and an SPC for the product *Singulair*. Merck Canada Inc. had granted an exclusive licence to the Irish company Merck Sharp and Dohme Ltd., to which notice was given by an importer who intended to import *Singulair* from Poland to the UK.

In a subsequent dispute between the importer and the Merck group, one of the issues was to whom the import notification should be given. The Court first interpreted 'holder or beneficiary of such protection', and held that notification should be given to the holder of the patent or SPC or to any other person enjoying rights conferred by law by that patent or SPC. The importer and the Commission argued that 'the term "beneficiary" refers to any company which, within a group, may reasonably be regarded as acting on behalf of the patent holder.'[50] The importer argued that it would be unreasonable to make the parallel importer responsible for determining which entity within a group holds the patent when the group operates as a single economic unit. However the Court pointed out that the purpose of the notification

[50] Para. 38.

requirement was to enable the holder of a patent or SPC to prevent parallel imports where it had not been possible to obtain a patent or SPC in the new Member State prior to accession. Furthermore, the Court stated that patents and SPCs are subject to rules on public disclosure so that anyone may easily ascertain the name of the patent or SPC holder. Thus, requiring a parallel importer to identify the holder of a patent or SPC before giving notification cannot be regarded as imposing an unduly onerous burden on the importer. Allowing an importer to give notification to any company in a group which includes the holder of a patent or SPC would undermine the effectiveness of the notification mechanism. For this reason the Court did not accept the enterprise approach in this case since the entity approach best served the purpose of the rules in question.

2.9. Summary of the Court's treatment of groups of companies in Union law

This case survey shows that the Court uses both the enterprise approach and the entity approach. Not surprisingly it seems that contextual and teleological interpretations of the secondary legislation are decisive in determining which approach to use. There has been a very large number of cases in which the enterprise approach has been used. However, most of these cases have dealt with competition law issues, which may give a distorted picture of how willing the Court is to apply the enterprise approach. If instead the focus is on the different situations in which the Court has considered which approach to use and the cases are categorised according to the area of the law concerned, with competition law being just one of the areas, it is clear that the use of the enterprise approach is the exception. It is therefore interesting to examine when the Court is willing to allow the exception.

The enterprise approach is most often used when the aim of Union law is to regulate market behaviour. Here, if a group of companies acts as a single undertaking, this may call for an enterprise approach. This is the case in competition law and to some extent in public procurement law. Also in VAT law the 'actual economic situation' must be considered so an enterprise approach may be called for. Given that the enterprise approach is used when a group acts as a single undertaking, the requirement for the group actually to be integrated and acts as one is logical. Therefore in these situations the Court requires control to be exercised within the group.

Where the aim of regulating market behaviour or the significance of economic reality is less pronounced, the Court seems less inclined to use the enterprise approach, but it does do so occasionally. *First*, this is the case where it appears to third party that a group of companies is a single enterprise; see sections 2.6 and 2.7. For instance where one company in a group represents another, making it natural to treat the two companies as one; see Case C-260/95 *DFDS A/S* and Case 218/86 *SAR Schotte GmbH*. However, there can also be situations in which it appears to a third party that the main centre of interest of a company in a group of companies is located with the parent company; see Case C-341/04 *Eurofood IFSC Ltd*. This latter consideration applies where the Court finds that Union law rules have the particular purpose of protecting what is ascertainable by third parties. However, the fact that it may be difficult for an outsider to distinguish between the different companies in a group is not in itself enough to treat the group as a single enterprise, given that information is available to identify which is the relevant company in a group; see Case C-539/13 *Merck Canada Inc*.

Second, there have been cases in which the Court has indicated that where the activities of a group of companies amount to an abuse of Union law, it is prepared to regard the group as a single enterprise. This was the situation in Case C-425/06 *Part Service Srl*. Also in the area of competition law the Court has indicated that the risk of avoidance makes it particularly appropriate to view a group of companies as a single enterprise. In tax law, on several occasions the Court has had the opportunity to assess whether the Member States' tax rules can be justified on the basis of preventing abuse, and here too the Court has accepted that there is a clear risk of tax avoidance in transactions between companies in the same group.[51]

The two exceptions referred to correspond largely to considerations normally referred to as misleading appearances and fraud. In company law theory these are often considered as justifications for piercing the corporate veil.[52] From this perspective the Court's case law appears to be in line with the practice developed by national courts for dealing with groups of companies. Given that in many jurisdictions there is seldom piercing of the veil, it may be that the Court is slightly more inclined to use the enterprise approach than some national courts. However, this does not alter the fact that the Court also seems to use the enterprise approach as an exception to the main rule which is still the entity approach. Other than the exception mentioned above, the Court does not seem willing to use the enterprise approach, even if it would benefit the purposes and effectiveness of Union law rules to do so.[53]

It can thus be concluded that the Court appears to have a reasonably pragmatic and balanced attitude to groups of companies in Union law.

Finally, the Court has not developed a precise definition of when a group of companies should be seen as a single enterprise. The concept of an 'enterprise' has mainly been developed in competition law where the Court has accepted that control of a group can be based on a majority shareholding, on a certain minority shareholding, or on the negative control that is often exercised by a joint venture partner. It seems that the definition of an undertaking used in competition law is increasingly being expanded, which is a problematic development as reflected in the literature cited in section 2.1. In this area the Court has also required that control should actually be exercised, which raises a number of difficulties of proof. The Court has dealt with the issue of proof primarily by accepting a presumption that

---

[51] See e.g. Case C-196/04 *Cadbury Schweppes*; Case C-446/03 *Marks and Spencer*; and Case C-264/96 *ICI*.

[52] For the law and economic theory on piercing the corporate veil, see Frank H. Easterbrook & Daniel R. Fischel: *The Economic Structure of Corporate Law*, 1991, p. 58; and Stephen M. Bainbridge: *Corporation Law and Economics*, Foundation Press, 2002, pp. 174-177. For national company laws, see the comparative studies referred to in footnote 6

[53] Case C-44/08 *Akavan*.

there is control in certain cases, shifting to the companies the burden of proving that control is not exercised.

The Court has been criticised for not formulating a uniform definition of a group of companies.[54] However, given that the use of the enterprise approach is dictated by the special purpose of the Union legislation in question, to use the same definition would probably not always be appropriate.

3. Union law and the application of national rules on groups of companies

As stated in the introduction, there has only been limited harmonisation of the company law rules on groups of companies. However, even in the absence of harmonisation, the Member States must ensure that national rules on groups are in accordance with the fundamental Treaty provisions on freedom of movement. In respect of rules on groups of companies, freedom of establishment (Article 49 TFEU) is the most likely freedom to be infringed. So far there have been very few cases in which the Court has had to explicitly consider company law rules on groups of companies.[55] However there is extensive case law on Article 49 in relation to other national group rules, such as the tax rules applicable to groups. While tax law differs from other areas of the law on a number of points, these cases can be used to illustrate the Court's approach to national rules on groups of companies.[56]

The intention of the following review is primarily to show how the Court can adopt differing perspectives when deciding on national rules on groups. In this context it is necessary to distinguish between rules on groups that constitute discrimination and those that can constitute restrictions (i.e. non-discriminatory obstacles). It is also necessary to start by seeing how national rules can affect a cross-border group in different ways. For example, if there is a group with a parent company (P) in Member State B, and a subsidiary company (S) in Member State A, one can either start from the basis of the rules on groups of companies that apply in Member State A or those that apply in Member State B.

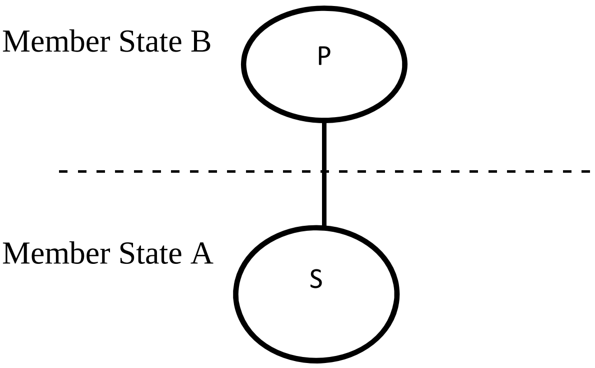
---

[54] See Stefan Grundmann: *European Company Law: Organization, Finance and Capital Markets*, 2nd edition, Intersentia, 2012, p. 767.

[55] The only judgment was given in Case C-186/12 *Impacto Azul*.

[56] A caveat is in order: the cases concerning the taxation of groups are often very complex and involve consideration of a number of special tax issues. It is not possible to cover all aspects of these cases here, as the purpose is to give an impression of the Court's approach to national laws on groups.

Figure 1:



3.1. Discriminatory rules on groups of companies

There is plentiful case law in which rules that discriminate against undertakings that exercise freedom of establishment have been examined by the Court. Where discrimination is found to exist, the Court examines whether there is a justification for treating foreign companies differently and whether such measures are proportionate. It is necessary to distinguish between the rules in Member State A and Member State B.

3.1.1. Discriminatory rules on groups in the Member State where the subsidiary is situated (Member State A)

There are two main ways in which a foreign parent company can be discriminated against in the Member State where its subsidiary is situated. Either the parent company is not allowed rights which parent companies normally have in Member State A, or the subsidiary is discriminated because it has a foreign parent company. Both these forms of discrimination are described briefly.

There have been several cases in which the Court has had to consider national tax rules that discriminate against foreign parent companies.[57] On the other hand there have been no cases where company law rules have been found to discriminate against foreign parent companies. However, Case C-186/12 *Impacto Azul* touched on this question. The case concerned Portuguese legislation under which a parent company could be made liable to the creditors of its subsidiary. This legislation only applied to parent companies established in Portugal. In the specific case a Portuguese company, Impacto Azul Lda, sold some real property to the company BPSA 9. The property was transferred but due to the financial crisis BPSA 9 was unable to pay as agreed. Since the company was insolvent Impacto Azul Lda argued that

[57] See e.g. Case C-282/07 *Truck Center*, where however the Court found that the discrimination was justified since non-resident foreign parent companies were in a different position from resident parent companies. There was a special situation in Case C-385/12 *Hervis*, where the Court indicated that the tax rules that resulted in higher tax liability for companies that were part of a group could be discriminatory if the companies which typically had to pay such taxes were normally part of a cross-border group. Thus the Court opened up for the possibility that rules on groups of companies could constitute indirect discrimination, which must be assumed to be the exception.

BPSA 9's ultimate parent company should be liable for its debts. This parent company was French and was therefore not covered by the Portuguese rules on a parent company's liability. Impacto Azul Lda argued that this difference in the treatment of Portuguese and foreign parent companies was in breach of the freedom of establishment in Article 49 TFEU.

The Court confirmed that Article 49 TFEU precludes any national measure which is liable to hinder or render less attractive the exercise of freedom of establishment. In the absence of harmonisation of the rules on groups of companies at European level, it is up to the Member States to lay down the rules. The fact that the measures on the liability of parent companies towards the creditors of their subsidiaries do not apply to parent companies established in other Member States is not contrary to Article 49 TFEU. Such an exclusion of foreign parent companies is not liable to make it less attractive for parent companies from other Member States to be established in Portugal. Thereafter the Court stated in paragraph 37: 'In any event, parent companies having their seat in a Member State other than the Portuguese Republic may choose to adopt, through contractual means, a system of joint and several liability for the debts of their subsidiaries.'

This last comment is interesting since it illustrates that there can be cases where it is an advantage for parent companies to be covered by rules on groups of companies. Therefore national laws ought to allow foreign companies to be covered, either by generally covering foreign parent companies or by making it possible for them to be covered by agreement or otherwise. A review of the Member States that have specific regulations on groups of companies shows that they do not always cover foreign parent companies and thus in several places there can be problems in relation to Article 49 TFEU.[58]

Other rights can be denied to parent companies. In Denmark it was previously the practice that the term 'parent company' did not cover foreign companies so that, among other things, parent companies situated in other Member States were not entitled to take up loans from Danish subsidiaries on the same terms as Danish parent companies.[59] This was naturally contrary to the freedom of establishment since there was no reason to prevent foreign parent companies taking up loans on the same terms as allowed to Danish parent companies. Denmark subsequently changed its interpretation of 'parent company' so as to include companies in other Member States.[60]

In addition to the above examples there can be other rights, for example the right to information etc., which it may be unjustified to deny to a foreign parent company. It is also

[58] See Christoph Teichmann, 'Konzernrecht und Niederlassungsfreiheit', *Zeitschrift für Gesellschafts- und Unternehmensrecht*, 2014, pp. 45-75.

[59] Under Danish law shareholders' loans are restricted, but an exception is made for loans to parent companies. The exception is now found in Section 211 of the Danish Companies Act.

[60] See Jens B. Hansen & Jens-Christian Nilsen, 'Grænseoverskridende koncernlån', *Revision & Regnskabsvæsen*, 2001, No 10, p. 26 ff.; and Karsten Engsig Sørensen & Paul Krüger Andersen, 'Ny dansk praksis vedrørende koncernlån til udenlandske moderselskaber', *Nordisk Tidsskrift for Selskabsret*, 2001:2, pp. 138-145.

clear that if obligations are imposed on foreign parent companies that are not imposed on domestic parent companies, this will equally be discriminatory.

Instead of discrimination against a parent company, there can be discrimination against a subsidiary because it has a foreign parent company. In the area of tax law there are countless examples where Member States have imposed special tax treatment on subsidiaries merely because they have a foreign parent company. Such cases are normally lost by the Member States.[61] There have been no company law cases involving this type of discrimination. However, a possible example of this kind of discrimination may be found in Danish law where employees in a Danish subsidiary are not given a right to elect employee representatives in a foreign parent company; see Section 141 of the Danish Companies Act which expressly only covers Danish parent companies. However, such discrimination does not necessarily disadvantage the parent company (which can always choose to provide for employee representation within the scope of the company law to which it is subject), so it is not obvious that there is discrimination contrary to Article 49 TFEU. On the other hand this could be discrimination contrary to Article 45 TFEU, on the free movement of workers. However, the rule can presumably be justified on the ground that it is the company law of the Member State where the parent company is established that should lay down the rules on employee representation.

3.1.2. **. Discriminatory rules on groups in the Member State where the parent company is established (Member State B)**

Freedom of establishment not only prohibits discrimination in the Member State where a company is established, but also hindrances in the country of origin.[62] This means that there can also be a breach of the right of establishment if the Member State where a parent company is established discriminates against it if it establishes itself in another Member State via a subsidiary. Here too the discrimination can be either against the parent company or the foreign subsidiary.

There have been many tax cases which have involved situations where a Member State has discriminated against a parent company because it has had foreign subsidiaries. If a case concerns a subsidiary that carries on genuine economic activities, the Member State will normally lose the case.[63] This seems to be so in cases concerning the taxation of the parent company. On the other hand, where cases involve the taxation of subsidiary companies, for example where a subsidiary makes a loss, it is less clear that there is unlawful discrimination.[64]

---

[61] See e.g. Case C-324/00 *Landhorst-Hohorst*; Joined Cases C-397/98 and C-410/98 *Metallgesellschaft*; Case C-200/98, *X and Y*; and Case C-524/04 *Thin Cap.*

[62] See Case 81/87 *Daily Mail*.

[63] E.g. Case C-264/96 *ICI*; Case C-168/01 *Bosal*; Case C-347/04 *Rewe*; and Case C-196/04 *Cadbury Schweppes*.

[64] Case C-446/03 *Marks and Spencer.*

There have not yet been any cases on company law rules that discriminate against parent companies with foreign subsidiaries. However there are almost certainly examples of cases where Member States have not fully extended their regulation of groups of companies to foreign subsidiaries. Thus, if parent companies are allowed special rights, for example the right to receive loans from other group companies, the right to information or the right to manage a subsidiary, it could be discriminatory not to extend this right to foreign subsidiaries. However, there will usually be reasonable justifications for not extending the rights since the assumption must be that it depends on the company law to which the subsidiary is subject whether it can give a loan, give information, or be subject to the management of the parent company. Thus it is most likely that this kind of different treatment of parent companies with foreign subsidiaries will normally not infringe the rules on freedom of establishment.

A parent company could also be discriminated against by having additional obligations imposed on it because it has subsidiaries in other countries. There do not appear to be any clear company law examples of this kind of discrimination.

Alternatively a foreign subsidiary can be subject to discrimination under the law which applies to the parent company. There do not appear to be any examples of this form of discrimination in the Court's case law. However, one example of this could be if the law that applies to the parent company does not give a foreign subsidiary a right to group representation. Under Danish law the employees of foreign subsidiaries do not have such a right,[65] but the Danish Companies Act does allow the general meeting of a parent company to decide that employees of one or more foreign subsidiaries may also participate in the election of group representatives. Since the parent company can extend the right of representation in this way it is hard to see how this can be a disadvantage for the parent company. On the other hand it is more natural to see the Danish rules as discrimination against foreign employees, contrary to Article 45 TFEU on freedom of movement.[66] In order to determine whether there is a breach of Article 45 it is necessary to assess whether there is any justification for excluding foreign employees. However, the fact that it is possible for the general meeting to extend the right of representation to foreign subsidiaries shows that there is no difficulty in doing so in principle, so it is difficult to see what the justification might be.[67]

3.2. Restrictive group rules

Freedom of establishment not only prohibits discrimination but also prohibits non-discriminatory restrictions.[68] If rules impose restrictions it will be necessary to evaluate

---

[65] This is clear from Section 141 of the Danish Companies Act.

[66] See Ruth Nielsen: *Koncernarbejdsret*, DJØF Publishing, 2nd Edition, 2006, pp. 209-210.

[67] The rules on European Works Councils were introduced precisely because it was recognised that the rules on employees' influence often only applied on a national basis. See Directive 2009/38/EC, recital 11. However, the Directive will hardly justify discrimination contrary to Article 45 TFEU.

[68] The extent of the prohibition of restrictions is still somewhat unclear; see among others Karsten Engsig Sørensen, 'Company Law as a Restriction to Free Movement: Examination of the Notion of 'Restriction' Using Company Law as the Frame of Reference', *European Company Law*, 2014, pp. 178-188.

whether they are justified by imperative requirements in the public interest and are proportional.[69] It is thus necessary to consider whether there is a restriction on freedom of establishment even where cross-border groups and purely national groups are treated in the same way.[70]

First, one can question whether it is possible to extend the regulation of groups of companies to include foreign parent companies. [71] For instance one can imagine imposing liability on foreign parent companies for the obligations of their subsidiaries, possibly by piercing the corporate veil. Even if the foreign parent companies were treated in the same way as domestic parent companies and there is no discrimination, such rules would unquestionably be restrictions.[72] Normally such rules can be justified by imperative requirements in the public interest since they are intended to protect the subsidiary company and the interested parties associated with it. However, the Court's judgment in Case C-81/09 *Idryma Typou* shows that in special cases it is a breach of the right of establishment to impose such a liability on a shareholder. In this case the Court did not believe that imposing joint and several liability for a fine on the company on shareholders with more than 2.5 % of the equity capital would have the intended effect. It has also been argued that an extensive intrusion in limited liability could be contrary to the right of establishment,[73] certain company law directives[74] or maybe even certain human rights.[75] These discussions assume that there is a very extensive intervention in limited liability that is more theoretical than realistic.

[69] See the test introduced in Case C-55/94 *Gebhard*.
[70] A prohibition of groups of companies would be a restriction on free movement; see Joined Cases C-105/12 to C-107/12 *Essent NV*, paras 43-47. This problem, which is a little unusual, is not discussed further here.

[71] On the basis of Case C-186/12 *Impacto Azul*, the principle must be that if a Member State decides *not* to extend obligations to foreign parent companies this will not constitute a restriction; see para. 35. However it has been argued that by not extending the obligations in Portuguese law to foreign parent companies, those foreign parent companies were prevented from exploiting the scope for group management in Portuguese law. It was thus argued that failing to impose such obligations effectively meant that foreign companies were deprived of rights; see Christoph Teichmann, 'Konzernrecht und Niederlassungsfreiheit', *Zeitschrift für Gesellschafts- und Unternehmensrecht*, 2014, pp. 45-75

[72] See Case C-81/09 *Idryma Typou*, paras 56-58, according to which rules imposing joint and several liability on major shareholders for certain fines were a restriction.

[73] It has been argued that Article 49 TFEU presumes that it is possible to implement establishment through a subsidiary with limited liability, so that setting aside this possibility would be in breach of Article 49; see Wolfgang Schön, 'Zweigniederlassung und Tochtergesellschaft - ein Grundsatz des Europäischen Unternehmensrechts', *EWS*, 2000, pp. 281-291.

[74] However, the Court has denied that the First Company Law Directive introduced a rule whereby shareholders would never be liable for the obligations of the company; see Case C-81/09 *Idryma Typou*, para. 44. It has also been argued that an extensive derogation from limited liability can be contrary to the Twelfth Company Law Directive which established that there is limited liability in companies with a single shareholder; see Heribert Hirte, 'Die Entwicklung des Unternehmens- und Gesellschaftsrechts in Deutschland in den Jahren 1991-1995', *Neue Juristische Wochenschrift*, 1996, p. 2832 with further references.

[75] As stated above in section 2.1, the Court has accepted that it is not contrary to Article 6 of the European Convention on Human Rights to impose liability on a parent company for a fine imposed on its subsidiary, as long as there is scope for rebutting the presumption that control is exercised in such a way as to give rise to liability.

In addition to provisions on liability other obligations may be extended to foreign parent companies, such as redemption obligations or information obligations. The starting point must be that it is possible to impose such obligations on foreign parent companies as long as they are properly justified. However, one can question whether it is possible to extend obligations to foreign parent companies if it would be difficult for foreign companies to comply with them. This could be the case with obligations on group representation. For example, if Denmark required foreign parent companies to allow employees of Danish subsidiaries to be represented in the parent company's management, it could be difficult for the parent company to comply with as it could be incompatible with the company law rules applicable to the parent company.[76] In this case there would be a restriction, and it would be necessary to examine whether such a restriction could be justified. In the first place it would appear to be justified by consideration for protecting the interests of the employees in the Danish subsidiary. However, if their interests are already protected by the company law to which the parent company is subject the Court may find it disproportional to require group representation under the company law rules to which the subsidiary is subject. The problem might also be resolved under the choice of law rules, since in this situation the parent company may be subject to the laws of two jurisdictions. If the choice of law rules unequivocally point in the direction of the parent company being subject to the company law of the jurisdiction where it is registered (or has its main centre of interest) the law governing the subsidiary would probably not apply.

Finally, one can consider whether it would be contrary to the freedom of establishment to extend the rules on groups of companies in the Member State where the parent company is resident to foreign subsidiaries. For example, it may be desirable to extend the rules whereby a subsidiary must give the parent company or its auditor certain kinds of information, or alternatively that the subsidiary should have the same auditor as the parent company. Also it could be desirable to prescribe that the subsidiary should be subject to certain limits on its acquisition of shares in the parent company or limit to the extent to which the subsidiary may provide a loan to the parent. In countries where it is accepted that a parent company has a right to manage its subsidiary, consideration it may be given to extending this right to foreign subsidiaries.

In these examples it is not always obvious that extending the application of the company law rules may be regarded as a restriction on free movement, since it can be to the advantage of the group for certain obligations to be extended to foreign subsidiaries. But certain obligations can also be a burden on the group, for example restrictions on acquisition of shares in the parent company, loans etc. In these cases the question is whether the rules are justified. If their intention is to protect the parent company or to make it easier for groups to operate, it seems possible that the rules will be justified. The Court does not usually prevent the Member States from defining the territorial extent of their laws, as long as they do not

[76] For the sake of good order it should be noted that Denmark does not impose such obligations on foreign parent companies.

regulate matters that are already regulated in other Member States.[77] As long as the company law to which the subsidiary is subject does not seek to safeguard the same interests are that pursued in the company law of the parent company it is not obvious that there will be a breach of the right of establishment. However, in some cases an extension of the rules on groups will lead to duplicated regulation of subsidiaries, and in these cases the problem must be solved by applying the choice of law rules.

Altogether it is not clear that the extension of rules on groups of companies to foreign parent or subsidiary companies would be in breach of the right of establishment. However the situation may be different if it results in imposing duplicated regulations on foreign companies. In such a case the problem will presumably be resolved by the choice of law rules.

4. Summary

Even though there is only limited regulation of groups of companies in Union law, the case law of the Court has nevertheless often dealt with such matters. This has occurred in at least two different ways.

First, the Court has had to consider whether a group of companies should be treated as single enterprise or as several separate entities in relation to the Union law rules in a number of different areas of law. The Court has, however, been willing to treat a group as a single enterprise where the purpose of the legislation so requires. This has especially been the case in competition law where the purpose is to regulate marked behaviour. But the Court has also been willing to use an enterprise approach where secondary legislation aims to protect reliance on appearances and in cases of abuse of Union law.

Second, the Court has applied the rules on freedom of movement when considering national laws that regulate groups of companies. It is clear that rules that discriminate against cross-border groups can be in breach of Union law but, without being discriminatory, rules that impose restrictions on cross-border groups can also be in breach of Union law. Hitherto, on this issue the Court has mainly been called upon to rule on discriminatory national tax laws, but this review shows that it can also be relevant to assess whether company law rules on groups of companies conflict with freedom of establishment.

[77] See Case C-167/01 *Inspire Art*.