III.1

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Who is To Blame? Liability of «Economic Units» for Infringements of EU Competition Law

(Knauf Gips KG ⁄. European Commission, ECJ (Second Chamber), Judgment of 1 July 2010, C-407/08 P)

The ECJ's ruling further develops the concept of a «single economic unit» that allows attribution of liability for anti-competitive conduct in cases involving complex corporate structures where the possibility of exercising a decisive influence cannot be always determined on the basis of the controlling shareholdings. The existence of a «single economic unit» can be inferred on the basis of a «consistent body of evidence» requiring case-by-case assessment.

(1) Facts and Procedure

(a) Background to the Appeal

The litigation in question originates from the ***Commission's* Plasterboard *decision***[1] against BPB PLC, Gebrüder Knauf Westdeutsche Gipswerke KG (now Knauf Gips), Société Lafarge SA and Gyproc Benelux NV.[2] The Commission concluded that the undertakings had infringed Article 81(1) EC (now Article 101(1) TFEU) by participating in a series of agreements and concerted practices aimed at stabilising prices on the plasterboard markets in several Member States. When setting the basic amount of the fine the Commission considered that (1) the infringement was very serious by its nature insofar as it pursued the end of the price war; (2) it had a significant impact on the already highly-concentrated and oligopolistic market; and (3) it had covered major EU markets such as France, Germany, the United Kingdom and the Benelux. For Knauf Gips the starting amount of the fine was set at EUR 52 million, which was then increased by 65% for the long duration of the infringement (from 31 March 1992,to 25 November 1998), which brought the final amount of the fine imposed on Knauf Gips to EUR 85,8 million.

The Commission considered the peculiar ***structure of the Knauf Group*** noting that Mr. B and Mr. C, Knauf Gips high level representatives were also the managers of Gebrüder Knauf Verwaltungsgesellschaft KG (Knauf VG), a ***holding company***, the function of which was to administer other companies of the Knauf Group.[3] While the Commission's infringement decision was addressed to Knauf Gips, the turnover taken into account for calculating the fine accounted for the worldwide turnover of all of the Knauf Group's companies involved in the manufacturing of plasterboard.[4]

Knauf Gips challenged the Commission's decision before the ***General Court*** (GC). The appellant's claim concerned *inter alia* the alleged infringement of the appellant's rights of defence, the concept of single infringement the principle of equal treatment when determining the amount of the fine and procedural irregularities contrary to the principle of good administration.[5] The ***appeal*** was ***dismissed*** by the GC.[6]

(b) Arguments of the Parties before the ECJ

The ***appellant*** contested the GC's finding that Knauf Gips formed a single economic unit with other companies within the Knauf Group and that it was responsible for the actions of the Knauf Group. Knauf Gips argued that its case differed from the factual situation in *Stora*,[7] the ECJ's judgment which set a rebuttable presumption that a 100% shareholding indicates that a parent company is able to exercise a decisive influence over the conduct of a subsidiary. Knauf Gips argued that the *Stora* presumption was not applicable because in the present case the appellant was not controlled by another company, and it did not hold shares in the companies related to Knauf VG. Referring to the *Baustahlgewebe* case[8] where the GC found that there was ***no economic unit in case of several minority shareholders***, the appellant excluded the possibility of finding joint control by the existence of many shareholders belonging to Knauf family. Knauf Gips also relied on *Aristrain* where the ECJ found that the simple fact that the share capital of two separate companies is held by the same person or the same family is insufficient, in itself, to establish the existence of an economic unit.[9] According to the applicant, the fact that Mr. B and Mr. C represented both Knauf Gips and Knauf VG could not imply that the companies were acting as a single economic unit for the purposes of the EU competition law, contrary to the GC's judgment.[10] Thus, by emphasising the corporate/structural arguments in determining the existence of an economic unit, Knauf Gips

seemed to downplay the behavioural elements, arguing that the fact that the same two shareholders managed all the companies in the Knauf Group and represented them during the period when the infringement was observed should be irrelevant.[11]

According to the ***Commission***, the GC based its finding of an economic unit on a number of factors including *inter alia* that during the Commission's investigation, Mr. B and Mr. C represented the whole Knauf Group being the sole interlocutors with the Commission and providing the latter with the sales data of all companies in the Knauf Group active on the plasterboard market. The Commission drew a parallel with *Stora* showing that the ***Knauf Group was managed under a family contract***, which ensured that the whole group fell under single management.[12] The Commission saw no contradiction with the *Aristrain* judgment because Mr. B and Mr. C were managing shareholders who ensured the single management of the whole group.[13]

(c) Opinion of the Advocate General

When evaluating the appellant's submission in the light of the GC's reasoning, Advocate General *Mazak* noted that (1) «the assessment of whether a group of companies constitutes an economic unit is not a matter of legal form but ***requires a case-by-case analysis***, close attention being paid to the specific facts of each individual case»;[14] and (2) the GC did not base its finding of an economic unit in the present case on the basis of isolated facts derived from the preceding jurisprudence.

By way of illustration, the AG noted that in *Baustahlgewebe* the GC did not base its finding of the absence of control solely on the numerical percentage shareholding, so the existence of 22 shareholders within Knauf Group and the possibility of fluctuating majorities could not, *per se,* preclude the GC from finding the existence of the economic unit.[15] According to AG *Mazak* the GC's finding was also in accordance with the *Aristrain* judgment where the ECJ held that the simple fact that the share capital of two separate commercial companies is held by the same person or the same family is insufficient in itself to establish that those companies formed an economic unit.[16] The fact that the appellant volunteered, without being requested, to provide the Commission with data not only in relation to its turnover, but also the turnover of all the companies with the Knauf Group was additional evidence for the GC to find that those companies constituted an economic unit with common interests.[17] The GC also noted that Knauf VG was only a ***holding company***, which was ***managed by the same individuals*** as the appellant, ***on the same premises and with the same personnel***.[18] At the same time, among the objectives of the Knauf ***family contract***, the GC highlighted that Article 1 of that contract sought to ensure that the companies within the Knauf Group were organised through a single management structure with a common purpose.[19]

According to AG *Mazak*, the appellant failed to demonstrate an error in law on the part of the GC in finding that the companies belonging to the Knauf family constitute a single economic unit.[20] In his opinion, AG *Mazak* did not address in much detail whether the GC has correctly found that in this particular case the appellant was not acting independently of other companies within the Knauf Group. The AG simply stated that it is settled case-law that the anti-competitive conduct of an undertaking can be attributed to another undertaking where it has not decided independently upon its own conduct on the market, but carried out the instructions given to it by that other undertaking, having regard in particular to the economic and legal links between them.[21]

At the same time AG *Mazak* disagreed with the GC's statement that Knauf Gips should have been aware from the Commission's ***Statement of Objections*** (SO) that the infringement concerned the whole Knauf Group. Referring to *Akzo Nobel*, the GC stated that «in such as situation, the onus was on the appellant to react during the administrative procedure, or be faced with the prospect of no longer being able to do so, by demonstrating that, despite the factors relied on by the Commission, it could not be held liable for the infringement committed by the Knauf Group».[22] AG *Mazak* considered that the GC had erred in law by finding that ***failure to act during the administrative procedure*** would preclude the undertaking from doing so before the GC. The mere failure of Knauf Gips to contest a particular position adopted by the Commission in its SO cannot, contended the AG, limit its ***rights of defence before the Court*** thus denying it the right of access to justice.[23]

(2) **Judgment**

The ECJ held that the concept of an ***«undertaking»*** in EU competition law «must be understood as designating an ***economic unit even if in law that economic unit consists of several persons***, natural or legal».[24] The existence of

an economic unit, according to the ECJ, could be inferred from a body of evidence, including in the present case the following: (1) the shareholders of Knauf Gips and of the other Knauf companies were the same; (2) two managing shareholders of Knauf Gips, Mr. B and Mr. C., were also the managing shareholders of all the companies within the Knauf Group; (3) Knauf VG was merely a holding company without its own staff or premises; (4) the Knauf family contract provided that its purpose was to ensure the single management and direction of the companies in the Knauf Group; (5) the sales figures furnished by Knauf Gips to the Commission referred not only to Knauf Gips but to all the Knauf Group's companies which operated on the plasterboard market; (6) without being required to do so by the Commission, Knauf Gips sent it the turnovers of the Knauf Group, which were subsequently used to calculate the fine.[25]

The ECJ stated that although the legal ***burden of proof*** is borne by the party alleging the existence of an infringement, «the factual evidence on which a party relies may be of such kind as to require the other party to provide an explanation or justification, failing which it is permissible to conclude that the burden of proof has been discharged».[26] In relation to the *Stora* precedent, the ECJ found that the GC did not rely on that case-law for the conclusion that there was an economic unit. The fact that the subsidiary is not 100% owned by the parent company could not exclude the possible existence of an economic unit.[27] On the basis of the above the ECJ upheld the GC's finding that the companies belonging to Knauf Group constitute a single economic unit.[28]

Having confirmed the existence of an economic unit the ECJ examined whether the Commission was entitled to impute the ***liability for the infringement*** to Knauf Gips rather than Knauf VG. Here, the ECJ considered the following: (1) Knauf VG was a holding company with no staff, managing a portfolio of companies for 22 shareholders who were also members of the Knauf family; (2) Knauf VG depended on Knauf Gips for its premises and staff; (3) Knauf Gips was the only Knauf company active on the plasterboard market not managed by Knauf VG; (4) most of the Knauf Group's documents seized by the Commission were printed on Knauf Gips's letterhead; (5) Knauf Gips had the largest turnover among the Knauf companies operating on the plasterboard market.[29] These facts allowed the ECJ to conclude that Knauf VG did not determine its market conduct autonomously, but was dependent in this regard on Knauf Gips.[30] According to the ECJ, «the fact that there is no single legal person at the apex of the Knauf Group (there were three: Knauf Gips, Knauf VG, and Knauf Fiber Glass GmbH) is no obstacle to the appellant being held liable for the actions of that group».[31]

In relation to the GC's understanding of the appellant's procedural ***rights of defence***, the ECJ agreed with AG *Mazak* and held that «there is ***no requirement*** under the law of the EU ***that the addressee of the Statement of Objections must challenge its various matters of fact or law during the administrative procedure***, if it is not to be barred from doing so later at the stage of judicial proceedings».[32] A ruling to the contrary would restrict the exercise of a natural or legal person's right to bring proceedings before the GC under Article 263(4) TFEU. The Court emphasised that any limitation of the rights to an effective remedy and of access to an impartial tribunal guaranteed by Article 47 of the Charter of Fundamental Rights of the EU must be provided for by law.[33]

(3) **Commentary**

In its *Knauf Gips* judgment the ECJ contributes to the continuous development of the concepts of «undertaking», «single economic entity/unit» as well as imputation of liability in EU competition law, which remain highly contested topics. The earlier case-law, when defining a «single economic entity/unit», attributed significant attention to the ***autonomy of conduct***: «if the undertakings form an economic unit within which a subsidiary has no real freedom to determine its course of action on the market»,[34] «the unified conduct on the market of the parent company and its subsidiaries takes precedence over the formal separation between those companies».[35] As summarised by *Wish* in his competition law treatise, «the crucial question is whether parties to an agreement are independent in their decision-making or whether one has sufficient control over the affairs of the other than the latter does not enjoy «real autonomy» in determining its course of action on the market».[36] The older ECJ's jurisprudence suggests that in order to impute the infringement to a parent company, the Commission would have to establish not only that the parent company «was able to exercise decisive influence over the policy of the subsidiaries» but also that it «in fact used this power».[37] The later cases of *Stora* and *Aristrain* established a ***rebuttable presumption linked to the majority shareholding***, which although insufficient in itself, created *prima facie* case for finding the exercise of decisive influ-

ence over a subsidiary's conduct.[38] Such presumptions, however, would not be applicable in the cases of non-majority ownership or particular corporate forms such as ***joint ventures***. For example, in the *Rubber Chemicals* case, the Commission stated that «in the case of a joint venture, jointly owned by its parents, the joint venture can be presumed to be autonomous from its parent companies» and «to constitute a separate undertaking».[39] In another joint venture case, *Sodium Gluconate*,[40] the Commission established liability of the parent companies based on the factual circumstances similar to those observed in *Knauf Gips*: (1) all the joint venture executives simultaneously held operational responsibilities in the parent companies; (2) JV's supervisory board was made up of two representatives of each parent company, who were jointly responsible for the JV's management; (3) the JV used the premises of one of the parent companies. Along similar lines, the common personnel and joint supervision of the 50:50 JV in *Chloroprene Rubber* sufficed to establish parental liability.[41]

A general trend traceable through the recent line of ECJ jurisprudence is the increased ***flexibility of the criteria taken into account*** when establishing a single economic unit and imputing the anti-competitive conduct to particular persons within such a unit. In the *Metsa* case the ECJ firmly stated that «it is settled case-law that anti-competitive conduct of an undertaking can be attributed to another undertaking where it has not decided independently upon its own conduct on the market, but carried out, in all materials respects, the instructions given to it by that other undertaking, having regard in particular to the economic and legal links between them».[42] In its subsequent *Akzo Nobel* judgment, the ECJ downplayed the importance of conduct by stating that the conduct of subsidiary on the market was not the only factor enabling the liability of the parent company to be established, but was only one of the signs of the existence of an economic unit.[43] In this regard the ECJ was criticised for implying that the attribution of conduct between the parent and subsidiary is always possible where both form an economic unit.[44]

The peculiar situation of the Knauf Group with its family contract, non-majority shareholdings, common management and the absence of a single entity which would formally control all of the Knauf companies, led the ECJ to further emphasise that the specifics of the corporate structure should not prevent the finding of decisive influence and attribution of liability within a single economic unit. The Court held in that respect that «the legal structure particular to a group of companies, which is characterised by the absence of a single legal person at the apex of that group, is not decisive where that structure does not reflect the effective functioning and actual organization of the group».[45] Following *Akzo Nobel*, the ECJ emphasised that the ***peculiarities of the corporate structure of an economic unit are largely irrelevant*** and the Commission can make inferences based on a «consistent body of evidence» calling for case-by-case assessment. In the words of the ECJ: «account must be taken of all the relevant factors relating to the economic, organisational and legal links which exist between it and the company in the same group which is considered to be responsible for the actions of that group, and which may vary from case to case and cannot therefore be set out in an exhaustive list».[46] This case also stands out for the decisiveness with which the ECJ quashed the GC's judgment in the part related to the procedural issues in the circumstances where it was unlikely to change the outcome of the appeal. The ECJ stressed that under the TFEU and the Charter of Fundamental Rights, the parties are not precluded from challenging the Commission's findings, even if such a challenge was not raised during the administrative procedure. In the absence of an explicit legal basis, such a restriction would be contrary to the fundamental principles of ***effective remedy and access to justice***. Without making any immediate conclusions, one might consider the transposition of this approach onto other areas of EU competition law, including its application in the context of a leniency programme.[47] As noted by some commentators, the *Knauf Gips* judgment might signal that the Court will be ***more willing to consider the arguments invoking basic rights*** under the Charter and the ECHR in competition cases than was the case in the past.[48]

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1 Commission Decision 2005/471/EC of 27 November 2002 relating to proceedings under Article 81 of the EC Treaty against BPB plc, Gebrüder Knauf Westdeutsche Gipswerke KG, Societe Lafarge SA and Gyproc Benelux NV (Case No. COMP/E-1/37.152 *Plasterboard*), OJ 2005 L 166, p. 8.

2 See also *Alexandr Svetlicinii*, Epilogue of the Plasterboard Litigation: How Much Legal Certainty in the Commission's Treatment of Repeated Infringements?, ELR [2010] 318-322.

3 Para. 39 of the Decision.

4 Para. 499 of the Decision.

5 *See Agnès Maitrepierre*, Cartel – Access to the file: The Court confirms the limits of access to the file (Knauf Gips), Concurrences [2010] 196-197.

6 GC of 8 July 2008, T-52/03 *Knauf Gips ⁄ Commission* (the

judgment is available in full text in French and German only on the website of the Court of Justice).

[7] ECJ [2000] ECR I-9925 *Stora Kopparbergs Bergslags ⁄ Commission*, paras. 28 and 29.
[8] GC [1995] ECR II-987 *Baustahlgewebe ⁄ Commission*.
[9] ECJ [2003] ECR I-11005 *Aristran ⁄ Commission*.
[10] Para 345 of the GC Judgment.
[11] Para. 56 of the ECJ Judgment.
[12] Para. 349 of the ECJ Judgment.
[13] Para 345 of the ECJ Judgment.
[14] Opinion of Advocate General *Mazak* of 11 February 2010, C-407/08 P *Knauf Gips ⁄ Commission*, para. 80.
[15] Para. 85 of the Opinion.
[16] Para. 86 of the Opinion.
[17] Para. 90 of the Opinion.
[18] Para. 348 of the GC Judgment.
[19] Article 1 «Aim of the contract»:
(1) the aim of the present contract is to maintain the Knauf companies as family companies;
(2) the aim of the present contract is to ensure a single management of the Knauf companies;
(3) the aim of the present contract is to guarantee as single, concentrated exercise of rights in all the Knauf companies;
(4) the aim of the present contract is to ensure that the decisions necessary for the future management, organization and legal form of the company continue to be possible and cannot be impeded by a single shareholder or a small number of them. (Footnote 64 of the Opinion).
[20] Para. 91 of the Opinion.
[21] Para. 92 of the Opinion, citing ECJ [2000] ECR I-10065 *Metsa-Serla Oyj and others ⁄ Commission*, para. 27.
[22] Paras. 359-360 of the GC Judgment, referring to GC [2006] ECR II-3389 *Akzo Nobel and Others ⁄ Commission*, para. 88.
[23] Para 96 of the Opinion.
[24] Para. 64 of the ECJ Judgment, referring to ECJ [2009] ECR I-8237 *Akzo Nobel and Others ⁄ Commission*, paras. 54 and 55.
[25] Paras. 66-71 of the ECJ Judgment.
[26] Para. 80 of the ECJ Judgment, referring to ECJ [2004] ECR I-123 *Aalborg Portland and Others ⁄ Commission*, paras. 78 and 79.
[27] Para. 82 of the ECJ Judgment.
[28] Para. 72 of the ECJ Judgment.
[29] Paras. 101-105 of the ECJ Judgment.
[30] Para. 106 of the ECJ Judgment.
[31] Para. 107 of the ECJ Judgment.
[32] Para 89 of the ECJ Judgment.
[33] Para. 90 of the ECJ Judgment.
[34] ECJ [1974] ECR 1183 *Centrafarm BV and Adnaan De Pejper ⁄ Sterling Drug Inc*, para. 41.
[35] CFI [1995] ECR II-117 *Viho Europe BV ⁄ Commission*, para. 50.
[36] *Richard Wish*, Competition Law, 5th edition (2003), pp. 88-89.
[37] See *Wouter P.J. Wils*, The undertaking as subject of E.C. competition law and the imputation of infringements to natural or legal persons, 25 E.L.Rev. [2000] 99-116, see also ECJ [1983] ECR 3151 *Allgmeine Elektrizitäts-Gesellschaft AEG-Telefunken AG ⁄ Commission*, para. 50.
[38] ECJ [2000] ECR I-9925 *Stora Kopparbergs Bergslags AB ⁄ Commission*, para. 29.
[39] Commission Decision of 21 December 2005, Case COMP/F/38.443 *Rubber Chemicals*, para. 263.
[40] Commission Decision of 2 October 2001, Case COMP/36.545/F3 *Sodium Gluconate*; GC [2006] ECR II-3085 *Avebe ⁄ Commission*.
[41] Commission Decision of 5 December 2007, Case COMP/38.629 *Chloroprene Rubber*.
[42] ECJ [2000] ECR I-10065 *Metsa Serla Oyj and Others ⁄ Commission*, para. 27.
[43] ECJ [2009] ECR I-8237 *Akzo Nobel and Others ⁄ Commission*, para. 73.
[44] See *Stefan Einhaus*, Parent Liability: Collective Responsibility Returns, ELR [2009] 380.
[45] Para. 108 of the Judgment.
[46] Para. 100 of the ECJ Judgment, see, by analogy, ECJ [2009] ECR I-8237 *Akzo Nobel and Others ⁄ Commission*, para. 74.
[47] See *Cyril Sarrazin*, Rights to an effective remedy and to an impartial tribunal: The CJEU upholds the fine while reinforcing the rights to an effective remedy and of access to an impartial tribunal of the undertakings (Knauf Gips), Concurrences [2010] 101-102.
[48] See *Antoine Winckler*, Fines: New Case Extending Company Liability in the Name of the 'Economic Unit' Concept and Reversing Prior Case Law on Admissible Arguments, 1 Journal of European Competition Law & Practice [2011] 34-35.

III.2

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Access to the file of a national competition authority
(Pfleiderer AG ⁄ Bundeskartellamt, Opinion of Advocate General Mazák of 16 December 2010, C-360/09)

In this reference for a preliminary ruling to the European Court of Justice (ECJ), the Local Court Bonn (Amtsgericht Bonn, Germany) requested guidance on whether there is a right of access by an aggrieved party to a leniency application and related documents voluntarily provided by a leniency applicant to the German competition authority in order to prepare a civil-law action for damages.

(1) **Facts and Procedure**

In 2008, the German Federal Cartel Office (*Bundeskartellamt*) acting pursuant to, *inter alia*, Article 81 EC (now Article 101 TFEU), imposed fines