Jus Corpus Law Journal

Open Access Law Journal – Copyright © 2022 – ISSN 2582-7820
Editor-in-Chief – Prof. (Dr.) Rhishikesh Dave; Publisher – Ayush Pandey

Filling a Fundamental Gap in the Single Economic Entity Philosophy

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Received 09 September 2022; *Accepted* 18 September 2022; *Published* 26 September 2022

Each business is a distinct legal entity alone responsible for its actions. The first portion of this statement is accurate, while the second component has less significance in terms of competition law. Even though it is acknowledged that they both have different legal identities in parent-subsidiary relationships, the parent can be held responsible for the subsidiary's actions. One may argue that a parent business should be responsible for the actions of its subsidiary because it owns the majority of the shares in the latter, which is why it is referred to be the parent. However, it is not always evident; the parent business of a subsidiary is sometimes a massive firm that does not have the time to intervene in the operations of its subsidiary. What should happen if a subsidiary undertakes an anti-competitive act without the parent's knowledge? Should a fully inactive parent be fined? While answering these concerns, we will demonstrate that the concept of a Single Economic Entity has a serious flaw, as highlighted by the recent WhatsApp privacy policy case, and how the presumption of decisive impact is nearly impossible to overcome. Because of its ownership, Meta (WhatsApp's parent company) is unable to evade antitrust inquiry. This creates a horrible precedent for parents of wholly-owned companies. A modification to the theory of Single Economic Entity is also offered so that parents of wholly-owned subsidiaries who have no involvement in their subsidiaries' anti-competitive behaviour are not held liable.

Keywords: *parent, subsidiary, antitrust, material fault, whatsapp, meta.*

INTRODUCTION

A parent company is a company that controls and holds majority shares of one or more companies, doing so, they get the right to control the affairs of said companies. Whether the parent takes part in the day-to-day operations of its subsidiary is purely up to the parent. A single economic entity is a doctrine used exclusively in Competition Law and is formed when one company controls the affairs of the other and the company being controlled cannot decide independently upon its conduct. In such a situation they both become a single entity for antitrust law. In WhatsApp's privacy policy case, Meta (previously '*Facebook*'), its parent company was held to be a party to the proceedings, afterwards, Meta argued against it but multiple judicial fora failed to provide adequate reasons as to its inclusion. This begs the question: Whether Meta and WhatsApp form a single economic entity? If yes then should Meta be liable for WhatsApp's conduct? We would see that the answer is not quite clear and a major lacuna exists in establishing the parent's liability within a SEE.

BACKGROUND OF THE CASE

Meta owns 100% of WhatsApp since 2014. In early 2021, WhatsApp introduced its new privacy policy, which allowed it to share the data of its users with its parent, Meta. The Competition Commission of India (**CCI**) immediately took *suo moto* cognizance of it and passed a *prima facie* order for investigation.[1] In its order, it held that WhatsApp was abusing its dominant position because data can take the form of 'non–price competition' which would put WhatsApp at an unfair advantage over other players. With regards to Meta being a party or not, the CCI said that Meta is a beneficiary of the anti-competitive conduct of WhatsApp and should also be liable.[2] When Meta argued that it was WhatsApp who introduced the policy and not Meta and the two of them, despite being parent-subsidiary, are separate legal entities, CCI said that Meta

[1] Reuben Philip Abraham & Afif Khan, 'The Jurisdictional Conundrum in Competition Commission of India's Investigation against Whatsapp' (*Kluwer Competition Law Blog*, 12 August 2022) <http://competitionlawblog.kluwercompetitionlaw.com/2021/06/18/the-jurisdictional-conundrum-in competition-commission-of-indias-investigation-against-whatsapp/#:~:text=The%20CCI%20passed%20a%20suo,of%20Vinod%20Kumar%20Gupta%20v> accessed 01 September 2022

[2] *Ibid*

was being 'evasive' and its arguments held no merit. The CCI's *prima facie* order for investigation was then challenged in the Delhi High Court, which reworded the CCI's order and failed to provide any clarity on Meta's role in the case.

WHAT IS A SINGLE ECONOMIC ENTITY?

It is a well-settled law that every company has a separate legal entity.[3] This means that the actions of one cannot be attributed to the other and everyone is responsible for their conduct. An 'undertaking' is any entity engaged in economic activity.[4] Different entities can form a single undertaking,[5] they do so when one company despite being a separate legal entity cannot decide independently on its conduct in the marketplace and is dependent on the other or where two of them are dependent on a third.[6] When this happens, it is said that a 'Single Economic Entity' is formed, they now form a single economic unit, incapable of entering into agreements between themselves, and the actions of one can now be attributed to the other. This generally happens in the cases of parent-subsidiary companies.[7] The *Akzo Nobel* case is the most landmark case in this regard, it says that a SEE is formed when the parent company exercises direct control over the subsidiary, and in such a case both of them become liable for the anti-competitive conduct. There are two steps to finding a SEE, *first*, a competition authority would have to demonstrate that the parent company can exercise decisive influence over the conduct of the subsidiary, s*econdly*, it would demonstrate that the parent company exercised a decisive influence.[8] The *Akzo* judgement also says that in the cases of wholly-owned subsidiaries, there exists a rebuttable presumption that the parent exercised a decisive influence. This means that the parent would be liable for the anti-competitive conduct of its subsidiary if it is unable to rebut the presumption.[9]

[3] *Balwant Rai Saluja v Air India Ltd* (2014) 9 SCC 407
[4] *Ministero dell'Economia e delle Finanze v Cassa di Risparmio di Firenze SpA & Ors* (Case C-222/04)
[5] *Ibid*
[6] *Express Bus Operators* Appeal No 3
[7] *Ibid*
[8] *Akzo Nobel & Ors v European Commission* (Case C-97/08 P)
[9] *Ibid*

Rebutting the presumption is a hard nut to crack in itself and it is even harder for parent companies of wholly-owned subsidiaries. There are no guidelines on how to rebut the presumption.

SEE IN INDIA

It was the case of *Exclusive Motors v Lamborghini*[10] where the Competition Commission of India (**CCI**) acknowledged the existence of SEE in the context of India and held that "*Agreements between entities constituting one enterprise cannot be assessed under the Act. This is in accord with the internationally accepted doctrine of a single economic entity.* "The *Lamborghini* judgement was used later on in the case of *Shamsher Kataria v Honda Siel*[11] where several original equipment manufacturers (**OEM**s) were found restricting the free flow of spare parts in the markets by entering into agreements with original equipment sellers (**OES**). OEMs were also not providing diagnostic tools, software programs, etc. to independent repairers which were necessary to repair technologically advanced vehicles.[12] With regards to the SEE doctrine, the OEMs contended that since most of them were sourcing parts from their parent/group companies, the agreements between them did not come under the purview of the competition act and availed the single economic entity defence. The commission accepted this doctrine and further stated that the exemption of a single economic entity stems from the inseparability of the economic interest of the parties to the agreement. Generally, entities belonging to the same group e.g., holding - subsidiaries are presumed to be part of a 'single economic entity' incapable of agreeing, the presumption is not irrebuttable. While this stance of the commission is correct, it does not shed much light on the liability of the parent in case of a SEE.[13]

For that we turn to *National Insurance Companies Ltd & Ors v Competition Commission of India*[14] wherein the Competition Appellate Tribunal (**COMPAT**) upheld CCI's order and held four insurance companies liable for bid-rigging even when all of their shares vested with the Ministry

[10] *Exclusive Motors Pvt Ltd v Automobili Lamborghini SPA* Case No 52 of 2012 (CCI)
[11] *Shamsher Kataria v Honda Siel* (Case No 03/2011)
[12] *Ibid*
[13] *Ibid*
[14] *National Insurance Companies Ltd & Ors v Competition Commission of India* AIR 2016 SC

of Finance.[15] Rejecting the SEE defence, the COMPAT stated that there was no de facto control over the companies by the government. In the first *Grasim/Aditya Birla* merger case the companies argued that they fell within the definition of a SEE which was accepted, but later on, when the same companies were found to be bid-rigging a tender, the SEE defence was not accepted by the CCI.[16] Looking at these case laws we see that the position regarding SEE isn't quite clear in India, let alone the position of attributing liability to the parent company in the case of a SEE. Now we must look at cases of foreign jurisdiction for guidance.[17]

SEE IN OTHER JURISDICTIONS: THE NEED FOR INCLUSION OF 'MATERIAL FAULT'

In the *Ball Bearings*[18] case of Singapore, the Competition Commission of Singapore (**CCS**) issued an Infringement Decision against four Japanese bearings manufacturers and their Singapore subsidiaries for contravening section 34 of the Competition Act by engaging in anti-competitive agreements and unlawful exchange of information in respect of the price and sale of the ball and roller bearings sold to aftermarket customers in Singapore. CCS imposed financial penalties of S$9,306,977 on the Parties for the infringement.[19] The CCS said that to determine if a SEE existed between a parent and its subsidiary company, the CCS would assess if a subsidiary "enjoys no economic independence" or if the entities "*form an economic unit within which the subsidiary has no real freedom to determine its course of action on the market*."[20] Having identified a SEE, a company may then be liable for the anti-competitive conduct of another company within the SEE since the SEE as a whole would be viewed as responsible for the breach of competition laws.[21]

In ***ICI v Commission***,[22] the European Court of Justice (**ECJ**) held that the fact that a subsidiary has a separate legal personality is not sufficient to exclude the possibility of imputing its conduct to the parent company. Such may be the case in particular where the subsidiary, although

[15] *Ibid*
[16] *Delhi Jal Board v Grasim Industries & Ors* C No 03 of 2013
[17] *Ibid*
[18] *Ball Bearings Case* CCS 700/002/11
[19] *Ibid*
[20] *Ibid*
[21] Joshua Seet, 'Attribution of Liability Between Parent and Subsidiary Within a Single Economic Entity: The Singapore Experience' (2017) 3 SJLS 124, 127
[22] *ICI v Commission* Case 48-69

having a separate legal personality, does not decide independently upon its conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company, where a subsidiary does not enjoy real autonomy in determining its course of action in the market, a SEE is formed and the actions of the subsidiaries may in certain circumstances be attributed to the parent company.[23]

Thus, for the first time, we have some clarity regarding when a SEE is formed and when a parent is liable for the acts of its subsidiary within a SEE. But the authors disagree with this view, we feel that the mere forming of a SEE doesn't attach liability to the parent company. Even if the subsidiary enjoys little to no economic independence, there needs to be some proven material fault of the parent in the anti-competitive conduct.

In the case of ***Alliance One International Inc. v Commission***[24], the European Commission (**EC**) found Alliance One International and four other companies liable for forming a buyer's cartel. According to the results of the Commission's investigation, this buyers' cartel fixed delivery prices and shares of quantities of raw tobacco annually, between 1996 and 2001,[25] and established price brackets for each variety of raw tobacco and minimum prices, between 1999 and 2001.[26]

The ECJ in its decision held that it was open for the EC to waive reliance solely on the 'presumption of decisive influence' and to hold parent companies liable only when there is evidence to show the actual exercise of decisive influence by the parent company even in cases of wholly-owned subsidiaries, in this case, the European Commission decided in its infringement decision not to hold some of the parent companies liable due to a lack of material involvement.[27]

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[23] *Ibid*
[24] *Alliance One International Inc v Commission* (Cases C-628/10 P)
[25] *Ibid*
[26] Jan-Niklas Steinhauer, 'The presumption of parental liability and the need for full judicial review An analysis of based on the recent case of Alliance One v European Commission' [2014] EBL 22
[27] *Ibid*

The decision in *Akzo Nobel*[28] also implicitly supports the notion that an additional element of fault, responsibility, or participation is required before liability can be attributed to the parent company; the act of instructing the subsidiary's anti-competitive conduct may indicate some level of fault, responsibility, or participation by the parent company in the anti-competitive conduct.[29] The categorization cannot be done purely based on SEE, and some further defect is necessary.[30]

In ***Koninklijke Grolsch NV v European Commission*** is also known as the 'Beer Cartel Case,'[31] the Commission imposed EUR 273 million in fines on the Dutch brewers Heineken, Bavaria, and Grolsch for their alleged participation in a beer cartel. The infringement found by the Commission consisted of price coordination, "incidental" coordination of other commercial conditions, and "incidental" allocation of customers.[32] Heineken, Bavaria, and Grolsch denied involvement in the alleged cartel and all three brewers appealed the Commission's decision. Although the Commission held Grolsch liable for the alleged infringement, the decision did not contain a detailed explanation of the facts and factors that justify the attribution of an infringement allegedly committed by a subsidiary to the parent company.[33] By withholding the facts and factors on which the Commission based its assumption of liability about Grolsch, the Commission had taken away the opportunity for Grolsch to contend with this assumption.[34] These failures resulted in the annulment of the entire decision about Grolsch. The parent company is not held liable in the end.[35]

It has also been decided that if a parent business can establish that it did not have decisive control over its subsidiary that is engaging in anti-competitive behaviour, the concept of personal

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[28] *Akzo Nobel & Ors v European Commission* (Case C-97/08 P)
[29] *Ibid*
[30] Okeoghene Odudu & David Bailey, 'The Single Economic Entity Doctrine in EU Competition Law' (2014) 51 CML Rev 1721, 1746
[31] *Koninklijke Grolsch v Commission* (Case T-234/07)
[32] *Ibid*
[33] *Ibid*
[34] De Brauw Blackstone Westbroek, 'EU General Court annuls antitrust fine imposed on Dutch beer brewer Grolsch' (*Lexology*, 15 August 2022) <https://www.lexology.com/library/detail.aspx?g=da19385d-291d-44df-a0cb-b5fab2c548d1> accessed 30 August 2022
[35] *Ibid*

responsibility will allow the parent firm to avoid accountability for its subsidiary's actions.[36] The United Kingdom similarly adheres to the notion that a parent firm that does not engage in[37] or has a decisive influence over its subsidiaries cannot be held accountable for an infringement committed by one of its subsidiaries.[38]

In the case of *Air Liquide*, the parent company was still held accountable despite evidence that none of the subsidiary's directors served on the parent's management board, that the subsidiary's directors had extensive authority, that the subsidiary had its commercial, marketing, human resources, information technology, and accounts departments, and that the subsidiary had not requested or received instructions from the parent regarding the infringement, even after that, the parent firm was still held accountable because it had the authority to choose the directors of the subsidiary.[39] The authors disagree with this decision, and the Commission should recognize that in cases like Air Liquide, the presumption of autonomy is supported by the overwhelming majority of the evidence.[40] If the subsidiary, in that case, weren't autonomous, it would be difficult to think of a situation in which any subsidiary would be, so the Commission shouldn't place an undue emphasis on the presumption.[41]

If a parent could be penalized for being entirely inactive, the assumption would be unavoidable and every parent firm would always be accountable because a corporation cannot do less than anything.[42] If a parent business complies with the requirements of the company law that applies to it, it would be absurd and against international etiquette to claim that it has exposed itself to fines.[43] If this were sufficient to result in sanctions, the presumption would be difficult to overcome.[44] The rebuttable character of the presumption is required to protect the parent

[36] *General Química SA v Commission* (C-90/09 P), [2011] ECR I- 1
[37] *Ibid*
[38] *Sainsbury's Supermarket Ltd v Mastercard Incorporated* [2016] CAT 11
[39] *L'Air liquid* [2011] ECR II-2809
[40] *Ibid*
[41] John Temple Lang, 'How Can the Problem of The Liability of A Parent Company for Price Fixing by A Wholly-owned Subsidiary Be Resolved?' (2014) 37 Fordham Intl LJ 1481, 1487
[42] *Ibid*
[43] *Ibid*
[44] *Ibid*

company's rights to the defence and access to justice because if the assumption were irrefutable, it would amount to a violation of basic rights.[45]

META'S LIABILITY IN THE WHATSAPP PRIVACY POLICY CASE

Now we turn to what we started with, the WhatsApp case and the role of Meta in it. Multiple judicial fora i.e., the CCI and the Delhi High Court have failed to shed any light on why Meta should be a party to the proceedings. CCI has stated that Meta is a beneficiary and hence liable to be a part of the proceedings, this makes little sense, a subsidiary's actions would always favour the parent. Active involvement of the parent in anti-competitive conduct is necessary to attach liability to the parent.[46] Here, no active involvement of Meta can be proved from the existing facts, and it can be proved that Meta instructed its subsidiary to draft such a policy.[47]

In a recent judgement, the Delhi High Court dismissed appeals of WhatsApp and Meta (previously Meta) against a single bench order declining to interfere with CCI's investigation into WhatsApp's 2021 privacy policy.[48] Meta had submitted that mere ownership (Meta's ownership of WhatsApp) cannot be the reason for CCI to involve it in its investigation in connection with WhatsApp's privacy policy issue.[49] The appeal was dismissed as being devoid of merits.[50] Unlike in the *Honda* case, WhatsApp and Meta can't themselves claim to be a Single Economic Entity as that would mean that Meta now cannot evade antitrust liabilities if WhatsApp is found guilty.

WAY FORWARD: CONCLUDING REMARKS

Although it seems unlikely that Meta's name would be removed as one of the parties to the case, a major lacuna can be solved in the sphere of parental liability and SEE if the following

[45] *Akzo Nobel & Ors v European Commission* (Case C-97/08 P)
[46] *AAA v Unilever* (2018) EWCA Civ 1532
[47] *Ibid*
[48] Nupur Thapiyal, 'Breaking: Delhi High Court Dismisses Appeals By Whatsapp, Meta Against CCI Investigation' (*Live Law*, 30 August 2022) <https://www.livelaw.in/top-stories/delhi-high-court-dismisses-appeals-by-whatsapp-meta-against-cci-investigation-207429> accessed 01 September 2022
[49] *Ibid*
[50] *Ibid*

modifications are adopted: The Single Economic Entity test should be revised to include the two limbs: *First,* the presumption of decisive influence, which can arise automatically in cases of wholly-owned subsidiaries or where the decisive influence of the parent is proved by substantial evidence, *Second,* material fault of the parent in the anti-competitive conduct should be proved. If both of the limbs of this test are satisfied, the competition regulator would be all in its capacity to attach liability to the parent company.

It should be an endeavour of all the competition watchdogs across the globe to stop cases like *Air Liquide* from happening as it defeats the whole purpose of the SEE doctrine. The presumption is rebuttable, but in practice, it is extremely hard to do so, so the inclusion of the second limb of a material fault makes even more sense. It would help in attaching antitrust liabilities only to those parent companies who partake in the misconduct of their subsidiaries. If sleeping parent companies, like in the case of *Air Liquide* continue to be fined, it would go against the principle of the SEE doctrine and law in general.