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ATTRIBUTION OF LIABILITY BETWEEN PARENT AND SUBSIDIARY WITHIN A SINGLE ECONOMIC ENTITY: THE SINGAPORE EXPERIENCE

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Competition law principles in Singapore provide that a company may be liable for the conduct of another company if they belong to a single economic entity, even though they each have a separate legal personality. The CCS has used this doctrine to hold parent companies liable for the actions of their subsidiaries, and vice versa. This article discusses this process of attribution, and proposes several clarifications that may be helpful to strengthen the doctrine.

I. INTRODUCTION

The doctrine of separate legal personality, which has long been recognised as a fundamental part of Singapore law,[1] treats a company as an independent legal person, separate from its shareholders or other companies in its corporate group. Liabilities that accrue to the company remain with the company, and recourse may not be sought from its shareholders or other related companies in the same corporate group.

Flowing from this doctrine, the Singapore High Court in *Manuchar Steel Hong Kong Ltd v Star Pacific Line Pte Ltd*[2] held that the concept of a single economic entity, where distinct and separate companies are regarded as having the same legal personality on the ground that they function as part of a single economic entity, had no application under Singapore law. Lee Kim Shin JC (as he then was) expressed difficulties with the concept of a single economic entity because, amongst others, it resulted in a multidirectional attribution of liability within the group —not only would a parent company be saddled with liability incurred by its subsidiary, a subsidiary itself may also be responsible for the liabilities of its sister and parent companies, simply because they all belong to the same corporate group.[3]

Even though the High Court rejected the application of the single economic entity, this does not mean that a company would therefore, in every instance, be shielded from the legal liability of its parent or other companies in the same corporate group.

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1 *Public Prosecutor v Lew Syn Pau* [2006] 4 SLR(R) 210 (HC); *Aron Salomon v A Salomon and Co Ltd* [1897] AC 22.

2 [2014] 4 SLR 832 (HC) [*Manuchar Steel*].

3 *Ibid* at para 99. This holding was approved in *ARS v ART* [2015] SGHC 78 at para 237.

In some circumstances, statutory imperatives may suspend the application of the doctrine of separate legal personality to impute legal liability of one company to another.[4]

In particular, Singapore's *Competition Act*[5] expressly prohibits "undertakings" from engaging in anti-competitive conduct,[6] and competition case law has clarified that, notwithstanding their separate legal personalities, several distinct legal entities can together constitute a single economic entity ("SEE") that qualifies as an "undertaking" for the purposes of the *CA*. In other words, a company may be liable for the anti-competitive conduct of another company, if they belong to the same SEE.

While various consequences flow from a finding that several distinct legal entities form a SEE,[7] this article focuses particularly on the attribution of liability within a SEE. Part II of this article will examine Singapore's experience in attributing liability within a SEE. Part III and Part IV will respectively discuss the European Union's ("EU") and United Kingdom's ("UK") approach to and considerations for the attribution of liability within a SEE, as decisions from these jurisdictions are "highly persuasive" since Singapore's competition laws have been modelled closely after the competition laws of these jurisdictions.[8] Part V of this article will highlight how Singapore's experience has diverged from those of the EU and the UK, and suggest reasons for such a divergence. It will proceed to propose several clarifications that may be helpful to further strengthen the understanding and application of the attribution of liability within a SEE under Singapore competition law.

II. Attribution of Liability within A Single Economic Entity in Singapore

Two international cartel decisions by the Competition Commission of Singapore ("CCS") are particularly important in discussing Singapore's approach to the attribution of liability within a SEE: *Re CCS Imposes Penalties on Ball Bearings*

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4 *Manuchar Steel*, *supra* note 2 at para 94.

5 Cap 50B, 2006 Rev Ed Sing [*CA*].

6 *Ibid*, ss 34, 47, 54.

7 Amongst others, an agreement between two legal entities within a SEE would not be considered to be a prohibited agreement between undertakings under section 34 of the *CA*: see *Transtar Travel Pte Ltd v Competition Commission of Singapore* [2011] SGCAB 2 [*Transtar*]. See also Richard Whish & David Bailey, *Competition Law* 8th ed (Oxford: Oxford University Press, 2015) at 99-101, and Ethel Lin & Joanne Yong, "The Single Economic Entity Doctrine in Competition Law", *Singapore Law Gazette* (June 2016), online: Singapore Law Gazette <http://www.lawgazette.com.sg/2016-06/1578.htm> for further discussion of the various consequences that may flow from the finding of a SEE. It has been observed in Alison Jones, "The Boundaries of An Undertaking in EU Competition Law" (2012) 8(2) European Competition Journal 301, that under EU competition law, the interpretation of a SEE has developed incrementally under two main strands of jurisprudence which are underpinned by different policy objectives—one dealing with the "substantive reach" of Article 101 of the *Treaty on the Functioning of the European Union* [*TFEU*] (*eg*, whether two companies belong to the same SEE for the purpose of excluding them from the application of Article 101 of the *TFEU*), and the other, dealing with the attribution of liability within a SEE. This divergence has created some tension in the way that the SEE has been interpreted.

8 See *Pang's Motor Trading v Competition Commission of Singapore* [2014] SGCAB 1 at para 33. See also *SISTIC.com Pte Ltd v Competition Commission of Singapore* [2012] SGCAB 1 at para 287.

Manufacturers Involved in International Cartel[9] and *Infringement of the Section 34 Prohibition in Relation to the Provision of Air Freight Forwarding Services for Shipment from Japan to Singapore.*[10]

A. *Ball Bearings Case*

The parties to the *Ball Bearings Case* were bearing manufacturers who each had a parent company in Japan and a subsidiary in Singapore.[11] The parties were held to have breached section 34 of the *CA* by engaging in a single continuous infringement, in pursuit of a common overall objective to coordinate the price of bearings for sale to the aftermarket in Singapore, so as to maintain each party's market share and protect their profits and sales (the "Market Share and Profit Protection Initiative").[12] The Market Share and Profit Protection Initiative was made up of numerous agreements and exchanges of information between the parties, including agreements on price lists setting out the common gross sales price for bearings, the maximum discount percentages that could be applied to the gross prices specified in the price lists, and the common exchange rates to be applied to the price lists to derive a figure relevant to the Singapore market.[13]

The CCS found that representatives of the parties' Japan parent companies attended regular meetings in Japan[14] and engaged in discussions and agreements on overall strategies for their respective Singapore subsidiaries to implement in pursuit of the Market Share and Profit Protection Initiative.[15] The CCS also found that the Singapore subsidiaries attended meetings in Singapore to exchange information about prices, discounts and selling conditions, and to agree on price lists, maximum discount percentages, and applicable exchange rates to be applied to the price lists.[16] While participants of the Singapore meetings deferred to the participants of the Japan meetings for decision-making in relation to the implementation of the various collusive activities,[17] the CCS held that the Singapore subsidiaries contributed to the Market Share and Profit Protection Initiative by discussing the overall strategies

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9 [2014] SGCCS 5 [*Ball Bearings Case*]. The Competition Appeals Board heard an appeal to the CCS's decision in the *Ball Bearings Case* on the narrow issue of the relevant financial year to be used for the purpose of calculating financial penalties, see *Nachi-Fujikoshi Corporation v Competition Commission of Singapore* [2016] SGCAB 1. This case has no relevance to the issues discussed in this paper.

10 (11 December 2014), CCS 700/003/11, online: CCS <https://www.ccs.gov.sg/~/media/custom/ccs/files/public%20register%20and%20consultation/public%20consultation%20items/ccs%20fines%2010%20freight%20fowarders/air%20freight%20forwarding%20%20infringement%20decision%20nonconfidentialpublic%20register.ashx> [*Freight Forwarding Case*].

11 The relevant parties to the *Ball Bearings Case* were: (1) JTEK Corporation and its wholly owned Singapore subsidiary, Koyo Singapore Bearings Pte Ltd; (2) NSK Ltd and its partially owned Singapore subsidiary NSK Singapore (Private) Ltd; (3) NTN Corporation and its wholly owned Singapore subsidiary NTN Bearing-Singapore (Pte) Ltd; and (4) Nachi Fujikoshi Corp and its wholly owned Singapore subsidiary Nachi Singapore Private Limited.

12 *Ball Bearings Case*, *supra* note 9 at para 100.

13 *Ibid* at para 103.

14 With the exception of NTN Japan, which expressed its intention to stop attending regular meeting in Japan from 6 September 2006.

15 *Ball Bearings Case*, *supra* note 9 at para 101.

16 *Ibid* at para 374.

17 *Ibid* at para 117.

decided by their Japan parent companies, and the methods to implement those overall strategies. Accordingly, the participants in the Singapore meetings were aware or could reasonably have foreseen that their contributions to those meetings were in pursuit of the Market Share and Profit Protection Initiative.[18]

Although the last known Singapore meeting was held on 14 March 2006, some of the Japan parent companies continued to enter into price increase agreements from the period after the cession of the Singapore meetings until 2010. While these agreements were not discussed in the Singapore meetings, the CCS determined that the Singapore subsidiaries had no intention of denouncing the cartel and ceasing the activities in pursuit of the Market Share and Profit Protection Initiative after their last Singapore meeting. Amongst others, the CCS found that the Singapore subsidiaries failed to publicly distance themselves from cartel conduct in the Japan meetings, but instead agreed that if a meeting were needed, it would be held only by the Japanese employees.[19]

In short, each party's Japan parent company and Singapore subsidiary were found to have contributed to cartelising the sale of bearings in the aftermarket in Singapore.[20]

1. *Attribution of Liability*

As a starting point, the CCS noted that section 34 of the *CA*, which prohibits anti-competitive agreements that have the object or effect of preventing, restricting or distorting competition within Singapore, could only be infringed by undertakings or associations of undertakings.[21]

The concept of an "undertaking" is defined in section 2 of the *CA* to mean "any person, being an individual, a body corporate, an unincorporated body of persons or any other entity, capable of carrying on commercial or economic activities relating to goods or services". The CCS noted that an "undertaking" must be understood as designating an economic unit for the purpose of the subject-matter of the agreement in question, even if in law, that economic unit may consist of several natural or legal persons.[22] Accordingly, a SEE consisting of several separate legal personalities could constitute an "undertaking" for the purpose of section 34 of the *CA*.

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".[23] 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.[24] As a result, entities that are found to be part of the SEE may be

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18 *Ibid* at para 143.
19 *Ibid* at para 374.
20 *Ibid* at paras 142, 143, 187, 220, 341.
21 *Ibid* at para 79.
22 *Ibid* at para 80
23 *Ibid* at para 84.
24 *Ibid* at para 92.

liable for anti-competitive conduct carried out by other entities in the SEE, even if the former may not have *directly* participated in such conduct.

In its assessment of EU jurisprudence, the CCS observed that the attribution of liability in the context of a SEE had application upwards, from a subsidiary to its parent company. While a further examination of the relevant EU cases will be conducted in Part III below, it suffices at this juncture to note the CCS's observations of the EU position:

> This approach has been generally affirmed by the courts of the EU, adhering to the view that where the "*parent company and its subsidiary form a single economic unit and, therefore, a single undertaking*" a decision imposing fines can be addressed "*to the parent company, without having to establish the personal involvement of the latter in the infringement*"... Where a parent company exerts decisive influence on a subsidiary company's commercial conduct at the time of an infringement of section 34 of the Act, *that parent company can be held jointly and severally liable for the infringement committed by its subsidiary company*.[25]

The CCS adopted the same approach of attributing liability upwards in a SEE,[26] and on the facts, the CCS held that the Japan parent companies exercised decisive influence over their subsidiaries. Liability was therefore attributed upwards, and the Japan parent companies and their respective subsidiaries were jointly and severally liable for the infringement.[27]

B. *Freight Forwarding Case*

The *Freight Forwarding Case* was decided about six months after the *Ball Bearings Case*, and reflected a development in the attribution of liability within a SEE—instead of attributing liability upwards (from subsidiary to parent), the CCS was then prepared to attribute liability downwards (from parent to subsidiary).

The *Freight Forwarding Case* involved 11 freight forwarder parties who were found to have infringed section 34 of the *CA* by collectively fixing certain fees and surcharges, and exchanging price and customer information in relation to the provision of air freight forwarding services for shipments from Japan to Singapore. Each of these parties consisted of companies belonging to the same corporate group,[28]

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25 *Ibid* at paras 91, 353 [emphasis added].

26 *Ibid* at para 358.

27 *Ibid* at paras 357-369.

28 Specifically, the 11 parties consisted of the following companies: (1) Deutsche Post AG, DHL Global Forwarding Japan KK ("DGF Japan"), DHL Global Forwarding Management (Asia Pacific) Pte Ltd ("DGF Asia Pacific") and DHL Global Forwarding (Singapore) Pte Ltd ("DGF Singapore") (together, "DGF"); (2) Hankyu Hanshin Express Co, Ltd. ("HHE Co") and its wholly owned subsidiary Hankyu Hanshin Express (Singapore) Pte Ltd ("HHE Singapore"); (3) "K" Line Logistics, Ltd ("KLJ") and its subsidiary "K" Line Logistics (Singapore) Pte Ltd (together, "K Line"); (4) Kintetsu World Express Inc Japan ("KWEJ") and its wholly owned subsidiary KWE-Kintetsu World Express (S) Pte Ltd ("KWES") (together, "KWE"); (5) MOL Logistics (Japan) Co, Ltd ("MLG-JP") and its subsidiary MOL Logistics (Singapore) Pte Ltd (together, "MLG"); (6) Nippon Express Co, Ltd ("NEJ") and its subsidiary Nippon

and (with the exception of one party)[29] this included Japan parent companies with shareholdings in Singapore subsidiaries in the same corporate group.

The CCS concluded in its infringement decision that the parties came together via the Japan Aircargo Forwarders Association ("JAFA") meetings in Japan to discuss and fix the pricing of various fees and surcharges.[30] To ensure effective implementation of the agreements, the parties also used the JAFA meetings to exchange information regarding the collection of various fees[31] and to discuss strategies for, and the outcomes of, negotiations with shippers for the payment of some surcharges.[32]

The *Freight Forwarding Case* does not expressly make clear who the participants to the JAFA meetings were in every instance. While the infringement decision identifies some parties' Japan parent companies as being actively involved in the JAFA meetings,[33] at other times, the infringement decision only specifies the parties as being responsible for participating in the JAFA meetings, without distinguishing whether the Japan parent company or the Singapore subsidiary/affiliate was involved.[34] Notably, there is no *express* mention that the parties' Singapore subsidiaries/affiliates were involved in the JAFA meetings.

Several indicators point to the likelihood that the JAFA meetings did not involve the parties' Singapore subsidiaries/affiliates. First, the JAFA was a representative body of freight forwarders in Japan,[35] and the meetings were held in Japan.[36] Second, on the sole occasion where the infringement decision specifically records the individual corporate attendees of a JAFA meeting (on 20 February 2006), none of the parties' Singapore subsidiaries/affiliates were recorded to be involved in

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Express (Singapore) Pte Ltd; (7) Nishi-Nippon Railroad Co, Ltd. and its subsidiary NNR Global Logistics (S) Pte Ltd (together, "NNR"); (8) Nissin Corporation and its wholly owned subsidiary Nissin Transport (S) Pte Ltd ("Nissin Singapore") (together, "Nissin"); (9) Vantec Corporation (of which Vantec World Transport Co, Ltd is now a part) and its subsidiary Vantec World Transport (S) Pte Ltd (together, "Vantec"); (10) Yamato Holdings Co, Ltd ("Yamato Holdings") and its subsidiaries, Yamato Global Logistics Japan Co, Ltd. ("Yamato Jpana") and Yamato Asia Pte Ltd ("Yamato Asia") (together, "Yamato"); and (11) Yusen Logistics Co, Ltd ("Yusen Japan") and its subsidiary Yusen Logistics (Singapore) Pte Ltd ("Yusen Singapore") (together, "Yusen").

29 The ultimate parent company of the Singapore incorporated companies within DGF (i.e. DGF Asia Pacific, DGF Singapore) is Deutsche Post AG, and not DGF Japan. Deutsche Post AG is also the ultimate parent company of DGF Japan.

30 *Freight Forwarding Case*, *supra* note 10 at paras 164, 330, 374.

31 *Ibid* at paras 197, 368.

32 *Ibid* at para 368.

33 For example, DGF Japan, KLJ, KWEJ, MLG-JP, amongst others, were identified as being actively involved in discussions in JAFA meetings regarding the Japanese Security Surcharge and the Japanese Explosives Examination Fee (see *ibid* at paras 218, 246, 260 and 272 respectively), while DGF Japan and NEJ were identified as being actively involved in discussions in JAFA meetings regarding the Japanese Fuel Surcharge (see *ibid* at paras 414 and 463 respectively).

34 See *ibid* at paras 290, 296, and 304, where NNR, Nissin and Vantec, which were undertakings consisting of various companies, were identified as being actively involved in discussions in JAFA meetings regarding the Japanese Security Surcharge and the Japanese Explosives Examination Fee. See *ibid* at paras 438, 445, 454, 468, 475, 483, 488 and 498, where K Line, KWE, MLG, NNR, Nissin, Vantec, Yamato and Yusen, which were undertakings consisting of various companies, were identified as being actively involved in discussions in JAFA meetings regarding the Japanese Fuel Surcharge See also, *ibid* at Table 2, Table 3, Table 5 and Table 6, where the parties who attended the JAFA meetings were only identified by their respective undertaking as a whole.

35 *Ibid* at para 161.

36 *Ibid* at para 341.

the meeting.[37] Third, the CCS found on the evidence that each party's Japan parent company informed their respective Singapore subsidiaries/affiliates of the amount to charge for various fees and surcharges;[38] such a practice would arguably be unnecessary had the Singapore subsidiaries/affiliates been in attendance at the JAFA meetings. Finally, three of the parties had variously submitted that their respective Singapore entities were not personally involved in the infringement, and neither had knowledge of nor participated in the infringing activities.[39] In response, the CCS conceded that only their Japan parent companies had participated in the JAFA meetings.[40] Taken as a whole, the JAFA meetings were likely to have only involved the parties' Japan parent companies, and not their Singapore subsidiaries/affiliates.

1. *Attribution of Liability*

Whilst the parties' Singapore subsidiaries/affiliates were unlikely to have been directly involved in the JAFA meetings, by applying the SEE doctrine, the CCS held the Singapore subsidiaries/affiliates to be jointly and severally liable together with their Japan parent companies in infringing section 34 of the *CA*.

As in the *Ball Bearings Case*, the CCS observed that section 34 of the *CA* could be infringed by undertakings, and a SEE could constitute such an "undertaking", even if it consisted of entities with separate legal personalities. To determine if a SEE existed between a parent and its subsidiary company, the CCS would assess if the parent exercised decisive influence over the subsidiary company.[41] Having regard to the economic, organisational and legal links between them, an assessment would be made as to whether the subsidiary independently decided upon its own conduct on the market.[42] Having identified a SEE, one company may then be liable for the anti-competitive conduct of another company within the SEE since the SEE as whole is responsible for the breach of competition laws.[43]

Following from the above, the CCS demonstrated from the evidence that the parties' Japan parent companies exercised decisive influence over their respective subsidiaries/affiliates by examining the shareholding relationship, economic and legal links between each parent and their subsidiaries/affiliates.[44] Accordingly, the CCS took the view that the agreements/concerted practices agreed at the JAFA

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37 *Ibid* at para 183.
38 *Ibid* at para 344.
39 *Ibid* at para 529.
40 *Ibid* at para 530.
41 *Ibid* at para 96.
42 *Ibid* at paras 81, 84. See also *ibid* at para 97, where the CCS noted that some of the factors that may be considered in assessing whether a subsidiary is independent include the parent's shareholding in the subsidiary, whether the parent has control of the board of directors of the subsidiary, and whether the subsidiary complies with the directions of the parent on critical matters such as sales and marketing activities and investment matters.
43 *Ibid* at para 69.
44 For example, the CCS looked at the reporting structures that existed amongst the entities, the existence of common directors, the parent company's right to nominate the subsidiary's/affiliate's directors, and the parent company's influence of the Singapore subsidiary's/affiliate's commercial and pricing policies,

meetings were "carried out by each [party's] Japan company and Singapore company acting as [a SEE]".[45]

Notably, the CCS did *not* make a finding that the Singapore subsidiaries/affiliates were, *solely by their very actions*, responsible for breaching section 34 of the *CA*. Each party's Singapore subsidiary/affiliate either (i) collected the surcharges quoted by its respective Japan parent company and remitted the same back to its parent company, or (ii) was informed of the applicable surcharges by its Japan parent company before charging the same to customers.[46] However, such actions were not found *of themselves* to be anti-competitive infringements—in the absence of the cartel activity by the Japan parent companies, there was no finding that the Singapore subsidiaries would have been, by their actions, liable for engaging in anti-competitive conduct. The Singapore subsidiaries/affiliates were jointly and severally liable along with their respective Japan parent companies because together they formed a SEE to carry out the agreements and concerted practices agreed at the JAFA meetings.

In effect, the SEE doctrine was used to attribute liability *downwards* from the Japan parent companies to their respective Singapore subsidiaries/affiliates. While the Japan parent companies were clearly involved in an agreement/concerted practice to fix the price of surcharges to customers via the JAFA meetings, the Singapore subsidiaries/affiliates who did not directly participate in the JAFA meetings were nonetheless jointly and severally liable because they formed a SEE with their respective Japan parent companies and implemented the cartelised prices.

This approach differs from the *Ball Bearings Case*, where liability was attributed *upwards* from the subsidiary companies in Singapore to the parent companies in Japan. There was understandably no need to attribute liability downwards in the *Ball Bearings Case* because the Singapore subsidiaries themselves were found to have engaged in anti-competitive conduct that constituted a breach of section 34 of the *CA*. Accordingly, the *Freight Forwarding Case* represents a development in Singapore competition law, by introducing the possibility of attributing liability downwards within a SEE.

III. Attribution of Liability within A Single Economic Entity in The European Union

As the CCS had relied heavily on EU jurisprudence as the foundation of the SEE doctrine, this Part proceeds to examine the key EU cases that set out the SEE doctrine,

amongst others, in determining whether sufficient economic and legal links existed between the parent and the subsidiary/affiliate to justify a finding of a SEE between the two. The CCS also exercised the presumption that arose from a 100% shareholding to determine that some of the parties' parent companies exercised decisive influence over their respective subsidiaries/affiliates. For example, Deutsche Post AG held 100% ownership in DGF Japan, DGF Singapore and DGF Asia Pacific (*ibid* at para 537); HHE Co held 100% ownership in HHE Singapore (*ibid* at para 545); KWEJ held 100% ownership in KWES (*ibid* at para 561); Nissin Corporation held 100% ownership in Nissin Singapore (*ibid* at para 592); Yamato Holdings held 100% ownership in Yamato Japan and Yamato Asia (*ibid* at para 609); Yusen Japan held 100% ownership in Yusen Singapore (*ibid* at para 626).

45 *Ibid* at para 530.

46 *Ibid* at paras 343-347, 520-523.

and observes that it has not been the practice in the EU to attribute liability downwards from parent to subsidiary within a SEE.

A. *European Union Case Law*

1. Imperial Chemicals Industries Ltd v Commission

Imperial Chemicals Industries Ltd v Commission[47] involved an appeal to the European Court of Justice ("ECJ") against a European Commission decision, which found that Imperial Chemicals Industries Ltd ("ICI"), together with several other competitors, concerted to increase the prices of dyestuff on three occasions from January 1964 to October 1967. ICI, which had its registered office outside the then-existing European Economic Community ("Community"),[48] had used its power to control its subsidiaries established in the Community to ensure that its pricing decisions were implemented in the market.[49] This was done, for example, by way of Telex messages sent to its subsidiaries, giving them orders regarding the prices and other conditions of sale which they were to apply in dealing with customers.[50] On appeal, the ECJ elaborated on the principle to be applied when finding a parent liable for the actions of its subsidiaries:

> The fact that a subsidiary has 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 having separate legal personality, does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company. Where a subsidiary does not enjoy real autonomy in determining its course of action in the market, the prohibitions set out in Article 85(1) may be considered inapplicable in the relationship between it and the parent company with which it forms one economic unit. In view of the unity of the group thus formed, the actions of the subsidiaries may in certain circumstances be attributed to the parent company.[51]

It may be observed that *only* the parent company, ICI, was liable for the concerted practices that raised the prices of dyestuff because the European Commission only addressed its infringement decision to ICI.[52] Its subsidiaries were not the subject of the European Commission's infringement decision, even though they were involved in implementing the concerted prices by charging such prices to customers within the Community. In other words, liability was not attributed downwards to the subsidiaries even though they were involved in implementing the concerted prices.

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47 C-48/69 [1972] ECR 619 [*ICI v Commission*]. *J R Geigy AG v Commission*, C-52/69 [1972] ECR 787 [*Geigy*] also shares a similar fact pattern to *ICI v Commission*.

48 At the time of the decision, ICI had its registered offices in London and Manchester.

49 *ICI v Commission supra* note 47 at para 130.

50 *Ibid* at para 138.

51 *Ibid* at paras 132-135.

52 *Ibid* at para 8.

2. Akzo Nobel NV v Commission

Akzo Nobel NV v Commission[53] has frequently been cited in Singapore[54] for the proposition that a parent company may be imputed with liability for the conduct of its subsidiary. In *Akzo Nobel*, the European Commission found in its infringement decision that four subsidiary companies of Akzo Nobel NV had directly participated in a series of agreements and concerted practices concerning price fixing, market sharing and concerted actions against competitors in the choline chloride sector in the European Economic Area ("EEA").[55] Akzo Nobel NV was jointly and severally liable for the infringement even though it had not participated in the cartel because it was in a position to exert decisive influence over the commercial policy of its subsidiaries.

On appeal, the ECJ upheld the European Commission's decision that the parent company could be jointly and severally liable with its subsidiaries if they formed a SEE. Specifically, it noted that:

> It is clear from settled case-law that *the conduct of a subsidiary may be imputed to the parent company* in particular where, although having a separate legal personality, that subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company... That is the case because, in such a situation, the parent company and its subsidiary form a single economic unit and therefore form a single undertaking... Thus, the fact that a parent company and its subsidiary constitute a single undertaking within the meaning of Article 81 EC enables the Commission to address a decision imposing fines to the parent company, without having to establish the personal involvement of the latter in the infringement.[56]

By holding that "the conduct of a subsidiary may be imputed to the parent company" where both form a SEE, the ECJ approved an upward attribution of liability. As the subsidiaries were *direct participants* in the anti-competitive agreements and concerted practices, the parent was also held liable for their conduct via the upward attribution of liability.

Notably, *Akzo Nobel* did not involve a downward attribution of liability from the parent company to the subsidiary. This is clear from the ECJ's statement reproduced above, which related to the process of imputing a subsidiary's conduct to its parent company. Further, it is observed that the European Commission chose in this case not to impute liability downwards to one of the subsidiaries. Akzo Nobel Chemicals SpA, an indirectly wholly owned subsidiary of the Akzo Nobel NV,[57] was originally an addressee of the European Commission's Statement of Objections, which alleged that Akzo Nobel Chemicals SpA had participated in certain anti-competitive activities

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53 C-97/08 [2009] ECR I-08237 [*Akzo Nobel*].

54 See *eg*, *Freight Forwarding Case*, *supra* note 10 at paras 93, 94; *Ball Bearings Case*, *supra* note 9 at paras 92, 93.

55 *Akzo Nobel*, *supra* note 53 at paras 13, 14.

56 *Ibid* at paras 58, 59 [emphasis added].

57 EC, *Commission Decision 2005/566/EC of 9 December 2004 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/E-2/37.533 — Choline Chloride)* [2005] OJ, L 190/22 at para 11 [*EC Choline Chloride Decision*].

regarding choline chloride in Spain. However, due to insufficient evidence, the European Commission decided not to include Akzo Nobel Chemicals SpA as being jointly and severally liable together with the rest of the Akzo Nobel group in respect of the anti-competitive practices.[58] The European Commission seemed to place weight on finding evidence of actual cartel conduct on the part of the subsidiaries, and was not prepared to attribute liability downwards from the parent to the subsidiary via the SEE doctrine, in the absence of clear evidence that the subsidiary was involved in the cartel.[59]

3. EC Bearings Decision *and* EC Freight Forwarding Decision

Finally, as a point of comparison to the CCS's *Ball Bearings Case* and *Freight Forwarding Case*, it may be helpful to examine how the European Commission decided on similar cases relating to the bearings cartel and the freight forwarding cartel in the EU. Both these cases involved some of the parties that were also the subject of the CCS's infringement decisions.

In the *EC Bearings Decision*,[60] the European Commission investigated cartel activity for the market involving bearings supplied to automotive original equipment manufacturers. In this case, parent companies located both within and outside the EEA (including parent companies located in Japan) were addressees of the settlement decision, along with their subsidiaries located within the EEA. While some parent companies[61] acknowledged liability for being directly involved in the infringement, all the parent companies also acknowledged liability for the infringing conduct of their wholly owned subsidiaries. Notably, the three parent companies[62] that did not admit to being *directly* involved in the infringing conduct were nonetheless held jointly and severally liable for their subsidiaries' infringements. While the published non-confidential version of the decision does not set out the specific involvement of each legal entity, it appears that liability was attributed upwards from the subsidiaries to the parent companies, instead of downwards from the parents to the subsidiaries.[63]

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58 *Ibid* at paras 174, 176.

59 In a more recent case where the European Commission decided to impose liability on parent companies by way of the upward attribution of parental liability, but not on their subsidiaries that were not involved in the anti-competitive conduct, see EC, *Commission Decision C(2010) 8761 of 8 December 2010 relating to a proceeding under Article 101 Treaty on the Functioning of the European Union and Article 53 of the Agreement on the European Economic Area (Case COMP/39.309 – LCD)*, online: European Commission <http://ec.europa.eu/competition/antitrust/cases/dec_docs/39309/39309_3643_4.pdf> at paras 68, 343-367. For a summary of the non-confidential version of the decision, see [2011] OJ, C 295/5.

60 EC, *Commission Decision C(2014) 1788 of 19 March 2014 relating to proceedings under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (Case COMP/39922 – Bearings)*, online: European Commission <http://ec.europa.eu/competition/antitrust/cases/dec_docs/39922/39922_2067_2.pdf> [*EC Bearings Decision*]. For a summary of the non-confidential version of the decision, see [2014] OJ, C 238/10.

61 Specifically, JTEKT Corporation, NSK Ltd, and Nachi-Fujikoshi Corporation, *ibid* at paras 72-74.

62 Specifically, AB SKF, INA-Holding Schaeffler GmbH & Co KG, and NTN Corporation, *ibid* at paras 65-67.

63 For completeness, it is noted that some of the parent companies (i.e. JTEKT Corporation, NSK Ltd, and Nachi-Fujikoshi Corporation) also acknowledged liability for their direct involvement in the infringing conduct.

In the *EC Freight Forwarding Decision*,[64] the European Commission investigated pricing coordination behaviour in the provision of international freight forwarding services with respect to four different surcharges/charging mechanisms. The European Commission first founded liability based on evidence of the legal entities that had directly participated in the cartel conduct, for example, by carefully tracking the legal entities that had attended cartel meetings.[65] Thereafter, the European Commission applied the SEE doctrine to attribute liability upwards to the parent companies who had (or were presumed to have) exercised decisive influence over the infringing subsidiaries.[66]

4. *Observations about The European Union's Approach to Attributing Liability within A Single Economic Entity*

As seen from the above cases, under EU law, the SEE doctrine has served as a route by which a distinct legal entity may be liable for another legal entity's competition law infringements, if both are found to form a SEE. However, this has generally only been applied to hold the parent responsible for the infringement of its subsidiary, in other words, an upward attribution of liability.

This has led to the observation that the attribution of liability may not hinge solely on the finding of a SEE. If liability may be attributed solely by finding a SEE, the logical application of this doctrine would result, amongst others, in a subsidiary being liable for infringements committed by other subsidiaries, and a subsidiary being liable for infringements committed by its parent.[67] This has not been the EU experience, as the European Commission has not sought to impute liability to a subsidiary for the conduct of its parent, or to one sister corporation for the conduct of another, solely on the basis that the entities are part of the same SEE.[68]

Instead, it has been suggested that some additional factor is involved for attributing liability within the SEE apart from the mere finding of a SEE, which has not yet been clearly and consistently enunciated by the courts.[69] One writer has suggested

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64 EC, *Commission Decision C (2012) 1959 of 28 March 2012 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (Case COMP/39462 – Freight forwarding)*, online: European Commission <http://ec.europa.eu/competition/antitrust/cases/dec_docs/39462/39462_6408_3.pdf> [*EC Freight Forwarding Decision*]. For a summary of the non-confidential version of the decision, see [2012] OJ, C 375/4.

65 *Ibid* at paras 668-779.

66 *Ibid* at paras 679-684, 691-694, 700-702, 705-709, 712-718, 724-730, 736-741, 746-753, 756-764, 768, 769, 774-776. See also *ibid* at para 799, where the European Commission rejected one undertaking's arguments that attempted to rebut the presumption that its parent company exercised decisive influence over its subsidiaries.

67 Okeoghene Odudu & David Bailey, "The Single Economic Entity Doctrine in EU Competition Law" (2014) 51:6 CML Rev 1721 at 1746.

68 Jones, *supra* note 7 at 319.

69 Note that there has been at least one case where the European Commission required additional factors, apart from a finding of a SEE, before it was willing to attribute liability within a SEE. See *eg*, *Alliance One International Inc v Commission*, Joined Cases C-628/10 P and C-14/11 P [2012] 5 CMLR 14, where the ECJ confirmed that it was open for the European Commission to waive reliance solely on the 'presumption of decisive influence', and to hold parent companies liable only where there is evidence to support the presumption of actual exercise by the parent companies of decisive influence which arises from the control by the parent companies of the entire share capital of the subsidiaries. In this case, the European Commission decided in its infringement decision not to hold some of the parent companies

that an additional finding of some "fault or responsibility" is required.[70] Another has observed that "liability is attributed either on the basis that (i) the legal entity directly participated in the infringement committed by the undertaking or (ii) [there was] a presumption of participation in the undertaking's infringement by that legal entity".[71]

The holding in *Akzo Nobel*—that the conduct of a subsidiary may be imputed to a parent company when "[the] subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company"—may also implicitly support the suggestion that an additional element of fault, responsibility or participation is needed before liability may 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.

This observation may also explain why there have been no EU cases to date where liability was attributed downwards from a parent to a subsidiary that has not itself been involved in the anti-competitive conduct. Since a subsidiary that does not know about, engage in, or decisively influence its parent's anti-competitive conduct cannot be said to have participated, or have fault or responsibility for the conduct, liability should not be attributed from the infringing parent to the 'innocent' subsidiary. Such thinking may explain why on the facts of *Akzo Nobel*, even though Akzo Nobel Chemicals SpA was an indirectly wholly owned subsidiary of Akzo Nobel NV, due to insufficient evidence that Akzo Nobel Chemicals SpA participated in the anti-competitive conduct, the European Commission did not hold the former jointly and severally liable with its parent for anti-competitive infringements.[72]

In sum, a study of the key EU cases has demonstrated that while liability has frequently been attributed upwards from an infringing subsidiary to its parent within a SEE, there have been no EU cases to date where liability has been attributed downwards from an infringing parent to its subsidiary.

B. *Policy Justifications*

1. *Personal Responsibility*

The theoretical justification underpinning the upward attribution of liability from a subsidiary to its parent, in the context of a cartel offence, has been expressed by the ECJ to rest on the principle of personal responsibility.[73]

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who variously owned all the shares of either of the two infringing companies liable because of a lack of 'material involvement' by the parent companies.

70 Jones, *supra* note 7 at 320.

71 Odudu & Bailey, *supra* note 67 at 1747. The authors have also proposed a third basis on which liability may be attributed in the absence of participation (whether actual or presumed) *ie* by tracing the entity that would benefit from the subsidiary's anti-competitive conduct.

72 *EC Choline Chloride Decision*, *supra* note 57 at paras 174, 176.

73 See *eg, Akzo Nobel*, *supra* note 53 at para 77; David Bailey, "Single, Overall Agreement in EU Competition Law" (2010) 47:2 CML Rev 473 at 484. See also, Odudu & Bailey, *supra* note 67 at 1724, where the authors note "[i]t is well established that the principle of personal responsibility governs the attribution of infringements of competition law, a principle that is founded in both the rule of law and the principle of fault."

On this principle, only undertakings that have participated in a cartel would be responsible for such activities. In other words, undertakings are only liable for their own actions.[74] The Attorney General at the Court of Justice of the European Union ("Attorney General Kokott"), noted in her opinion in *Akzo Nobel* that this principle of personal responsibility is founded in the rule of law and principle of fault.[75] The requirement of fault as a condition for attributing liability can also be found in Article 23(2) of Council Regulation No. 1/2003,[76] which provides that the European Commission may impose fines on undertakings and associations of undertakings where they have "intentionally or negligently" infringed competition law rules.

At first blush, it may seem that requiring a parent company that did not *directly* participate in a cartel to take responsibility for the anti-competitive activities of its subsidiaries does not cohere with the principle of personal responsibility. However, a deeper appreciation of the role of the parent company may be apposite in finding personal responsibility—if the parent company exercised decisive influence over the infringing subsidiaries and instructed them to participate in the cartel, it seems difficult to argue that the parent company should be absolved of responsibility for such anti-competitive activity simply because it did not directly participate in the same.[77] The parent's exercise of decisive influence over its subsidiaries appears to be the key plank on which the parent's fault is based. The ECJ in *Akzo Nobel* observed

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74 Bailey, *ibid* at 484.

75 See *Opinion of AG Kokott*, *Akzo Nobel NV v Commission* C-97/08 P [2009] ECR I-08237 at para 39 [*AG Kokott Opinion*] [emphasis in original]:

> The consequence of the *sanctionative nature* of measures imposed by competition authorities for punishing cartel offences – in particular fines – is that the area is at least akin to criminal law. Therefore, what is decisive of the attribution of cartel offences is the *principle of personal responsibility*, which is founded in the rule of law and the principle of fault. Personal responsibility means that in principle a cartel offence is to be attributed to the natural or legal person who operates the undertaking which participates in the cartel; in other words, the principal of the undertaking is liable.

See also *Opinion of AG Ruiz-Jarabo Colomer, Aalborg Portland v Commission*, Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P [2004] ECR I-123 at paras 63-65,explaining that "when it comes to imposing penalties or making compensation for unlawful conduct, a system of objective responsibility, or strict responsibility, is unacceptable."

76 EC, *Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the treaty*, [2003] OJ, L001/0001.

77 It is recognised that recent EU case law has developed such that a finding of parental liability does not require the decisive influence exercised by the parent company on its subsidiaries to necessarily extend to the cartel activity that the subsidiaries are involved in. Further the parent company need not have instigated or participated in the cartel conduct, and knowledge of the cartel conduct is not required. See Romina Polley, "Parental Liability in Joint Venture Cases" (19th St Gallen International Competition Law Forum ICF, 7 and 8 June 2012), online, Social Science Research Network <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2214847>; see also Aistė Mickonytė, "Joint Liability of Parent Companies in EU Competition Law" (2012) 1 Lund Student EU Law Review 33; Stefan Thomas, "Guilty of Fault that One Has not Committed. The Limits of The Group-Based Sanction Policy Carried out by The Commission and The European Courts in EU-Antitrust Law" (2012) 3 Journal of European Competition Law & Practice 11. It is beyond the scope of this article to engage in a full discussion of these developments, and the impact it has on the principle of personal responsibility. For a discussion on how parental liability should only be attributed on the basis of the parent company's fault, either in directly controlling the areas where the subsidiary's anti-competitive violations occurred, or where it had failed to implement proper compliance measures, see Hofstetter Karl & Ludescher Mellanie, "Fines Against Parent Companies in EU Antitrust Law: Setting Incentives for 'Best Practices Compliance"' (2010) 33 World Competition 55.

that the attribution of liability to a parent that did not directly participate in an anti-competitive infringement did not amount to the imposition of a strict liability regime (contrary to the principle of personal responsibility) because the parent company would have had exercised decisive influence over the subsidiary for liability to be attributed to the parent.[78] In a similar vein, Attorney General Kokott noted in her *Akzo Nobel* opinion that, where a parent company exercises decisive influence over its subsidiaries, it accords with the principle of personal responsibility to hold the parent company jointly and severally liable together with the subsidiaries for the latter's infringing conduct.[79]

Even if the parent company did not directly instruct or influence its subsidiary to engage in the anti-competitive conduct, an argument may also be made that the parent company should nonetheless share in the responsibility due to its failure to use its decisive influence over the subsidiary to prevent it from engaging in such conduct.[80]

It follows from the above that, if a parent company is able to demonstrate that it did not exercise decisive influence over its subsidiary that is involved in the anti-competitive activity, the principle of personal responsibility would allow the parent company to escape liability for its subsidiary's conduct.[81]

2. *Effective Enforcement of Competition Rules*

A separate ground that has motivated the upward attribution of liability is the need to ensure effective enforcement of competition rules in order to deter anti-competitive offences.[82]

The European Commission has enunciated the twin objectives of punishment and deterrence when imposing financial penalties, and the upward attribution of liability has enhanced the punitive and deterrent effects of such penalties.

For one, the upward attribution of liability has led to the imposition of higher financial penalties. In accordance with Article 23(2) of Council Regulation No. 1/2003,[83] the overall limit that the European Commission may impose for an anti-competitive infringement is set at a maximum of 10% of an infringing undertaking's total turnover in the preceding business year. Since the 10% limit is imposed on the undertaking as a whole, should liability be attributed to the parent such that the parent and the subsidiary together form a SEE, the base total turnover on which the 10% cap is calculated may be significantly larger, allowing the European

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78 *Akzo Nobel*, *supra* note 53 at para 77.

79 *AG Kokott Opinion*, *supra* note 75 at para 43.

80 *Freight Forwarding Case*, *supra* note 10 at para 93. See also 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 at 1487.

81 *General Quimica SA v Commission*, C-90/09 P [2011] ECR I-1.

82 *AG Kokott Opinion*, *supra* note 75; see also *Britannia Alloys & Chemicals Ltd v Commission*, C-76/06 P [2007] ECR I-4405 at para 22; *ACF Chemiefarma NV v Commission*, C-41/69 [1970] ECR 661 at para 173; Julian Joshua, Yves Botteman & Laura Atlee, "'You Can't Beat The Percentage' – The Parental Liability Presumption in EU Cartel Enforcement" in *The European Antitrust Review 2012 – A Global Competition Review Special Report*, online: Steptoe & Johnson LLP http://www.steptoe.com/assets/htmldocuments/GCR%20The%20Euro%20Antitrust%20Review%202012_Cartels_Joshua-Botteman-Atlee.pdf>.

83 *Supra* note 76.

Commission to impose larger maximum financial penalties. It is unsurprising that commentators have observed that the SEE doctrine "has resulted in EU authorities collecting roughly EUR 10 billion in fines in the period of 2005-2009, an enormous increase in comparison to the almost humble EUR 300 million in the period of 1995-1999".[84]

The motivation behind imposing higher level of financial penalties seems to stem from a desire to create a greater punitive and deterrence effect, which results in more effective enforcement of and compliance with competition laws. With larger financial penalties, parent companies would be under greater pressure to supervise their subsidiaries to ensure that competition laws are not breached.[85] This thinking has been emphatically described by former European Commissioner for Competition Policy, Neelie Kroes:

> Never, ever under-estimate the effect large fines – in the absence of jail terms – have on the target audience... Fines were not deterrent in previous decades. Just think about that for a moment... year after year we would catch a cartel and impose a fine that would have little or no effect on a company's incentives. What is the point of that? Now, taking better account of the economic impacts of abuses and cartels, we fine in order to deter, linking the fine to the relevant sales of the infringing company. If we catch recidivists... the fine increases are severe.[86]

Further, the upward attribution of liability may also address the concern that successful enforcement of fines would be jeopardised by transfers of assets between the parent company and its subsidiaries.[87] In a situation where a subsidiary was found to have breached competition laws, the subsidiary may attempt to transfer its assets out (for example, to its parent) and thereafter claim that it has insufficient resources to pay the financial penalties imposed. The upward attribution of liability would ensure that the true economic strength of the whole undertaking is taken into account when imposing financial penalties for anti-competitive infringements, and also increases the likelihood that the financial penalties would be directed at entities that have the ability to pay the fine.[88] This would arguably lead to greater effectiveness in enforcing competition rules by closing the loopholes that may otherwise be available to infringing entities in attempting to minimise their liabilities for any financial penalties that may be imposed.

Finally, by attributing liability to a parent company, the risk of having fines uplifted due to recidivism increases because previous cartel behaviour of any other company in the SEE may be taken into account when a finding is made on recidivism.[89] For

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84 Mickonytė, *supra* note 77 at 34; see also Thomas, *supra* note 77.

85 Lang, *supra* note 80 at 1486.

86 Neeile Kroes, "Antitrust and State Aid Control – The Lessons Learned" (Speech delivered at the 36th Annual Conference on International Antitrust Law and Policy, Fordham University, 24 September 2009), online: European Commission <http://europa.eu/rapid/press-release_SPEECH-09-408_en.htm?locale=en>. See also Wouter P J Wils, "Optimal Antitrust Fines: Theory and Practice" (2006) 29:2 World Competition 183 for an in-depth discussion on the use of fines as a competition law enforcement tool.

87 *AG Kokott Opinion*, *supra* note 75 at para 43.

88 Polley, *supra* note 77.

89 Joshua, Botteman & Atlee, *supra* note 82.

example, in the *Candle Waxes Decision*,[90] two of the parties who were the subjects of the decision had their fines uplifted by 60% for recidivism, as their subsidiaries were addressees of previous European Commission decisions concerning cartel activity. Adopting this broader application of recidivism within a SEE to justify significant uplifts in fines would go some way to ensure that companies comply with competition laws.

IV. Attribution of Liability within A Single Economic Entity in The United Kingdom

Turning to the UK's experience with the attribution of liability within a SEE, the UK courts have also considered (and at times disagreed on) the issue of whether a subsidiary should be responsible for the anti-competitive actions of its infringing parent.

In *Provimi Ltd v Roche Products Ltd*,[91] the claimants brought a follow-on civil claim against the defendants for damages arising from the latter's cartel activity, following a decision by the European Commission that various manufacturers of vitamins had operated cartels contrary to Article 81 of the EC Treaty.[92] While the European Commission decision identified F Hoffman-La Roche AG (Switzerland) and Aventis SA as the undertakings involved in the vitamins cartel, their indirect subsidiaries in the UK (Roche Products Ltd and Rhodia Ltd, respectively), who were not addressees of the European Commission decision, were named amongst the defendants in *Provimi*.

Amongst others, the defendants sought to strike out the claim on the grounds that their UK subsidiaries should not be liable for the vitamins cartel. While they acknowledged that the UK subsidiaries implemented their parent companies' cartel agreements, the defendants argued that this in itself did not amount to an infringement of Article 81 of the EC Treaty. To found a claim, it had to be shown that the subsidiaries were "aware or should have been aware of the state of mind of the parent company... who have been found to be a party to the infringing agreements".[93]

Aikens J, sitting in the High Court, held that the claim should not be struck out on that basis, as there was an arguable case that the subsidiaries that implemented the infringing agreement of their parent companies could be held responsible for the cartel activity, even if they had no knowledge or intention of engaging in the cartel. As long as the subsidiaries were included with their respective parents as part of an undertaking, all the entities in the undertaking would be liable for the

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90 EC, *Commission Decision C(2008) 5476 of 1 October 2008 relating to a proceeding under Article 81 of the Treaty establishing the European Community and Article 53 of the EEA Agreement (Case COMP/39181 – Candle Waxes)*, online: European Commission <http://ec.europa.eu/competition/antitrust/cases/dec_docs/39181/39181_1908_8.pdf>. For a summary of the non-confidential version of the decision, see [2009] OJ, C 295/17. While the General Court reduced the amount of fines on appeal in 2014, it did not overturn the European Commission's finding of recidivism.

91 [2003] EWHC 961 (Comm) [*Provimi*].

92 EC, *Commission Decision 2003/2/EC of 21 November 2001 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/E-1/37.512 — Vitamins)* [2003] OJ, L 6/1.

93 *Provimi*, *supra* note 91 at para 24.

cartel infringement as a whole. In what has turned out to be the statement of much deliberation in later cases, Aikens J noted:

> It seems to me to be arguable that where two corporate entities are part of an 'undertaking' (call it 'Undertaking A') and one of those entities has entered into an infringing agreement with other, independent, 'undertakings', then if another corporate entity which is part of Undertaking A then implements that infringing agreement, it is also infringing art 81. In my view it is arguable that it is not necessary to plead or prove any particular 'concurrence of wills' between the two legal entities within Undertaking A. The EU competition law concept of an 'undertaking' is that it is one economic unit. The legal entities that are a part of the one undertaking, by definition of the concept, have no independence of mind or action or will. They are to be regarded as all one. Therefore, so it seems to me, the mind and will of one legal entity is, for the purposes of art 81, to be treated as the mind and will of the other entity. There is no question of having to 'impute' the knowledge or will of one entity to another, because they are one and the same.[94]

This proposition (which has subsequently been referred to in shorthand as the "*Provimi* point") has been variously accepted and doubted in later cases. In the judgment of the High Court in *Cooper Tire and Rubber Co v Shell Chemicals UK Ltd*,[95] Teare J agreed with the *Provimi* point,[96] but this was doubted on appeal by Longmore LJ.[97] In a later High Court decision of *Toshiba Carrier UK Ltd v KME Yorkshire Ltd*,[98] Sir Andrew Morritt C was unable to conclude that the *Provimi* point was clearly wrong,[99] but on appeal, Etherton LJ took the view that the *Provimi* point had no application as "the mere fact that the share capital of two commercial companies is held by the same person. . . is insufficient in itself to establish that these two companies are an economic unit with the result that. . . the actions of one company can be attributed to the other."[100] In *Nokia Corporation v AU Optronics Corporation*,[101] the High Court took the view that it was arguable that civil law damages could be maintained by a person who suffered loss by reason of a cartel against a participating undertaking which implemented the arrangement but did not have knowledge of the cartel—at least where the latter is under some significant element of influence or control by a member of the undertaking which does have knowledge of the cartel.[102] In other words, the court agreed with the *Provimi* point, but also noted that a reference to the ECJ may be necessary to finally clarify the law.[103]

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94 *Ibid* at para 31.
95 [2009] EWHC 2609 (Comm).
96 *Ibid* at para 50.
97 *Cooper Tire & Rubber Co Europe Ltd v Dow Deutschland Inc* [2010] EWCA Civ 864 at para 45 [*Cooper Tire & Rubber Co Europe*].
98 [2011] EWHC 2665 (Ch).
99 *Ibid* at para 42.
100 *KME Yorkshire Ltd v Toshiba Carrier UK Ltd* [2012] EWCA Civ 1190 at para 39 [*KME Yorkshire*].
101 [2012] EWHC 731 (Ch) [*Nokia Corporation*].
102 *Ibid* at para 82.
103 Given that the UK voted to leave the EU in June 2016, it remains to be seen how the ECJ will shape the development of UK competition law in the future.

Most recently, the UK Competition Appeal Tribunal ("CAT") in *Sainsbury's Supermarkets Ltd v Mastercard Incorporated*[104] comprehensively examined the debate surrounding the *Provimi* point, before indicating that it was hesitant to extend the law beyond the position applied in the EU. In rejecting the *Provimi* point, the CAT took a clear position that a person who neither participated in the infringement nor had decisive influence over the other members' infringing conduct cannot be liable for the infringement by reason only of the fact that the person is a member of the undertaking responsible for the infringement.[105] It remains to be seen if the position in *Sainsbury's Supermarkets* will be upheld by the superior courts.

In determining the weight that should be given to the line of UK cases that have considered the downward attribution of liability from parent to subsidiary, it is important to be aware of the different contexts between these UK cases and the Singapore cases. Most pertinently, (with the exception of *Sainsbury's Supermarkets*[106]) the UK cases involve claims for civil damages by claimants who had suffered loss from the defendants' cartel conduct and were attempting to impute civil liability to defendant subsidiaries that were not direct addressees of a European Commission decision. In contrast, the CCS's decision in the *Freight Forwarding Case* involved the imposition of financial penalties by a competition authority that are punitive, not compensatory. While it is beyond the scope of this article to discuss the different considerations that would arise in a penal sanction compared to a compensatory award, it is highlighted that the court in *Nokia Corporation* relied on this civil-penal distinction to distinguish its divergence from the EU practice of not attributing liability downwards.[107]

V. Charting A Singapore Path

EU case law has developed to attribute liability upwards within a SEE. The UK has had a more involved experience in exploring the boundaries of such attribution of liability, and the latest word by the CAT in *Sainsbury's Supermarkets* seems to caution against adopting a downward attribution of liability to a person who neither participated in the infringement nor had decisive influence over the infringing conduct of other members in the SEE.

In Singapore, the CCS's approach in the *Freight Forwarding Case* has been to attribute liability downwards, from parent companies that were directly involved in cartel activities, to their respective Singapore subsidiaries that would not, solely by their actions, have been considered to have infringed section 34 of the *CA*. This Part

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104 [2016] CAT 11 [*Sainsbury's Supermarkets*].

105 *Sainsbury's Supermarkets*, *supra* note 104 at para 363(23).

106 In *Sainsbury's Supermarkets*, the defendant (Mastercard) attempted to defeat Sainsbury's Supermarket Ltd's claim for damages arising from Mastercard's establishment and implementation of certain Multilateral Interchange Fees ("MIF") in breach of Chapter I of the *Competition Act 1998* (UK), c 41 and/or Article 101 of *TFEU*, *supra* note 7. Amongst others, Mastercard argued that Sainsbury's Bank was part of the same undertaking as Sainsbury's Supermarket Ltd. In the event that the MIF were considered to have breached competition laws, Sainsbury's Bank plc (together with Sainsbury's Supermarket Ltd, as part of the same undertaking) would also be a party to such an infringement, and this would bar Sainsbury's Supermarket Ltd from making a claim on the principle of *ex turpi causa*. The CAT held that Sainsbury's Bank and Sainsbury's Supermarkets Ltd were not part of the same undertaking, and even if they were, any infringing conduct on the part of the former could not be attributed to the latter.

107 *Nokia Corporation*, *supra* note 101 at para 81.

highlights some advantages to this development, before proceeding to propose several clarifications that may be helpful to strengthen the understanding and application of the attribution of liability within a SEE.

A. *Advantages of Attributing Liability Downwards*

First, developing the downward attribution of liability may allow the CCS to hold local subsidiaries liable for the anti-competitive conduct of their overseas parents, avoiding the need for the CCS to enforce its decisions in a foreign jurisdiction.

Compared to its earlier enforcement actions involving local cartels, the CCS has shifted its focus to international cartels in recent years. Where it had previously only issued cartel infringement decisions relating to local cartels, the CCS issued two infringement decisions in relation to international cartels in 2014 (the *Ball Bearings Case* and the *Freight Forwarding Case*), and expects to deal with more international cartels in the future.[108] This shift is understandable because the inherent structure of Singapore's economy makes it especially susceptible to harm from international cartels. Amongst others, its trade-dependent open economy necessitates that it imports significant amounts of goods and services, making it vulnerable to international cartels because it often has no other alternative but to take the prices set by these cartelists.[109]

However, the focus on a shift to international cartels has brought several challenges. Of relevance are the difficulties that may arise in imposing financial penalties on participants of international cartels when these entities are located outside Singapore. For example, in the context of the *Freight Forwarding Case*, if the CCS had only imposed fines on the Japan parent companies and these companies refused to pay the fines, the CCS may have had to register its infringement decision in a Singapore District Court pursuant to section 85 of the *CA* before enforcing it overseas, and face the challenges that come with such overseas enforcement.[110]

In contrast, by holding the Singapore subsidiaries jointly and severally liable together with their Japan parent companies for the cartel conduct, the CCS was able to look directly to the Singapore subsidiaries for the full sum of the financial penalty, and avoid the difficulties of foreign enforcement. In Singapore's context, the ability

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[108] See interview with Chief Executive of the CCS, Toh Han Li, by Faaez Samadi (9 February 2015), online: CCS <https://www.ccs.gov.sg/~/media/custom/ccs/files/media%20and%20publications/publications/journal/9-2-15__an_interview_with_toh_han_li.ashx>, where Toh Han Li observed that the CCS had 9 leniency cases in its dockets, some of which involved international cartels.

[109] It has been observed that increase in prices due to international cartels tends to affect developing countries disproportionately because they are largely price takers on the global market. The same may be said of Singapore. See Kathryn McMahon "Competition Law and Developing Economies: between 'Informed Divergence' and International Convergence" in Ariel Ezrachi, ed, *Research Handbook on International Competition Law* (Edward Elgar Publishing, 2013) 209; See also interview with Chief Executive of the CCS, Toh Han Li, by John Bodrug (16 April 2015), online: The Antitrust Source <http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/jun15_toh_intrvw_6_17f.authcheckdam.pdf>.

[110] For example, the CCS may have to obtain a certified copy of the judgment under the *Reciprocal Enforcement of Commonwealth Judgments Act* (Cap 264, 1985 Rev Ed Sing) or the *Reciprocal Enforcement of Foreign Judgments Act* (Cap 265, 2001 Rev Ed Sing), and would also have to navigate different laws of enforcement, depending on the place of enforcement. It is beyond the scope of this paper to discuss the challenges of foreign enforcement of a Singapore judgment.

to hold a local subsidiary liable for the anti-competitive conduct of its overseas parent may be a key advantage of developing the downward attribution of liability within a SEE.

Second, developing a downward attribution of liability may also lead to more effective compliance with competition laws through higher fines and greater deterrence.

When calculating the base amount for financial penalties, the CCS would, as a starting point, take a percentage rate of the turnover of the business of each undertaking concerned in Singapore for the relevant product and geographic markets affected by the infringement in the undertaking's last business year.[111] By increasing the number of legal entities found to form an undertaking by way of a downward attribution of liability, the collective turnover of the undertaking would generally increase, which would in turn increase the base penalty amount. As of October 2016, the two international cartel decisions represent the largest amount of fines that the CCS has imposed to date on a single undertaking. In the *Freight Forwarding Case* for example, a fine of S$2,035,995 was imposed on one of the parties. This compares to the highest fine of S$405,114 that was imposed on a party involved in a local cartel.[112] The financial penalty would have been lower in the *Freight Forwarding Case*, had the CCS not attributed liability downwards and included the local subsidiary's turnover as part of its base financial penalty calculations.

As highlighted in Part III(B) of this article, such a potential increase in financial penalties may have a deterrent effect in preventing other undertakings from engaging in similar anti-competitive conduct. The CCS has previously highlighted that it considers deterrence to be one of the key objectives of imposing financial penalties,[113] and has in past cases demonstrated its willingness to increase financial penalties when it considered them insufficient to meet the objectives of deterrence.[114] Accordingly, to the extent that the downward attribution of liability may result in higher financial penalties, this may be useful in ensuring compliance with competition laws through greater deterrence.

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[111] *Freight Forwarding Case*, *supra* note 10 at para 650. See also CCS, *Competition Commission of Singapore Guidelines on the Appropriate Amount of Penalty 2016*, online: CCS <https://www.ccs.gov.sg/~/media/custom/ccs/files/legislation/ccs%20guidelines/e%20gazette%205pm/guidelines%20on%20the%20appropriate%20amount%20of%20penalty%202016.ashx> at para 2.5 [*CCS Guidelines on the Appropriate Amount of Penalty 2016*]. However, it should also be pointed out that the CCS is constrained under section 69(4) of the *CA* to only impose a maximum financial penalty of 10% of such turnover of the business of the undertaking in Singapore for each year of infringement for such period, up to a maximum of three years.

[112] In *Infringement of the section 34 prohibition in relation to the distribution of individual life insurance products in Singapore* (17 March 2016), CCS 500/003/13, online: CCS <https://www.ccs.gov.sg/~/media/custom/ccs/files/public%20register%20and%20consultation/public%20consultation%20items/id%20against%2010%20financial%20advisers/fundsupermart%20id_public%20register.ashx>, Professional Investment Advisory Services Pte Ltd was fined S$405,114 for engaging in an anti-competitive agreement to pressure its competitor, iFAST Financial Pte Ltd, to withdraw a competitive offer from the life insurance market.

[113] *CCS Guidelines on the Appropriate Amount of Penalty 2016*, *supra* note 111 at para 1.6.

[114] In *Re Price Fixing in Bus Services from Singapore to Malaysia and Southern Thailand* [2009] SGCCS 2 at paras 495, 518, 581, 591 and 627, the CCS increased the financial penalties of 4 parties to the price fixing infringement (Express Bus Agencies Association, Lapan Lapan Travel Pte Ltd, Luxury Tours & Travel Pte Ltd and T&L Tours Pte Ltd) on the basis that the initial financial penalties were "insufficient to act as an effective deterrent".

B. *Further Clarifications*

While there may be cogent reasons for developing the downward attribution of liability within a SEE, it may also be helpful, going forward, to clarify several questions regarding its application.

1. *Attribution of Liability to Subsidiaries without Nexus or Connection to the Anti-competitive Conduct*

First, it may be helpful to clarify the circumstances under which liability may be attributed downwards from parent to subsidiary within a SEE.

Under the approach adopted in the *Freight Forwarding Case*, where a parent and its subsidiary together form a SEE, liability may be attributed downwards from parent to subsidiary within the SEE.[115] If a parent exercises decisive influence over its subsidiary, both may be considered part of the same SEE.[116] Where a parent holds (whether directly or indirectly) 100% shareholding in a subsidiary, a rebuttable presumption arises that the parent did in fact exercise decisive influence over the subsidiary (the "presumption of decisive influence").[117]

On a broad reading of this principle, it may be possible for a subsidiary to be jointly and severally liable for the anti-competitive conduct of a parent that exercises decisive influence over it, even if the decisive influence had no relation to, and the subsidiary had no nexus or connection with, the anti-competitive conduct in question. Further, it may be possible that all wholly owned subsidiaries would *always* be liable for their parents' anti-competitive conduct, unless they are able to rebut the presumption of decisive influence. This may lead to the curious result that wholly owned subsidiaries may be liable for their parents' conduct, even if they were not directly involved in and had no nexus or connection with the anti-competitive conduct.

To illustrate the point, imagine a corporate group consisting of a parent company headquartered in Japan, and two wholly owned Singapore subsidiaries. One subsidiary is involved in freight forwarding services ("Subsidiary A"), and the other, in the manufacturing of plastics ("Subsidiary B"). If the Japan parent company were involved in cartel activity in the provision of freight forwarding services and Subsidiary A were involved in implementing the cartel agreements in Singapore, would the presumption of decisive influence operate to hold both Subsidiary A and Subsidiary B jointly and severally liable for the cartel conduct of their parent, merely by the fact of the parent's 100% ownership in the subsidiaries? Even if Subsidiary B did not implement the cartel agreement and had no nexus or connection with the anti-competitive conduct, would it still be liable for the conduct of its parent company?

To extend the query further, imagine a situation where Subsidiary A is involved in cartel activities, but the Japan parent company and Subsidiary B have no knowledge about such activities. On settled case law, the Japan parent company may be jointly and severally liable for the conduct of its subsidiary via the upward attribution of

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[115] *Freight Forwarding Case*, *supra* note 10 at para 530.

[116] *Ibid* at para 96.

[117] *Ibid* at para 82. See also *ibid* at paras 537, 545, 561, 592, 600 and 626 for instances where the presumption of decisive influence was applied.

liability within a SEE if it exercises decisive influence over Subsidiary A. However, after liability is attributed upwards to the Japan parent company, would it subsequently be attributed downwards by way of the presumption of decisive influence to also hold Subsidiary B jointly and severally liable? If so, Subsidiary B may be liable for the anti-competitive conduct of Subsidiary A, only by reason of its shareholding connection with its Japan parent company.

This issue may be particularly acute in the case of private equity firms and other similar investment funds that may hold significant shareholdings in a large number of subsidiary companies across different sectors and industries, but that may not necessarily know of or be intimately involved in every executive decision or day-to-day operations of these subsidiaries. In 2014, the European Commission had attributed liability upwards to investment company Goldman Sachs Group, Inc ("Goldman") for the cartel conduct of its subsidiary, Prysmian SpA.[118] Goldman has reportedly appealed the decision on the basis that it had owned all the shares of Prysmian SpA for only six weeks before subsequently selling off its stake over time, and also noted that it had "no knowledge or involvement in the purported collusive behaviour".[119] If liability were to be further attributed downwards, this opens the risk that Goldman's subsidiary companies across a diverse range of industries may find themselves potentially liable for the anti-competitive conduct of their parent company or their sister subsidiary company in a completely unrelated industry, even if they had no knowledge or direct involvement in the anti-competitive conduct. The whole private equity group may potentially be considered a SEE as the mere fact that the parent company and its subsidiaries are active in different economic sectors does not preclude the exercise of decisive influence by the parent company over its subsidiaries, even if the latter enjoyed a certain level of autonomy in the management of its business.[120]

It remains an open question how far the CCS intends to apply the doctrine of downward attribution of liability. It has so far only been applied in the *Freight Forwarding Case,* where the subsidiaries were responsible for *implementing* the parent company's cartel agreements, regardless of whether or not they knew about the existence of such anti-competitive conduct.[121] Should the CCS determine to limit the application of the doctrine to this extent, it could consider explicitly introducing

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[118] The full decision of EC, *Commission Decision C(2014) 2139 of 2 April 2014 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Community and Article 53 of the EEA Agreement (Case AT.39610 — Power Cables)* is not yet published. For a summary of the non-confidential version of the decision, see [2014] OJ, C 319/10.

[119] Tom Fairless, "Goldman Sachs Appeals EU Cartel Fine", *The Wall Street Journal* (13 June 2014), online: The Wall Street Journal <http://www.wsj.com/articles/goldman-sachs-appeals-eu-cartel-fine-1402675329>.

[120] *Holding Slovenske elektrarne doo (HSE) v Commission*, Case T-399/09 [2014] 4 CMLR 21 at para 54 [*HSE*].

[121] It would appear that the subsidiary's knowledge of the anti-competitive conduct was not critical to the CCS's downward attribution of liability. While NNR and Yusen submitted that their respective Singapore subsidiaries neither had knowledge nor participated in the infringement, the CCS did not seek to refute the parties by proving that the Singapore subsidiaries knew about their Japan parents' anti-competitive conduct, or generally had knowledge about the infringement. Instead, the CCS found that the subsidiaries were liable on the basis that "the agreements/concerted practices agreed at the JAFA meetings were carried out by each Parties' Japan company and Singapore company acting as a single economic unit": *Freight Forwarding Case*, *supra* note 10 at paras 529, 530.

an additional limb to be satisfied before liability may be attributed downwards within a SEE: the subsidiary has to be shown to have implemented (or otherwise participated in) the anti-competitive conduct of its parent, regardless of whether it knew or ought to have known that its conduct was in furtherance of the anti-competitive conduct, before it can be jointly and severally liable with its parent company.[122]

On the other hand, should the doctrine be extended to include the attribution of liability downwards to subsidiaries that were not involved in implementing the parent company's cartel agreement and had no nexus or connection with the cartel conduct, such an extension may potentially conflict with the principle of personal responsibility. The CCS has recognised that the principle of personal responsibility is important in determining the entity that should answer for a competition law infringement.[123] On this principle, it may be difficult to see why a subsidiary with no nexus or connection to its parent's anti-competitive activity should be jointly and severally liable for the activity. UK judges have also highlighted this difficulty. Etherton LJ, for example, expressed in *KME Yorkshire* that "the mere fact that the share capital of two commercial companies is held by the same person... is insufficient in itself to establish that... the actions of one company can be attributed to the other."[124] Separately, Longmore LJ in *Cooper Tire & Rubber Co Europe Ltd*[125] also noted his discomfort over the downward attribution of liability on entities that dealt entirely in another product that was in no way connected to the cartelised product.[126]

Should the downward attribution of liability be extended to include subsidiaries that did not implement the parent's cartel agreement and had no nexus or connection with such activities, the potential conflict that such an extension would have with the principle of personal responsibility may have to be addressed.

2. *Presumption of Decisive Influence*

Second, it may be helpful to provide further guidance on when the presumption of decisive influence may arise as the basis for a finding a SEE between separate legal entities, as this may have a significant bearing on how often the downward attribution of liability may be applied.

Under EU law, the test for finding a SEE is divided into two stages. First, a competition authority would have to demonstrate that the parent company *can* exercise decisive influence over the conduct of the subsidiary. Thereafter, it would have to demonstrate that the parent company *actually* exercised such decisive influence.[127] The competition authority cannot find a SEE merely on the basis that the parent company is *able* to exert a decisive influence over its subsidiary, without demonstrating

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[122] Such an approach may also be consistent with academic observations that in practice, EU law has only attributed liability within a SEE on the basis that (i) the legal entity directly participated in the infringement committed by the undertaking or (ii) there was a presumption of participation in the undertaking's infringement by that legal entity. See Odudu & Bailey, *supra* note 67 at 1747.

[123] *Freight Forwarding Case*, *supra* note 10 at para 89.

[124] *KME Yorkshire*, *supra* note 100 at para 39.

[125] *Cooper Tire & Rubber Co Europe*, *supra* note 97.

[126] *Ibid* at para 45.

[127] *Akzo Nobel*, *supra* note 53 at para 60; *HSE*, *supra* note 120 at para 29. See also Thomas, *supra* note 77; Joshua, Botteman & Atlee, *supra* note 82.

that influence was *actually* exerted.[128] However, as clarified in *Akzo Nobel*,[129] the competition authority may rely on a rebuttable presumption that the parent company could, and did in fact exercise decisive influence over its subsidiary, if the parent company holds 100% (or a *de minimis* amount less than 100%)[130] of the shares in the subsidiary (in other words, the presumption of decisive influence).

The applicable test under Singapore law for finding a SEE, as set out in the *Freight Forwarding Case,* follows in the vein of EU law. If a subsidiary has no real freedom to determine its course of action in the market and enjoys no economic independence from its parent (in other words, the parent exercises decisive influence over the subsidiary), both the parent and the subsidiary will be considered to be a SEE.[131] The *Freight Forwarding Case* also cites *Akzo Nobel* with approval, and states that where a parent company has a 100% shareholding in a subsidiary (whether held directly or indirectly), a rebuttable presumption arises that the parent exercised decisive influence over the subsidiary, and they together form a SEE.[132]

However, in the *Ball Bearings Case*, the CCS observed that the presumption of decisive influence may operate even in situations where a subsidiary is *majority-owned*, if it could be shown that the parent company had a clear ability to exercise control over the subsidiary:

> In the circumstances, where a subsidiary is *majority-owned*, rather than wholly-owned by the parent company, the principles applicable to presuming that the parent exercised decisive influence may nevertheless apply where there is *a clear ability* to exercise control. Thus, where the level of shareholding, coupled with any other economic and legal organisational links are such as to allow the parent to direct the conduct of its subsidiary, CCS is entitled to presume, in the absence of evidence to the contrary, that the parent company did *in fact* exercise decisive influence over its subsidiary.[133]

In the *Freight Forwarding Case*, the CCS also relied on the presumption of decisive influence to hold that one group of companies (KLS and KLJ) formed a SEE, notwithstanding the fact that the parent company did not hold 100% of the shares in the subsidiary. Specifically, the CCS held that "[i]n CCS's view, the *88.7% ownership*

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[128] *General TechnicOtis v Commission,* Joined Cases T-141/07, T-142/07, T-145/07 and T-146/07 [2011] ECR II-4977 at para 58.

[129] *Akzo Nobel*, *supra* note 53 at para 61 where the ECJ stated:

> [I]t is sufficient for the Commission to prove that the subsidiary is wholly owned by the parent company in order to presume that the parent exercises a decisive influence over the commercial policy of the subsidiary. The Commission will be able to regard the parent company as jointly and severally liable for the payment of the fine imposed on its subsidiary, unless the parent company, which has the burden of rebutting that presumption, adduces sufficient evidence to show that its subsidiary acts independently on the market.

[130] See *Elf Aquitaine v Commission,* T-299/08 [2011] ECR II-2149 at para 56 [*Elf Aquitaine*], where the General Court held that the presumption of decisive influence arose in a situation where the parent company held 97.55% of the shares in the subsidiary.

[131] *Freight Forwarding Case*, *supra* note 10 at paras 70, 84 and 96. See also *Transtar*, *supra* note 7 at para 67.

[132] *Freight Forwarding Case*, *supra* note 10 at para 82. See also *Ball Bearings Case*, *supra* note 9 at paras 354 and 355.

[133] *Ball Bearings Case*, *supra* note 9 at para 356 [emphasis added].

of KLS by KLJ, where the remaining shares are owned by 'K' Line Singapore Pte. Ltd., *creates a rebuttable presumption that KLJ exercises decisive influence over KLS*".[134] The finding in the *Freight Forwarding Case* seems to suggest that a shareholding of 88.7% in the subsidiary may be sufficient to trigger the presumption of decisive influence necessary to find a SEE.[135]

Accordingly, there may currently be some uncertainty as to the conditions that have to be satisfied before the presumption of decisive influence may be triggered under Singapore law. On one hand, the *Freight Forwarding Case* cites the *Akzo Nobel* position that the presumption of decisive influence would arise where the parent has 100% shareholding in its subsidiary. However, the *Ball Bearings Case* and other parts of the*Freight Forwarding Case* suggest that the presumption of decisive influence may be triggered even in the absence of a 100% shareholding situation. Further guidance would therefore be welcomed on the situations where the presumption of decisive influence would arise under Singapore law.

In providing guidance to this question, it may be helpful to bear in mind that the broader the presumption of decisive influence is construed to apply, the easier it would be for parent-subsidiary companies to be considered a SEE, and for liability to be attributed downwards within the SEE. Since the introduction of downward attribution of liability already makes it easier for subsidiaries not directly involved and having no knowledge of their parents' cartel conduct to be nonetheless held jointly and severally liable, it should be considered if the bar should be lowered even further by adopting a broader application of the presumption of decisive influence to expose more 'innocent' subsidiaries to potential liability. Before broadening the presumption of decisive influence, it may also be helpful to be aware of the observation amongst commentators that, in the EU's experience, it has proven to be challenging for companies to rebut the presumption of decisive influence,[136] not least because the EU courts have so far provided little guidance on how the presumption may be rebutted.[137] It has been observed that there has only been one case to date where the EU court has considered the presumption of decisive influence to have been successfully rebutted.[138]

VI. Conclusion

The law relating to the attribution of liability between parent and subsidiary within a SEE has seen significant developments in the *Ball Bearings Case* and the *Freight Forwarding Case*. Notably, the CCS has adopted the approach of attributing liability downwards from parent to subsidiary.

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134 *Freight Forwarding Case*, *supra* note 10 at para 552 [emphasis added].

135 While the General Court has recognised in *Elf Aquitaine*, *supra* note 130, that a 97.55% shareholding in a subsidiary may give rise to the presumption of decisive influence, there have been no EU decisions to date indicating whether a high 80% shareholding is sufficient to invoke the presumption. In contrast, it is noted that the General Court in *HSE*, *supra* note 120, did not extend the presumption of decisive influence to a situation where the parent held 74.44% shareholding in the subsidiary.

136 See *eg*, Nils Wahl, "Parent Company Liability – A Question of Facts or Presumption?" (19th St Gallen International Competition Law Forum ICF, 7 and 8 June 2012), online: Social Science Research Network <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2206323>.

137 See *eg*, Lang, *supra* note 80 at 1499; Thomas, *supra* note 77 at 13.

138 Wahl, *supra* note 136 at 8.

This development is to be welcomed in view of the particular circumstances faced by Singapore, for example, in the need for more effective enforcement of its competition laws by holding local subsidiaries of international cartels jointly and severally liable, and for greater deterrence through larger financial penalties.

Moving forward, several important clarifications may be helpful in the course of applying this doctrine. Specifically, guidance would be welcomed on whether additional limits would be imposed when attributing liability downwards in a SEE, for example, by requiring the subsidiary to have implemented its parent's anti-competitive agreements. Separately, guidance may also be helpful in clarifying the situations when the presumption of decisive influence may arise to hold that parents and subsidiaries belong to the same SEE. These clarifications would strengthen the understanding of the principles that undergird the downward attribution of liability, and bring greater certainty to its application in Singapore.