Parental liability in EU competition law

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I start by saying that in the eyes of the no prime companies and their subsidiaries are separate legal entities, and in principle, they're responsible for their own infractions and their own. That's our only say for certain our circumstances. But immediate competition low prime companies are commonly held liable for the anti competitive backs of their subsidiaries, and they're forced to basically confined so the question I asked myself was, why, why our parent companies held responsible for the illegal behaviour of their subsidiaries in that contract. And the answer given by the court to this question ever since AXA, which is the seminal judgement of this matter, has been that the competition rules are addressed against undertakings. The concept of an undertaking must be understood as referring to an economic unit which may consist of several legal persons And in the case of foreign companies and their subsidiaries, that's an economic unit and therefore, a single undertaking will exist where the parent company exercise a decisive influence over the conduct of its subsidiary, which is pursued where the parent company wholly owns the subsidiary. So in these circumstances, the reason why private companies are held liable and according to the EU court, to be held liable for the illegal behaviour of their subsidiaries is quite simply because they constitute a single undertaking. Now, on the face of it, this explanation may sound convincing, but if we take a closer look, it becomes clear that it is unsatisfactory when it is used in order to ascribe liability for at least two reasons. The first reason is that it fails to explain why it parent companies are singled out in the corporate group. So if we accept that foreign companies are held liable for the behaviour of their subsidiaries, because you they constitute a single undertaking, then this mean the subsidiaries to also be responsible for the legal behaviour of the

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prime companies on the same basis. They

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also constitute a single undertaking, but we know very well, that this doesn't really happen. And the second reason for that is that it is impossible to tell whether parental liability in EU competition law is personal or because and unfortunately, the language of the EU coercion decision is ambiguous. One could argue that parental liability is the carrier, which means quite simply that parent companies are essentially responsible not for their own act, but for the acts of the third party, the subsidiary. But the problem here is that this approach is impossible to reconcile with the well established principle in the competition law which is that competition responsibility is personal in nature, which means that every entity is responsible for its own act

only And the reason for that is that antitrust fines are criminal. On the other hand, that parental liability is personal. And the courts have claimed that parent companies are penalised for an infringement that they are deemed to have committed themselves, then the question becomes how the parent company has committed the infringement. So in other words, what conduct on part of the parent company is objectionable? And this question is critical from a deterrence perspective, but the answer is not clear. So it's not necessary that the parent company has itself been involved in the violation or that it has directed the subsidiary to commit infringement. And it's completely irrelevant whether or not the parent company took measures to prevent the illegal behaviour. So one is left wondering what exactly parental liability in the EU competition law under the single undertaking argument is saying to encourage or discourage things. So coming that I just mentioned, and some others, in my view force us to rethink the justification for parental liability in the competition law. And it seemed to me that there are three different options. First option is to say, parent companies should be called liable, where they have used their subsidiaries as the vehicle for perpetrating the infringement. And this thing can very much reflect the case law before axle where the existence of a single undertaking was unnecessary, but not a sufficient condition for the imputation of liability. So on top of that, some connection between the polling company and the legal conduct was required. And this approach has important advantages in the sense that it is in line with the principle of personal responsibility and also it has a very strong deterrent appeal, since it sends out the message that I tend to exploit the parent subsidiary structure in order to evade natural liability will not be tolerated. But the main disadvantage in the sense is that this approach will be relevant in a rather specific set of circumstances and from a policy perspective, it may be desirable that parental liabilities impose beyond this narrow scenario. So, a second option potentially complementing the first one is to say that parent company should be held liable when failing to exercise Maitland in order to ensure that subsidiaries will not violate the competition rules. And again, this is an approach which has significant benefit. It's also in line with the principle of personal responsibility. foreign companies are held accountable for their own behaviour. Also, it can help us mitigate some aspects of the case law that currently are a bit cornered obstacle for instance, the fact that the current company is not necessarily that it has directly subsidiaries to participate in the payment. What matters really is whether eight calls vigilante now and also from a return perspective, this approach can encourage corporate group to remain alert to potential antitrust violations and be proactive in preventing them. This approach, having said that has two drawbacks. The first one is that it assumes that the competition rules imposed on corporate group of business duty. And this is a defensible claim, but it's not a no bitch claim in light of the letter of the antitrust provision. And the second means that it would require some modifications in the existing case law because it implies that one company should be able to defend themselves on the basis that either they were not in a position to exercise vigilance in the first place, or on the basis that they did everything they could to prevent the anti competitive conduct, even though ultimately they fail to the show. Then we have a third option, which is to say that a parent company should be held liable, where it benefits from the activities of its subsidiaries,

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in which case, it should also share the race condition associated liabilities. And this is an argument that has been developed mostly in the context of private tort cases transposed in public competition enforcement. It has significant advantages, the most important one being that it can accommodate the existing case law very well and it provides a convincing justification for parental liability. And also it's returned because again, it incentivizes corporate group to ensure that their subsidiary will behave in an abstract compliant manner. But it has an important disadvantage that we cannot disregard which is that it's impossible to reconcile with the principle of personal responsibility. So under the third option, parental liability is because nature Companies are liable for the acts of a third entity. There's procedures. So where does this all leave us? In a situation which is rather difficult in the sense that identifying the scope and the limits of corporate group responsibility, especially in the reom. So our criminal law has proved quite challenging and still a work in progress. So all things consider, I say that the second option, the failure to exercise vigilance argument is not the best but at the moment, the most realistic solution to the problem of developing coherent theory of parental liability in the EU competition law. But at the same time, I should also say that EU courts have not sown any indication that they might be ready to move away from the single undertaking argument, and in fact, recently, they went a step farther By holding up the concept of undertaking had the same scope in both public and private enforcement