The notion of undertaking in EU competition law

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Abstract

EU competition law uses the term ‘undertaking’ to designate the economic operators concerned by its mandates, regardless of their ownership and legal form. The notion seeks to place economic players as such, and not a legal entity, as addressees of competition rules.

This dissertation examines the legal consequences of this perspective. A first chapter explores its origin and underlying logic, looking at the theories that, in various areas of law, have challenged the role of the legal entity as sole possessor of rights and duties, such as the lifting of the veil, enterprise theories and single entity doctrines. The second reviews the evolution of the notion of undertaking in the jurisprudence of the CJEU and identifies the tensions and contradictions that this remarkable process has confronted in the way. A third chapter dissects economic entities and seeks to define its boundaries, an exercise that exposes some contradictions. The following chapter looks at the uses that have been made of the ‘entity’ limb of the notion (this is, the idea that many legal persons may be treated as one): theories of parental and subsidiary liability, calculation of fines, exemption from the prohibition in Article 101 TFEU, succession of undertakings, and merger control. Chapter 5 looks at the ‘economic activity’ requirement, which has served to date to carve out an exception to the scope of competition rules for State activities, and discusses the recent declaration in *Sumal* that ‘conglomerate’ groups of companies pursuing different activities may contain several economic units. Chapter 6 examines the continued relevance of legal entities and the resulting dual enforcement model whereby an economic and a legal entity perspective coexist in the application of competition rules. A last chapter concludes.

The discussion is based on a careful examination of the judgments of the CJEU. The result is a detailed description of a historic process where EU competition law is breaking new ground to ensure appropriate accountability of economic players, a process rife with contradictions that attest to the unfinished nature of the task.

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Dedication

This dissertation is dedicated to my father Alberto Araujo Fernández, a postgraduate student at the University of Glasgow before me, and who passed away while this thesis was being written. His love of study, discipline and generosity lie at the heart of my determination to complete this wonderful adventure in law and in life. He shares this dedication with his beloved partner and friend, my mother Lilias Boyd, a daughter of Glasgow, where they met many years ago. Here's to all you started.

Author's declaration

I declare that, except where explicit reference is made to the contribution of others, that this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

Marcos Araujo Boyd

THE NOTION OF UNDERTAKING IN EU COMPETITION LAW

Introduction

European competition rules are addressed to undertakings, which makes them their subjects.[1]

This is true across the various areas of EU competition law. Articles 101 and 102 TFEU[2] name undertakings as the entities concerned by them, as do their implementing rules.[3] Acts based on Article 106 TFEU incorporate the provisions on competition by reference, and therefore the same notion applies.[4] The Merger Regulation controls concentrations between undertakings.[5] Undertakings are a necessary element for State aid rules to apply.[6] That gives this notion a horizontal nature, linking the various fields of EU competition law through a common denomination and, arguably, a shared notion.

Despite its relevance, the term 'undertaking' was not defined when it was inserted in the ECSC Treaty in 1951[7] or the EEC Treaty in 1957.[8] Alongside other denominations such as firms, economic players or businesses, the legal profession struggled at the time with this

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[1] The term 'subjects' applied to the undertaking was first used by the Commission in the case leading to the Judgment of 28 March 1984, *Compagnie Royale Asturienne des Mines SA and Rheinzink GmbH v Commission*, 29 and 30/83, ECLI:EU:C:1984:130, at 8, and later recovered by Wouter P.J. Wils, 'The undertaking as subject of E.C. competition law and the imputation of infringements to natural or legal persons', (2000) 25 *European Law Review* 99.

[2] Unless otherwise specified, all references to the competition rules in the Treaties follow the numbering of the Treaty on the Functioning of the European Union.

[3] See Regulation 1/2003 [2003] OJ 1/1. Note that some of its provisions are addressed to persons, such as Art 7.2, 18.4 or 19.

[4] Article 106 concerns public undertakings and certain assimilated entities with a special status and provides that these players are initially subject to other Treaty provisions. See generally Jose Luis Buendia Sierra, *Exclusive Rights and State Monopolies under EC Law* (OUP 1999).

[5] Regulation 139/2004, [2004] OJ L 24/1 (Merger Regulation).

[6] The beneficiaries of State aids are undertakings. The central role played by the concept of undertaking in this area is impliedly acknowledged in the Notice on the notion of State, [2016] OJ C 262/1, whose first section after the introduction discusses the "*notion of undertaking and economic activity*".

[7] Treaty establishing the European Coal and Steel Community, signed on 18 April 1951, English Special edition, 1972.

[8] Treaty establishing the European Economic Community, signed on 25 March 1957, English Special edition, 1972.

notion.[9] Only in 1991 did the CJEU[10] attempt in *Höfner* a definition that has become almost a mantra:

> 'In the context of competition law (…), the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed (…)'.[11]

In subsequent years, the Court assimilated the notion to the single economic entity doctrines that it had been using to resolve situations where the doctrine of legal personality interfered with the substance of the law, furthering a historical development in the law that goes to the root of this dissertation: the identification of economic players, regardless of their status, as addressees of these rules, in the stead of specific legal entities.

EU competition law is not alone in this quest. Over the years, as discussed in chapter 1 of this dissertation, courts from all jurisdictions have sought to address some of the disfunctions of the legal entity perspective, and especially the silo structure it allows, through piercing the corporate veil, enterprise doctrines and other single entity approaches aimed at enforcing laws having in mind economic reality. Legislators have also intervened with a similar purpose in mind; in the EU legal order a mention should be made of the Accounts Directive[12] and particularly its consolidated treatment of groups;[13] the Directive on Transfers of Undertakings[14] or the Directive on Workers' Councils,[15] as well as upcoming initiatives in the

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[9] As famously declared by Joaquín Garrigues in 1970, "for over half a century, we the jurists have been courting her but have yet to take possession" ('*Acotaciones de un jurista sobre la reforma de la empresa'*, Madrid, 1970, p. 4, quoted in Eduardo Galán Corona, '*La empresa como destinataria de las normas de competencia'*, (1975) II Actas de Derecho Industrial 291, at 295).

[10] The acronym CJEU and the term 'Court' are used here to denote the Court of Justice of the European Union irrespective of its component court, even in respect of decisions adopted before it had this name. 'CJ' or Court of Justice and 'GC' or General Court identify the component of the CJEU that has authored a particular judgment.

[11] Judgment of 23 April 1991, *Höfner and Elser v Macrotron*, C-41/90, ECLI:EU:C:1991:161, para. 21. This definition would eventually find its way into legislative texts such as Art. 1 of Protocol 22 of the EEA Agreement ([1994] OJ L 1/3) and Article 2.1 (10) of Directive (EU) 2019/1 empowering national competition authorities (ECN+ Directive) [2019] OJ L 11/3.

[12] Directive 2013/34/EU on Annual Accounts, [2013] OJ L 182/19.

[13] The Accounts Directive replaces the Seventh Company Law Directive on consolidated accounts 83/349.

[14] Directive 2001/23/EC on Transfers of Undertakings [2001] OJ L 82/6.

[15] Directive 2009/38/EC on European Works Councils [2009] OJ L 122/28.

tax field such as the proposed Common Consolidated Corporate Tax Base[16] and the recent proposal for a Directive on 'shell' companies, [17] which seek to correct the abusive use of the corporate form in the taxation field.

While forming part of this trend, EU competition law has gone much further than any other area of law in its mission to hold businesses directly accountable regardless of the legal clothing that they use. There are several reasons for this prominence. Foremost among these is the fact that this area of law looks at the effect of economic actions, which makes it naturally inclined to disregard formal appearances, not least under the 'more economic approach' pursued in recent years. Chance has also played a part: probably just by a historical accident, the term employed by EU competition rules to denote its subjects is sufficiently vague to have allowed the Court to define its meaning as it sees fit. The fact that the content of these rules is defined by an institution with wide interpretative powers free from the shackles of national law categories has undoubtedly assisted this fascinating experiment.

That said, replacing legal persons with economic players is a tall order. The legal entity perspective is deeply ingrained in all legal systems, providing not only clarity and certainty, but also useful risk isolation and protecting investment. The proposed correction, in contrast, is case-law driven, with the result that its solutions lack the precision and authority of a legal text and are specific to a particular situation. Further, the answers are not entirely stable, reflecting the changing views of different judges sailing largely uncharted waters over the years, with limited reliance on settled legal notions. Despite the unique position of the CJEU as a creator of legal categories free from national law encumbrances, this was bound to be a very complicated process, deserving a thorough consideration.

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[16] See proposals at https://ec.europa.eu/taxation_customs/business/company-tax/common-consolidated-corporate-tax-base-ccctb_en. For a recent discussion on the treatment of company separation in the tax field with sharp criticism of the use by groups of companies of separate legal entities, see Janet Dine and Marios Koutsias, 'The Three Shades of Tax Avoidance of Corporate Groups: Company Law, Ethics and the Multiplicity of Jurisdictions Involved'. (2019) 30(1) *European Business Law Review* 149.

[17] Proposal for a Directive laying down rules to prevent the misuse of shell entities for tax purposes and amending Directive 2011/16/EU. COM(2021) 565 final of 22 December 2021.

Research questions and methodology

This dissertation seeks to explore the fascinating process whereby EU competition law attempts to identify economic players as the true addressees of its mandates, to expose the challenges the CJEU has encountered, and to evaluate the risk that the notion acquires a divergent meaning when used for different purposes.

While this is a classic area of EU competition law, this thesis assumes that a fresh look is needed. A detailed historic analysis showing its initial interpretation and evolution was largely lacking, as well as a separate examination of each of the 'uses' of the notion, this is, its functions. Notably, its unitary meaning of the notion across its uses shows signs of fatigue, a reality often overlooked. It was also necessary to better explain the current dual enforcement model in EU competition law whereby the economic unit perspective coexists with the legacy legal entity perspective without replacing it entirely.

This thesis assumes that the EU doctrine on the undertaking is rooted on a broader body of theories that have sought to address the anomalies of the prevailing system of personification of economic players through legal entities. It is expected that the research on the notion of undertaking in EU competition law could helpfully advance research in that area.

As befits a notion created and modelled by jurisprudence, the discussion relies heavily on the case-law of the CJEU. Particular attention has been given in that respect to the dialogue, not exempt of divergence, between the General Court and the Court of Justice, as well as the tension between the CJ and its Advocates-General. The numerous Grand Chamber pronouncements in this area have been identified as such throughout the text. Care has been taken in placing each judgment under a historic perspective, this being important to truly appreciate the choices the Court was taking.

The reliance on case-law explains the enforcement-oriented perspective across the discussion. As a lawyer I am keen on understanding the practical implications of the doctrines crafted by the Courts in the application of the law. In that respect, and regardless of the insistence from

the Court that undertakings, and not legal entities, are the addressees of these provisions,[18] sight must not be lost to the fact that enforcement ultimately requires the identification of an entity with legal personality. While the notion of undertaking seeks to correct a strict legal entity viewpoint, it does not entirely dispense with it. The result is a dual enforcement model where competition rules are applied simultaneously to economic players and specific legal persons under both economic and legal entity perspectives, a reality that has not sufficiently been examined to date.

Understanding this dual application model requires careful consideration of the Court's pronouncements, beyond providing an account of when and how the notion emerged, looking at the specific facts that explain each declaration to grasp the underlying logic of this truly historic project. As may be expected, examining this material reveals a body of jurisprudence of doubt[19] which exhibits the inevitable inconsistencies that have arisen from the involvement of many judges in different courtrooms, over the years, confronting different problems as if all could be addressed with a comprehensive, but not entirely developed, theory of the undertaking.

Another focal point in the discussion concerns the examination of the 'uses' of the notion of undertaking. While initially meant to correct the distortions resulting from a strict legal entity perspective, the theory of the undertaking pursues other goals such as underpinning parental liability, facilitating some form of affiliate liability, upholding increased fines for groups of companies through various mechanisms, exempting intragroup agreements from the prohibition of Article 101 TFEU, strengthening succession theories and better articulating merger control rules. This rainbow of purposes raises consistency questions, as the Court has struggled between appropriately resolving the problems raised by each of them and, at the same time, building a consistent notion intended to be shared by all, a process that shows signs

[18] Judgment of 18 July 2013, *Schindler and Others v Commission*, C-501/11 P, ECLI:EU:C:2013:522 at 102; Judgment of 10 April 2014, *Commission v Siemens AG Österreich and Others*, C-231/11 P to C-233/11 P, ECLI:EU:C:2014:256 at 42; Judgment of 10 April 2014, *Areva and Others v Commission*, C-247/11 P and C-253/11 P, ECLI:EU:C:2014:257 at 123; Judgment of 6 October 2021 (Grand Chamber) *Sumal v Mercedes Benz Trucks España*, C-882/19, ECLI:EU:C:2021:800 at 39.

[19] I am borrowing this term as a tribute to the inspiring article by Takis Tridimas, 'Precedent and the Court of Justice: A Jurisprudence of Doubt?' in Julie Dickson and Pavlos Eleftheriadis (eds.), *Philosophical Foundations of European Union Law* (Oxford: Oxford University Press, 2012).

of fracture. As with the immortal Andersen's tale of the New Emperor's Clothes, few would admit it, but all would see that the meaning of the notion of the undertaking in the context of merger control and in other areas of EU competition law does not always coincide.[20] A more recent challenge to the unity of the notion is the recent judgment in *Sumal*,[21] with its landmark declaration that conglomerate groups of companies may contain multiple economic units, raising in louder terms the question whether the logic of the notion in a given context (such as, in that case, descending liability of a subsidiary under Article 101 TFEU) should be used for other purposes (like fine-setting). Examining that matter required a hard look at the various uses of the notion, which I have called in a separate publication 'a band featuring various imperfectly tuned instruments including [besides the intragroup exemption] wide parental company liability, an expansive view of succession of undertakings, jurisdictional anchoring, or the consideration of group-wide sales in the calculation of fines, to name a few of the components of this noisy army marching on with the mission to place substance over form'.[22]

The comparative examination of the notion across its uses and its threat to fracture the notion of undertaking, on the one hand, and the complicated articulation of parallel economic and legal entity perspectives in enforcement are the main focal points of this dissertation, which concludes with an identification of the avenues which the Court is expected to address in the coming years to better articulate the notion of undertaking and, through it, to further the historic process of attribution of legal obligations to economic players.

Terminology

Much of the confusion that plagues the discussion on the notion of undertaking derives from a careless use of terminology. In common language, terms such as companies, enterprises, undertakings, firms or even brands are used interchangeably. Surprisingly, that a tendency is

[20] See in this respect Alison Jones, 'The Boundaries of an Undertaking in EU Competition Law', (2012) 8(2) *European Competition Journal*, 301, 315 ff, discussing merger rules and the intragroup exemption and the subsequent Court judgments of 26 September 2013, *EI du Pont de Nemours v Commission*, C-172/12 P, ECLI:EU:C:2013:601 at 47 and of the same date, *Dow Chemical v Commission*, C-179/12 P, ECLI:EU:C:2013:605 at 58 and the discussion in sections 3.1.2.c and 4.6.1 of this dissertation.

[21] Judgment of 6 October 2021 (Grand Chamber) *Sumal v Mercedes Benz Trucks España*, C-882/19, ECLI:EU:C:2021:800. See discussion at section 4.2.2.

[22] Marcos Araujo Boyd, 'Rethinking the Intragroup Exemption after Ecoservice', (2021) V(2) *Market and Competition Law Review* 50.

also present in the specialised field of company law, where most authors discuss indistinctly corporations and firms.[23] Competition rules themselves, especially Regulation 1/2003,[24] also refer to undertakings as addressees of decisions, ignoring the fundamental role of legal entities in that step. The fact that 'undertaking' is used in other areas of EU law with different meanings[25] and that even EU competition rules has at least two distinct concepts for that term[26] adds to the confusion, on top of which occasional translation errors muddy the waters further.[27]

Given this situation, at the risk of stating the obvious the terms listed below will be used as follows:

1. 'Entity' is used here as a general term for an organisation. It may or may not enjoy legal personality or, as so often, contain several persons, but it may in any event be seen as a logical unit and therefore its boundaries should be rationally identifiable. An 'economic entity' would be an organisation that carries out an economic activity and may contain (and frequently does) several individuals and legal entities linked by controlling rights.

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[23] Jesús Alfaro Águila-Real, 'Corporations are not Firms', Oxford *Oxford Business Law Blog*, 29 May 2017, https://www.law.ox.ac.uk/business-law-blog/blog/2017/05/corporations-are-not-firms and the discussion in chapter 1, section 1.1.3 of this thesis.

[24] Regulation 1/2003, [2003] OJ 1/1.

[25] See concerning the Directive on the Transfers of Undertakings (Directive 2001/23/EC [2001] OJ L 82/16) the Judgment of 2 December 1999, *Allen*, C-234/98, ECLI:EU:C:1999:594, at 19. Art 3 of the Directive on European Works Council (Directive 2009/38/EC, [2009] OJ L 122/28) adds to the confusion by defining 'groups of undertakings' with a terminology that is very close to, but not quite the same as, that used in competition law. The Accounts Directive (Directive 2013/34/EU [2013] OJ L 18/19) also employs the term 'undertaking', again with a different meaning. See also Art 2 (13) of Regulation 2015/848 on Insolvency Proceedings, [2015] OJ L141/19.

[26] See Art 5 of the Merger Regulation which, when importing the terminology of the Accounts Directive, uses the term 'undertaking' as referring to legal entities and consequently making reference to 'undertakings that control other undertakings'. A similar inconsistency is found in Art 2(2) of Regulation 2022/720 (the vertical block exemption regulation), [2022] OJ L 134/4.

[27] A notable example is the definition of 'undertaking' in Article 1 of Protocol 22 to the Agreement on the European Economic Area of 2 May 1992 ([1994] OJ L 1/3), in which in the German version used the term 'Rechtssubjekt', suggesting it had to be a legal entity, unlike other language versions. This was at the heart of the discussion in *Dansk Rørindustri* (Judgment of 28 June 2005 (Grand Chamber), *Dansk Rørindustri v Commission*, C-189/02, ECLI:EU:C:2005:408, at 107-114). An earlier example is *Intermills*, whose English version uses at some points 'undertakings' while the French employs 'sociétés'. Judgment of 14 November 1984, *Intermills*, 323/82, ECLI:EU:C:1984:345 at 2.

2. The term ‘undertaking’ will (except where otherwise indicated) refers to its meaning under competition law. It is assumed that it has the same content in all EU languages, as befitting a term embodying a common meaning defined by EU law, ignoring the specificities of the English word.[28]

3. ‘Firm’ is reserved for economic actors regardless of their legal form. While it is argued here that it should coincide with the notion of undertaking, the term (alongside other terms such as business players, business organisations, economic players or the like) designates these agents as they are understood in the economic field and is therefore, not used here as a legal notion.

4. ‘Natural persons’, ‘private persons’ or ‘individuals’ are used interchangeably.

5. ‘Legal entities’ are corporate structures with legal personality under the law of the place where they are incorporated, and include companies, corporations, foundations, charities or other organisations with legal personality. ‘Legal person’ encompasses both legal entities and individuals.

6. The terms ‘group of companies’ or ‘corporate groups’ are used to identify a combination of legal entities linked by relationships involving sole control, that is, where one of them has, by virtue of ownership or other rights, the capacity to determine the commercial behaviour of others. The term ‘parent company’ denotes the legal entity in possession of these rights, and the companies under its control are

[28] The choice of ‘undertaking’ in the English version of the Treaties instead of the more common ‘enterprise’ is a mystery. The original translations of the Treaties (United Nations, 1957 Treaty Series 261 at 140 and 1958 Treaty Series 298 at 11) and the academic literature at that time (eg Gerhard Bebr, 'The Concept of Enterprise under the European Communities: Legal Effects of Partial Integration' (1961) 26 *Law and Contemporary Problems* 454 and Fernand Spaak and Jean N Jaeger, ‘The Rules of Competition within the European Common Market’ (1961) 26 (3) *Law and Contemporary Problems* 485) used ‘enterprise’. While following the UK accession ‘undertaking’ became the official term, ‘enterprise’ resurfaced many years later in the 1996 Leniency Notice ([1996] OJ C 207/4) and in the definition of SMEs ([2003] OJ L 124/36). The 2006 version of the Leniency Notice ([2006] OJ C 298/17) however returned to ‘undertaking’. A more recent example of the indistinct use of these terms is found in the recent proposal for a Directive on ‘shell’ companies, which uses both in different provisions (cfr. Arts. 3 and 5 of the proposal for a Directive laying down rules to prevent the misuse of shell entities for tax purposes and amending Directive 2011/16/EU. COM(2021) 565 final of 22 December 2021). Notably, the UK competition rules also employ both terms, the 1998 Competition Act having chosen ‘undertaking’ and the 2002 Enterprise Act the other denomination, despite seemingly having the same concept in mind.

named affiliates, subsidiaries or subservient companies indistinctly. Joint ventures subject to joint control as defined under merger control rules[29] are discussed separately.

7. The term ‘attribution’ is loosely used to identify the logical process whereby a given behaviour is ascribed to any entity, not necessarily a ‘person’. In accordance with the recent practice of the Court, however, ‘imputation’ is used only to refer to a claim made against a legal entity.

Structure

This thesis is structured as follows:

Chapter 1 introduces the discussion by looking at the imperfect correspondence between legal entities and economic players. It discusses the notion of ‘firm’ used in economic literature and examines the constituent elements of companies and the attempts made to address laws to economic players irrespective of their legal form under theories such as the piercing of the corporate veil, the enterprise paradigm and single entity doctrines.

Chapter 2 examines the origins and evolution of the notion of undertaking in EU competition law, from its initial appearance in the ECSC Treaty to its current meaning, following the trail opened through the years by the CJEU. The purpose of this section, beyond providing the background required to properly understand the material that is used in later parts of the thesis, is to stress the evolutionary nature of this notion and its nature as a historic process still open to change.

Chapter 3 dissects the notion of undertaking, showing its various components, from the simplest structures (one-person undertakings and professionals) to corporate groups. It looks at the treatment of employees, agents, affiliates, and other stakeholders, with particular emphasis on the notion of ‘control’ and analyses the specific elements of State-owned enterprises or SOEs. Chapter 3 also looks at how the size of an undertaking is established, noting the contradictions between the accounting rules, the special provisions in the Merger Regulation

[29] See Jurisdictional Notice [2008] OJ C 95/1 at para. 62 ff.

and the criteria to be followed in the calculation of fines. It concludes by identifying several areas where the boundaries of the undertaking differ for the purposes of merger control and other enforcement areas and the challenges in the treatment of ‘conglomerate’ groups following *Sumal*.

Chapters 4 and 5 looks at the constructions that rely on the notion of undertaking for specific purposes. Chapter 4 discusses the uses linked to the ‘entity’ or structural part of the definition laid down in *Höfner*, that is, the treatment of multiple legal entities as a unity, including communication of liability, the use of the notion for fine setting, the intragroup exemption, succession, and the concept as understood in the merger control field. Chapter 5 examines the uses of the second limb of that definition, that is the identification of an ‘economic activity’ as the basis for unitary treatment, including the challenges of the *Sumal* perspective concerning conglomerate groups. In both chapters, the discussion is limited to identifying potential elements of tension between the different uses of the notion rather than conducting an exhaustive analysis of each of these uses.

Chapter 6 looks at the notion as a centre of attribution and explains the dual enforcement model that is applied in EU competition law, where its addressees are simultaneously identified under an economic entity viewpoint under the ‘undertaking’ label and through a legal entity viewpoint as individual legal entities. This part of the discussion is limited to the Treaty provisions on infringement and discusses the continued relevance of the legal entity despite the increased reliance on the notion of undertaking in the case law of the CJEU. Chapter 7 offers some conclusions from the research and identifies questions that emerge from the analysis.

CHAPTER 1 – ECONOMIC ENTITIES AND THE LAW

Business law in general, including competition rules, assumes that economic players are subject to its mandates. Yet the law does not address these entities directly, but the vehicles that embody them. Legal entities, and only they, contract, buy, sell, appear before courts, and pay taxes. The above is the prevalent position taken by legal systems, with occasional corrections that seek to go beyond mere legal form. In the remainder of this work, this enforcement model or paradigm is referred to as the 'legal entity' perspective.

An alternative viewpoint is that firms pre-date their legal architecture, which is merely an instrument through which they act. Rather than these instruments, business laws in general should have in mind the economic players, or the 'firm', as the true addressee of business rules. Under this perspective, the legal entity perspective should be overcome, or at the very least made more malleable where necessary in order to ensure that the law achieves its intended purpose, by looking at the economic reality behind corporate structures. This logic inspires, if not always in an entirely consistent manner, the notion of undertaking in the field of EU competition law and is hereafter referred to as the 'economic entity' perspective.

The adoption of an economic entity perspective is not unique to EU competition law (or even, through a process of emulation, by national competition laws). For many years, legislators and courts throughout the world have sought to overcome the anomalies resulting from the prevailing legal entity paradigm when applying the law to economic these organisations. In this respect, EU competition law is a relatively advanced disciple of a body of theories, doctrines and legal constructions that have sought over the years to place substance over form with respect to corporate groups.

This chapter 1 sets out to explore these earlier doctrines and the way in which they relate to the notion of 'undertaking' as developed in EU law. Its first section discusses their underlying logic by looking at the notion of the 'firm' as developed in business literature. A second part turns to legal entities, and questions whether they simply embody the firm or represent a distinct reality, discussing its main features (personhood, limited liability and the capacity to

possess other entities) and the potential anomalies resulting therefrom. A final section places the notion of undertaking in EU competition law with respect to these theories.

1.1 The 'firm' as an economic entity

The notion of undertaking, as employed in the field of competition law, is generally assumed to correspond to the 'firm', a term consolidated in economic thinking following Ronald Coase's seminal 1937 article,[30] which inaugurated an area of research that has continued to this day.[31]

1.1.1 Coase's conception of the firm

Coase's analysis takes as its starting point the question of why firms, in the sense of organised structures to conduct business activities, exist if, as was then understood by economic science, price mechanisms ensure the efficient use of resources, which would suggest that workers, suppliers and clients could simply trade directly. Coase convincingly argued that those mechanisms involved various forms of transaction costs (although he did not use that term), which could be efficiently managed by firms. In the absence of these structures, each individual economic agent (investors, workers, managers, suppliers and many others) would need to obtain and process information, make decisions and implement their actions negotiating and concluding separate contracts for each exchange transaction. By handing the power to organise these transactions to a firm, the latter would greatly minimise those costs. [32]

[30] Ronald H Coase, 'The Nature of the Firm', (1937) 16 (4) *Economica* 386. The relevance of Coase's work in the construction of the undertaking was already noted in Wouter PJ Wils, 'The undertaking as subject of E.C. competition law and the imputation of infringements to natural or legal persons', (2000) 25(2) *European Law Review* 99 at 102. In a similar sense, with a more detailed view of that contribution, Thibault Schrepel, *The Theory of Granularity: A Path for Antitrust in Blockchain Ecosystems* (January 14, 2020), available at SSRN: https://ssrn.com/abstract=3519032 at 6.

[31] For an introduction to the theory of the firm and its evolution (with the added value of a competition law perspective) see Florence Thépot, *The Interaction Between Competition Law and Corporate Governance. Opening the 'black box'*. Cambridge, 2019, at pp 18ff. Also John Kay, 'Theories of the Firm' (2018) 25(1) *International Journal of the Economics of Business* 11.

[32] Ronald H Coase, 'The Nature of the Firm', fn 30 above at 392.

By implication, the firm should be expected to expand for so long as this integration represented an advantage with respect to the price mechanism in an open market.[33]

As is immediately apparent, the notion of 'control' is central to Coase's initial understanding of the firm and to the evolution of the notion. The power to determine a course of action enables the firm to decide the terms of business among the various stakeholders in an efficient manner.

Coase's perspective would be usefully complemented by the understanding of the firm as a 'nexus of contracts', whereby people would transact with a corporate entity rather than its components, placing the firm at the centre of a web of legal agreements, with employees, suppliers, customers, and lenders.[34] More recently, the understanding of the firm as an organised nexus of contracts has been challenged, as empirical evidence of businesses articulated in alternative ways has become available.[35] This may be relevant with respect to new ways of organising digital players such as blockchain-based platforms, an issue that is a recent object of attention by competition law scholars.[36]

1.1.2 Perspectives on the nature of firms

In recent years, the academic work on the nature of the firm has inquired on the true nature of these organisations,[37] resulting in two broad paradigms: an 'institutional' perspective that sees

[33] In Coase's own words, 'a firm will tend to expand until the costs of organising an extra transaction within the firm become equal to the costs of carrying out the same transaction by means of an exchange on the open market or the costs of organising in another firm'. Ibid, at 395.

[34] This was famously first expressed by Michael Jensen and William Meckling, 'Theory of the firm: Managerial Behavior, Agency Costs and Capital Structure (1976) 3(4) *Journal of Financial Economics* 305. For a comment on this contribution see William W Bratton Jr, 'The Nexus of Contract Corporation: A Critical Appraisal' (1989) 74 *Cornell Law Review* 407; Grant M Hayden and Matthew T Bodie, 'The Uncorporation and the Unraveling of the "Nexus of Contract Theory"' (2010) 109 *Michigan Law Review* 1127 and David Gindis, 'On the origins, meaning and influence of Jensen and Meckling's definition of the firm', (2020) 72(4) *Oxford Economic Papers* 966.

[35] Andrew Verstein, 'Enterprise without Entities', (2017) 116 *Michigan Law Review* 247.

[36] See in this respect Thibault Schrepel, *The Theory of Granularity…* in fn 30.

[37] Recent works include Eric W Orts, *Business Persons - A Legal Theory of the Firm*, Oxford, 2013; Weijing Zhang, *The Origin of the Capitalist Firm - An Entrepreneurial/Contractual Theory of the Firm*, Springer 2018; Abraham A. Singer, *The Form of the Firm: A Normative Political Theory of the Corporation*, Oxford 2019 and Eva Micheler, *Company Law: A Real Entity Theory*. Cambridge, 2021.

firms as an identifiable social organisation, and a 'transactional' viewpoint whereby the firm would aggregate multiple stakeholders. These two models have been respectively labelled by Marc Moore and Martin Petrin as the 'entity' and the 'contractarian' theories of the firm.[38]

The first of these perspectives sees firms as a social reality, whose existence and corresponding responsibilities transcend the various private identities and interests of any of its human component 'parts'. For its proponents, firms are a 'social fact' whose members intend to act not as individuals but as part of the firm, a reality accepted by non-members, who agree that the members of the firm constitute a reality of its own. This consensus makes firms real.[39] In turn, the 'contractarian' approach sees the firm as having no distinct existence or interests independently of the aggregate private identities and interests of its various human constituents as expressed via their consensual market interactions with one another.[40] This second approach would tend to look rather to the specific position of the various stakeholders and place liability on them rather than on the organisation itself.

The above discussion has, besides a doctrinal interest, important practical consequences, since the 'entity' viewpoint is more responsive to the perceived social responsibilities of firms, while the 'contractarian' paradigm is generally hostile to their recognition and would tend to identify the underlying components or stakeholders as subjects of the law.

While recognising their differences, these perspectives are not necessarily mutually exclusive, as each focus on different elements which are useful to understand firms. The contractarian perspective usefully highlights agency issues and incentives, providing a solid economic and legal analysis, and has become the dominant analytical framework. In turn, the entity viewpoint, once cleared from the anthromorphism of its initial formulations by von Gierke,[41] usefully places firms as social actors who do exist as entities distinct from their components. That assumption that economic players do exist and operate in the markets lies at the base of

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[38] Marc Moore and Martin Petrin, *Corporate Governance - Law, Regulation and Theory*, Bloomsbury, 2017, at 23. Eva Micheler adds a 'concession' perspective that sees company law as a creature of law. See Eva Micheler, *Company Law…* cit in the previous footnote at 12.

[39] Eva Micheler, *Company Law…* at 21.

[40] Marc Moore and Martin Petrin, *Corporate Governance…* cit at 23.

[41] Marc Moore and Martin Petrin, *Corporate Governance…* at Chapter 2, footnote 4 and Eva Micheler, *Company Law…* at 18.

their recognition as ‘undertakings’ by EU competition law, making the entity perspective unavoidable in this dissertation.

1.1.3 Firms and legal entities

As explained in the introduction of this chapter, firms act in the legal world through legal entities. This ‘legal entity’ perspective is prevalent in the application of all laws, with limited corrections that occasionally require the consolidated treatment of these vehicles and jurisprudential doctrines aiming at placing economic reality above form – an ‘economic entity perspective’ very much in the making.

The sheer weight of the legal entity perspective explains that, more frequently than not, terms such as ‘firms’ and ‘companies’ or ‘corporations’ are used interchangeably. Somewhat surprisingly, this is so not only in usual language, but also in legal and economic literature. As explained by Jean-Philippe Robé,

> ‘The concept of firm is explained in this chapter, which starts by making a sharp distinction between the concepts of ‘firm’ and ‘corporation’. The two words are often used as synonyms, but they correspond to radically different notions. A firm is an organization performing an economic activity. A corporation is a type of legal person – most firms of some significance being organized using business corporations.’[42]

[42] Jean-Philippe Robé,*Property, Power and Politics – Why We Need to Rethink the World Power System*, Bristol University Press, 2021, at 195. See from the same author ‘The Legal Structure of the Firm’ (2011) 1(1) *Accounting, Economics, and Law* 1. More recently Jesús Alfaro Águila-Real, ‘Corporations are not Firms’, cit above at fn 23.

Robé's position on terminology has been opposed by several authors, who claim that this differentiation may not be relevant and could result in further confusion.[43] However, even these authors agree that economic players and legal vehicles are different realities.[44]

Irrespective of the above discussion, the distinction between firms and the legal vehicles they use cannot be overlooked in this dissertation, which explores the increased reliance of an economic entity perspective through the notion of undertaking. It may not be seriously questioned that, in most organisations, the economic players or firms do not fully or exclusively correspond to specific legal entities. That is especially the case of the firms most concerned with EU competition law, which are frequently multinational groups of companies most of whose components are dependent affiliates used by firms to structure their activities. These constellations of legal persons within a firm blur the original identification between a business entity and its legal personification. The following section discusses the constituent elements of legal entities, the anomalies stemming from it, and the corrections that have emerged to bridge the gap between form and substance.

1.2 The law of legal entities and its inconsistencies

Over the last two centuries, the laws of multiple jurisdictions have given business players various tools to help them function as collective entities through a right to set up and control legal entities. These vehicles consistently feature three constituent ingredients which are universally recognised: the attribution of legal personality, the limited liability of shareholders and the right to own other entities. The following subsections discuss these tools and the potential anomalies they cause.

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[43] Simon Deakin, David Gindis and Geoffrey M Hodgson, 'What is A Firm? A Reply to Jean-Philippe Robé' (2021) 17(5) *Journal of Institutional Economics* 861. This was followed by a rebuttal (Jean-Philippe Robé, 'Firms Versus Corporations: A Rebuttal of Simon Deakin, David Gindis, and Geoffrey M. Hodgson', (2021) 1(9) *Journal of Institutional Economics* 1) and a counter-response (Simon Deakin, David Gindis and Geoffrey M. Hodgson, 'A further reply to Jean-Philippe Robé on the firm' (2022) 1(4) *Journal of Institutional Economics* 1).

[44] As noted by in the last counter-response of Deakin, Gindis and Hodgson quoted in the earlier footnote, '(w)e also concur that the concepts of 'firm' and 'corporation' are neither synonymous nor interchangeable' ('A further reply…' at 1.)

1.2.1 Legal personality

Legal personality makes it possible to treat an organisation, and particularly a business entity, as a centre of attribution. Originally an individual concession, it became generally available under statutory provisions by the middle of the nineteenth century. The 'legal entities' so constituted, as they were often called, would generally be treated under the law as ordinary (i.e. 'natural') persons, and hence recognised the right to enter into legal relationships such as contracts, to apply for licences and ultimately to run businesses, subject to the conditions laid down by the law governing their creation.

The nature of this 'fiction' or 'artificial' construction[45] has been extensively debated in the legal literature. For the purposes of this discussion suffice to say that this tool permits business entities to enter into relationships and facilitate transactions, enabling them to operate the 'nexus of contracts' identified in the theory of the firm. As Bryant Smith noted in 1928 and remains true today,

> 'The broad purpose of legal personality, whether of a ship, an idol, a molecule, or a man, and upon whomever or whatever conferred, is to facilitate the regulation, by organized society, of human conduct and intercourse.'[46]

Legal personality constitutes an essential feature for the functioning of firms, since the enforcement of any obligation (be it contractual or not, such as an obligation imposed under public law) requires the latter to exist. While it has been argued that technological developments may make it possible to set up firms using other parameters and eventually make legal entities redundant, actual experience of this is still limited.[47]

It would be immediately noted that the grant of legal personality does not result from the existence of a market player understood as a 'real entity' but from the constitution of a corporate vehicle. In other words, legal personality belongs to the corporate vehicle, not to the

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[45] On the 'artificial' tag see Arthur W Machen, 'Corporate Personality', (1911) 24(4) *Harvard Law Review* 257.

[46] Bryant Smith, 'Legal Personality' (1928) 36 *Yale Law Journal* 283 at 296.

[47] See in this regard June Carbone and Nancy Levit, 'The Death of the Firm' (2017) 101 *Minnesota Law Review* 963; Andrew Verstein, 'Enterprise without Entities', (2017) 116 *Michigan Law Review* 247.

business players that possess them. The constitution of a legal entity, from which legal personhood flows, is in that respect a formal transaction which takes place in a legal setting, outside the business world in which firms operate. In a certain sense, companies are used as a vehicle or an avatar by the business players themselves to intervene in the market, but are a separate reality from them.

The separate legal personality raises difficult questions when combined with the other two features identified above, namely limited liability and groups of companies, which are discussed in turn.

1.2.2 Limited liability and lifting the veil

Limited liability, the 'unyielding rock' of corporate law,[48] came into being some years after the arrival of legal personality to protect the incentive to accumulate capital by guaranteeing to investors in a project that they would not respond for the debts of the organisation beyond the capital that they had agreed to contribute. The term itself is somewhat confusing, as it suggests that entities would only respond for their obligations up to a limit, when in legal terms companies are liable without any limit – it is their shareholders, who are only liable up to the limit of their capital contribution. That said, it is not only common but correct to identify this tool as 'limited liability', since that is what the mechanism achieves in the end for its owners.

The grant to market players of limited liability is understood as necessary to protect investment, which the laws make subject to various requirements of transparency, publicity and, with respect to the larger entities, independent verification of the accounts. Despite these tools, this mechanism raises at times questions of material justice, as it may deceive stakeholders such as suppliers, workers or lenders who, assuming a relationship with a business player, end having to realise that they only deal with a specific legal entity. These considerations explain the emergence of doctrines that allow the lifting (or piercing[49]) of the

[48] This epithet was famously used by Lord Neuberger in *Prest v Petrodel Resources Ltd* [2013] UKSC 34, [2013] 3 WLR 1 at 66, citing an extra-judicial publication by Lord Templeman ('Forty Years On', (1990) 11 *Company Law* 10). For a detailed review of the emergence of limited liability in the United States see Philip I. Blumberg, 'Limited Liability and Corporate Groups' (1986) 11 *Journal of Corporate Law* 573. As to the UK, the leading case is *Salomon v A Salomon & Co Ltd* [1896] UKHL 1 [1897] AC 22.

[49] In *Atlas Maritime Co SA v Avalon Maritime Ltd, The Coral Rose No 1* [1991] 4 All ER 769 CA at 776) Staughton LJ said: 'To *pierce* the corporate veil is an expression that I would reserve for treating the rights or

corporate veil, a common name for a variety of tools that seek to correct the effect of the interposition of a formal structure on the claims directed against an economic entity or unit.[50]

Corporate veil piercing doctrines, universally presented as inconsistent and lacking a clear logic,[51] tackle the excesses of limited liability through an approach that ultimately hinges on two necessary requirements: control and abuse. By the first of these, the corporate veil would be lifted only where the entity in question was being used by a controlling owner that was acting through the corporation and could be identified by the 'piercing' exercise, as the claim ultimately rested on the assumption that someone was using the corporate structure as a 'façade'. As concerns the second limb, the legal fiction may only be challenged if there is a sufficiently serious reason. In civil law jurisdictions, this would mean the existence of an 'abuse of rights', a principle whereby the law may be disapplied in the presence of an unconscionable claim.[52] For their part, common law jurisdictions have struggled with different notions over the years, most notably fraud, dishonesty, and concealment. In the end, for both legal systems the real question was whether there should be limits to corporate interposition.

Veil piercing is best seen as an exception to the principle of limited liability, pursuant to which a company, the separate legal personality of which is maintained, is held liable for an obligation owed by its controller.[53] The doctrine operates as a 'safety valve' in corporate law

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liabilities or activities of a company as the rights or liabilities or activities of its shareholders. To *lift* the corporate veil or *look behind it*, on the other hand, should mean to have regard to the shareholding in a company [its controllers] for some legal purpose.' This distinction is not universally accepted and therefore has not been used in the discussion that follows.

[50] The literature on corporate veil is very extensive. See generally Eva Micheler, *Company Law*… cit at fn 37, at 58. For a comparative law perspective with a specific reference to the competition rules, see Sandra K Miller, 'Piercing the Corporate Veil among Affiliated Companies in the European Community and in the U.S.: A Comparative Analysis of U.S., German, and U.K. Veil-Piercing Approaches' (1998) 36 *American Business Law Journal* 73. For a useful account under UK law see Aleka Mandaraka-Sheppard, 'New Trends in Piercing the Corporate Veil: The Conservative Versus the Liberal Approaches', (2014) 35 (1) *Business Law Review* 2 and Agustin Ricardo Spotorno, 'Piercing the Corporate Veil in the UK: The Never-Ending Mess', (2018) 39(4) *Business Law Review* 102. As regards Spanish law, see Carmen Boldó Roda, *Levantamiento del velo y persona jurídica en el derecho privado español* (3ª ed.) Aranzadi, 2006 and Segismundo Álvarez Royo-Villanova, 'La STS 673/2021 y la revisión de la doctrina del levantamiento del velo', *La Ley* 9998, 27 January 2022.

[51] See references to criticism of the doctrine in A Spotorno, 'Piercing …' cit in the preceding fn at 103.

[52] A famous precedent in this respect is the International Court of Justice decision in *Barcelona Traction, Light and Power Co Ltd*, [1970] ICJ 3, which held that the corporate veil may be lifted in cases of misuse, fraud, malfeasance or evasion of legal obligations.

[53] Eva Micheler, *Company Law*… cit at fn 37, 62.

systems, so that the privileges associated with corporate vehicles are no longer admissible in extreme cases of fraud or abuse of rights. These doctrines are, however, not aimed at resolving the question of how economic agents should be treated under corporate law. As such, they must be placed apart from enterprise and single entity doctrines, which question legal separation itself, and which are discussed later in this chapter.

1.2.3 Affiliate ownership. The emergence of groups of companies

The third mechanism conferred on business players by corporate laws that is relevant to the discussion of the relationship between the firm and the legal entity consists in the possibility of a legal entity owning participations in other legal persons. These shareholdings may reach a level permitting total control over the owned entity, turning it into a subsidiary.

As explained by Philip Blumberg, the recognition that legal entities could own capital in other legal entities enabled them to enjoy, as well, the benefits of limited liability, without it being realised that the relation between parent and subsidiary, both entities being part of the same economic structure, is markedly different from that of the investor and the enterprise.[54] The tool emerged independently from the two elements discussed earlier (legal personality and individual limitations on liability) at the turn of the twentieth century. An article published in 1929 extolled the creation of corporate structures based on multiple legal entities as a source of multiple benefits, including

> 'increased facility in financing; the desire to escape the difficulty, if not the impossibility, of qualifying the parent company as a foreign corporation in a particular state; the avoidance of complications involved in the purchase of physical assets: the retention of the good will of an established business unit; the avoidance of taxation; the avoidance of cumbersome management structures [and] the desire for limited liability'.[55]

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[54] Philip I. Blumberg, 'Limited Liability and Corporate Groups' (1986) 11 *Journal of Corporate Law* 573, at 608.

[55] William O. Douglas and Carrol M. Shanks 'Insulation from Liability Through Subsidiary Corporations', (1929) 39 (2) *Yale Law Journal* 193. On a related vein, US corporate lawyers would warn about the potential imbalances resulting from the expansion of 'megasubsidiaries' placing the assets of companies in the hands of the management bodies of corporations and not, as originally envisaged in corporate law, of shareholders. See

Out of these possibilities, probably the main use of subsidiary creation was to split the firm's liability across different legal entities whilst enabling the aggregation of assets between the two, reducing the risk of cross-contagion from any liability affecting the whole firm.[56] That, however, came at a cost, as employees, creditors, tax authorities or other stakeholders would be unable to access the assets of these structures if a breach occurred. Confronted with these claims, the courts have generally taken the position that these mechanisms were acceptable; their answer, arguably influenced by the wish to aid the creation and development of legal entities seen as useful mechanisms to facilitate investment and trade, confirmed the use of corporate entities despite the potential tension with principles of material justice, particularly in respect of subsidiaries.[57] Only in the presence of 'some relevant wrongdoing' would a correction be introduced.

Besides limiting liability, interposing companies allowed firms to initiate activities with a clean slate and, in certain cases, to circumvent mandatory provisions, especially where, by combining this practice with mechanisms to conceal the identity of their shareholders, the latter remained unidentified. A telling example of this in the US was the sidestepping of the 'Commodities Clause' introduced by the Hepburn Act,[58] which had made it unlawful for a railroad company to transport in interstate commerce (except for its own use) virtually any article or commodity manufactured, mined, or produced by the railroad company or under its authority.[59] That limitation was famously bypassed by railway operators through sister corporations, with some support from the US Supreme Court.[60]

Melvin Aron Eisenberg, 'Megasubsidiaries: The Effect of Corporate Structure on Corporate Control', (1971) 84(7) *Harvard Law Review* 1577.

[56] Richard Squire, 'Strategic Liability in the Corporate Group' (2011) 78 *The University of Chicago Law Review* 605.

[57] In the words of the UK Court of Appeals, 'the court is not free to disregard the principle of *Salomon v A Salomon & Co Ltd* [1897] AC 22 merely because it considers that justice so requires. Our law, for better or worse, recognises the creation of subsidiary companies, which though in one sense the creatures of their parent companies, will nevertheless under the general law fall to be treated as separate legal entities with all the rights and liabilities which would normally attach to separate legal entities.' *Adams v Cape Industries plc* [1990] Ch 433 at 536. Note however that this finding may have been affected by *Vedanta* and *Opkabi* discussed below.

[58] 34 Stat. 584 (1906)

[59] This prohibition sought to protect US farmers, who were forced by railway companies to sell their produce at loading (where their bargaining power was low), the railway company getting the much higher destination price.

[60] *United States v. Elgin, J. & E. Ry. Co*., 298 US 492 (1936). The later *United States v. S. Buffalo Ry. Co*., 333 US 771 (1948) declined to overrule *Elgin* on similar facts. Taken from Phillip I. Blumberg, 'The Transformation

The generalisation of multiple entity structures over the years resulted in a process whereby legislators shifted from a pure legal entity perspective to an economic entity viewpoint,[61] seeking to disregard independent legal entities and target the economic groups that controlled them,[62] thereby giving birth to what is commonly known as the 'enterprise doctrine'. The following subsection examines this development.

1.2.4 Enterprise doctrine

This term identifies various strains of legal thinking originally developed in the US that posit that economic entities should be addressed as such by the law, and not each legal entity independently. One of its implications would be the need to identify the ultimate centre of decision making in corporate groups rather than treating each legal entity as a wholly separate being.

Adolf A. Berle is credited with the formulation of the 'enterprise entity' as a theory in 1947.[63] In his article, Berle examined several anomalies, such as the doctrine of 'de facto' corporations, lifting the veil decisions affirming shareholder liability by the courts, and judgments on the misuse of corporate structures to circumvent the law. He concluded that some decisions of the courts could be better understood as being addressed to the business group or 'enterprise' and not the legally independent persons controlled by it.

However, an enterprise perspective under the law predated Berle's academic proposal. As explained by Blumberg, several US laws had turned to the notion of control as early as 1933 in

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of Modern Corporation Law: The Law of Corporate Groups' (2005) 37(3) *Connecticut Law Review* 605, at 608 fn 10. That principle would be abandoned in *Anderson v Abbott*, 321 US 349 (1944), where the USSC held that 'Courts will not allow the interposition of a corporation to defeat a legislative policy' (at 321 US 362). Under UK law, the principle that a corporate parent may not use a subsidiary to obtain a legal benefit to which it would not otherwise be entitled was affirmed in *Merchandise Transp. Ltd. v. British Transport Commission*, [1962] 2 QB 173.

[61] For an account of these developments, see Phillip I. Blumberg, 'The Transformation of Modern Corporation Law: The Law of Corporate Groups' (2005) 37(3) *Connecticut Law Review* 605, at 608. See also Phillip I Blumberg, 'The Corporate Entity in an Era of Multinational Corporations', (1990) 15 *Delaware Journal of Corporation Law* 283.

[62] For a useful summary of that process in the US, see Phillip I. Blumberg, 'The Transformation of Modern Corporation Law: The Law of Corporate Groups' (2005) 37(3) *Connecticut Law Review* 605.

[63] Adolf A Berle Jr, 'The Theory of Enterprise Entity', (1947) 47(3) *Columbia Law Review* 343.

the context of various regulatory programmes dealing with key industries for the economy as a reaction to the risks of circumvention through setting up formally independent corporate vehicles.[64]

As is immediately apparent, while they may recall the 'corporate veil' constructions developed in the context of limitations of liability, these legislative initiatives were aimed at economic groups without assuming or requiring fraud or concealment as a justification. The question was not whether the interposition of a legal entity and the resulting limitations of liability should be treated as an abuse of law, a matter courts were aiming at. Firms were welcome to dress themselves up as legal entities, an act that would not be deemed to be a concealment of any sort. The only issue was to ensure that laws in different fields achieved their intended purpose, which may at times require a consolidated treatment of formally separate legal entities.

1.2.5 EU legislation on consolidation

A description of legal tools overcoming a strict legal entity paradigm would be incomplete without a reference to several pieces of EU legislation that consider economic players and often even label their addressees as 'undertakings', as with the Directive on the Transfers of Undertakings,[65] which looks at economic activities defined as 'organised grouping of resources which has the objective of pursuing an economic activity'; the Directive on European Workers' Councils,[66] which despite not defining the 'undertakings' seeks a consolidated treatment of groups of companies; the Accounts Directive,[67] which provides for the consolidation of corporate accounts within groups of companies or the Regulation on

[64] Blumberg cites in this regard the Emergency Transportation Act (48 Stat. 217 (1933)), the Securities Acts of 1933 and 1934 (48 Stat. 74 (1933) and 48 Stat. 881 (1934)), the Public Utility Holding Company Act (13 49 Stat. 803 (1935)), the National Labor Relations Act (49 Stat. 449 (1935)) and the Investment Company Act of 1940 (54 Stat. 789 (1940)) as examples. See Phillip I. Blumberg, 'The Transformation of Modern Corporation Law: The Law of Corporate Groups' (2005) 37(3) *Connecticut Law Review* 605, at 608.

[65] Directive 2001/23/EC, [2001] OJ L 82/16 (as amended).

[66] Directive 2009/38/EC on European Works Council [2009] OJ L 122/28.

[67] Directive 2013/34/EU on Annual Accounts [2013] OJ L 18/19.

Insolvency Proceedings,[68] to name various instruments which take a material approach to the economic players considered by their mandates.

Alongside these Directives, mention should be made of the many years the EU has invested unsuccessfully in other projects aimed at regulating economic entities and empowering agencies and courts to examine the mazes of legally separate entities through which they act. The historic failures of the proposed Fifth and Ninth Company Law Directives, which intended to address respectively the structure and management of groups of companies, deserve a special mention. While it is true that these initiatives did not cover all possible vehicles used by economic players, a common solution in that area would have paved the way to a broader framework for the treatment of groups of entities, which might well have been a game changer in the legal treatment of undertakings in the EU. In the tax field, the recent (and, at the time of writing, unfortunately stalled) projects for a Common Consolidated Corporate Tax Base should be mentioned as an indication that this process still shows some signs of life.[69]

Most unfortunately, these legislative efforts have developed without consistence with the notion of undertaking as developed in EU competition law, despite identifying their addressees as undertakings.[70] That has reduced the legal weight that a broader application of the notion may have provided and, more importantly, deprived the Legislature an opportunity to endorse its creation, condemning the doctrine of the undertaking as developed in competition law to the status of a judicial creature.

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[68] Regulation 2015/848 on Insolvency Proceedings, [2015] OJ L 141/19.

[69] See proposals at https://ec.europa.eu/taxation_customs/business/company-tax/common-consolidated-corporate-tax-base-ccctb (accessed on 1 June 2022). For a discussion of the treatment of company separation in the tax field see Janet Dine and Marios Koutsias, 'The Three Shades of Tax Avoidance of Corporate Groups: Company Law, Ethics and the Multiplicity of Jurisdictions Involved'. (2019) 30(1) *European Business Law Review* 149. A mention must also be made of the work at OECD level in this area, most especially the *OECD Guidelines for Multinational Enterprises*, OECD Publishing, 2011.

[70] See fn 25 above.

1.2.6 Single entity doctrines

In parallel with the enterprise perspective examined in the preceding subsection, reference needs to be made to the trend in the case law that disallows defences based on separate legal personality, thereby correcting potential injustices resulting from a strict interpretation of the principle of separate legal personality in groups of companies, and which may broadly be referred to as single entity doctrines.[71]

As with the case of piercing the corporate veil, single entity doctrines aim to correct potential excesses in the exercise of the rights enjoyed under company law. However, the target here is not to soften the edges of the legal limitations of liability in the context of fraud, but to treat several independent legal entities as one. A relevant example in this respect is the use of single entity arguments to 'anchor' a matter before a certain jurisdiction, giving potential claimants the right to formulate their claims against a parent company domiciled in a given country with respect to actions committed abroad by a subsidiary, as in the recent judgments of the UK Supreme Court in *Vedanta*[72] and *Okpabi*,[73] where the court allowed the claim, noting that the defendant and its subsidiary were 'a single commercial undertaking, with boundaries of legal personality and ownership within the group becoming irrelevant'.[74] It should be noted that these decisions considered a situation where the subsidiary was a mere instrument in the hands of its parent company, expressly rejecting a finding of liability based merely on the existence of control, an element which was considered to be just a starting point, the issue being 'the

[71] This term has been chosen for the sake of consistency with the purpose of this thesis. US antitrust practice uses this term as shorthand for the exclusion of agreements between companies forming a 'single entity' under section 1 of the Sherman Act. Thus, the corresponding term in the US would be 'enterprise liability' or 'enterprise doctrine'. See in that respect the ground-breaking article by Meredith Dearborn, 'Enterprise Liability: Reviewing and Revitalizing Liability for Corporate Groups', (2009) 97 *California Law Review* 195. Also Gwynne Skinner, 'Rethinking Limited Liability of Parent Corporations for Foreign Subsidiaries' Violations of International Human Rights Law', (2015) 72 *Washington & Lee Law Review* 1769. With respect to Europe, see Martin Petrin and Barnali Choudhury, 'Group Company Liability' (2018) 19 *European Business Organization Law Review* 771.

[72] *Lungowe v Vedanta Resources plc* [2019] UKSC 20. For a comment see Andrew Sanger, 'Parent Company Duty of Care to Third Parties Harmed by Overseas Subsidiaries' (2019) 78 *The Cambridge Law Journal* 486; Gareth Jones, 'It's Not Easy Being a Parent: AAA v. Unilever and the Control Conundrum – When a Controlling Shareholder May Owe a Duty of Care in Respect of the Acts or Omissions of a Subsidiary', (2019), 40(1) *Business Law Review* 2.

[73] *Okpabi v Royal Dutch Shell plc* [2021] UKSC 3.

[74] *Vedanta,* 51, restated in *Okpabi,* 157.

extent to which the parent did take over or share with the subsidiary the management of the relevant activity'.[75]

In EU law, single entity considerations have mainly been applied in the area of competition law, as the following section explores.

1.3 The notion of undertaking in EU competition law

It is entirely logical that, in the field of competition law, economic players should be viewed as an economic reality irrespective of legal form. This is necessary to properly assess their actions and evaluate their market power; at the same time, parent and affiliate entities need to be shielded from rules against agreements between independent players. As a result, EU competition law has, from its inception, applied single entity constructions to groups of companies.

An early example of the above is the judgment of the Court in *ICI*.[76] As explained in more detail in chapter 2 of this dissertation, the price-fixing activities considered in that precedent had been directed by the parent company but implemented within the common market by its affiliates. Attributing the conduct to the parent legal entity was problematic, as it was located outside the territorial scope of the then Common Market. Besides, at the end of the enforcement procedure the Commission had notified the decision imposing the fine through a subsidiary.[77] In the end, all these difficulties were addressed by the Court through a single entity doctrine whereby the Court noted that '(…) the subsidiary, although having separate legal personality, [did] not decide independently upon its own conduct on the market, but carrie[d] out, in all material respects, the instructions given to it by the parent company'.[78] That made attribution of liability to the parent company plausible.

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[75] *Okpabi*, at 147.

[76] Judgment of 14 July 1972, *Imperial Chemical Industries v Commission*, 48/69. ECLI:EU:C:1972:70.

[77] Ibid at 34.

[78] Ibid at 133.

In subsequent years, as explained in the following chapters of this thesis, the Court applied the single entity logic to achieve multiple goals, including expanding parental liability beyond the confines of *ICI* to cases with no direct involvement of the parent, applying single entity logic to recidivism so that market players would bear additional fines despite it was different entities that may have committed the earlier breach or applying succession doctrines to avoid that corporate reorganisations interfered with competition law enforcement.

The adoption of a broader definition of the undertaking as an economic entity irrespective of legal form stretched the single entity doctrine beyond its historical confines until it morphed into a fuller doctrine of the 'undertaking', this term having brought the recognition of the separate entity to a whole new level. The term would henceforth be used as a centre of attribution, with the historical declaration that the principle of personality should apply to the undertaking and not to the persons in it,[79] despite maintaining the 'single entity' terminology interchangeably with the notion of undertaking.[80]

The above process implies the recognition of economic players as a reality distinct of the legal entities through which they act, revealing a policy decision to move away from a strict legal entity perspective. As the Court would recently observe in *Schindler*, the assumption is that

> 'The authors of the Treaties chose to use the concept of an undertaking to designate the perpetrator of an infringement of competition law, who is liable to be punished pursuant to Articles 81 EC and 82 EC, now Articles 101 TFEU and 102 TFEU, and not the concept of a company or firm or of a legal person, used in Article 48 EC, currently Article 54 TFEU.'[81]

[79] Judgment of 10 April 2014, *Commission v Siemens Österreich*, C-231/11 P to C-233/11 P, ECLI:EU:C:2014:256, at 56. See section 2.2.4 below.

[80] Judgment of 6 October 2021 (Grand Chamber) *Sumal v Mercedes Benz Trucks España*, C-882/19, ECLI:EU:C:2021:800 at 67.

[81] Judgment of 18 July 2013, *Schindler and Others v Commission*, C-501/11 P, ECLI:EU:C:2013:522, at 102.

1.4 Conclusions

As can be seen from the preceding sections, the notion of undertaking in EU competition law has to be placed in the context of a wider process engaged in by legislators and courts aimed at correcting potential distortions resulting from the prevailing legal entity paradigm, identifying economic actors or firms as separate to the legal vehicles through which they act.

Company law, understood here in a broad sense, has granted market players (understood here as real beings whose existence predates their recognition by the law) the ability to set up formal entities that provide for three very relevant elements to carry business activities: personification, limitation of liability, and the power to own other legal entities. Each of these elements serves a defined purpose and they have been remarkably successful, as their expansion through virtually all jurisdictions shows; at the same time, their combined effect has led to legal entities moving away from their original role of giving legal personality to a firm, which is mainly run today through a constellation of interposed vehicles. The recognition that firms no longer correspond to these vehicles lies at the heart of this thesis.

Despite identifying the potential distortions that result, courts and legislators have kept these rights virtually untouched, consolidating a legal entity perspective that only is rarely disturbed. EU competition law has sought to overcome this anomaly to the extent that it interferes with its ultimate goals, ensuring that economic players, and not merely the legal entities that personify them, follow market rules. To that effect, it has availed itself of legal tools that would assist it in placing substance over form, adopting an economic entity approach based on an expansive reading of the single entity doctrine.

Over the years, that doctrine has been expanded to cover other instances where the prevailing legal entity perspective interfered with its mandates. That process, where a single entity doctrine would give birth to the notion of undertaking as it is today known in EU competition law is explored in the next chapter.

CHAPTER 2 – THE EVOLUTION OF THE NOTION OF UNDERTAKING IN EU COMPETITION LAW

As with every other creature of case-law, the legal notion of undertaking is a historical process, having transformed the meaning of fundamental principles of law.

In that respect, the term ‘undertaking’ stands out in the Treaties for the freedom it gave to the Court to shape its meaning over the years. Early case law, understandably concerned by formal clarity in its impulse of a new legal order, opted to define it as a legal entity. Later jurisprudence in the field articulated a single entity doctrine, avoiding labelling economic players as undertakings. From the years following the 1991 seminal judgment in *Höfner*, the Court has placed the undertaking as the subject or addressee of competition law.

The process has not lacked inconsistencies, turnarounds, and occasional translation errors, not to mention judgments presenting earlier cases in support of a point that had never been made before. Special mention should be made here of the different approaches of the General Court and the Court of Justice, the latter being frequently asked to intervene in Grand Chamber format to qualify earlier judgments, sometimes even from the Grand Chamber themselves.

This Chapter will take stock of this remarkable process. As attractive as history is at times, the examination is necessarily limited to what is needed to show how, and if possible, why doctrines were presented, amended or formulated in a certain way.

The discussion is divided into three parts. The first section looks at the original meaning of the notion of undertaking in the ECSC Treaty and early case law. The second section describes the evolution of the doctrine of the Court in the application of the competition rules in the TFEU to this day. A third section offers some provisional xrconclusions.

2.1 The notion of undertaking in the ECSC Treaty

The Treaty of Paris of 18 April 1951 (the ECSC Treaty)[82] led the founding Member States to sail into the uncharted waters of 'a destiny henceforward shared'[83] through the common management of the strategic and traditionally state-intervened sectors of coal and steel. This was done by placing the economic entities pursuing these activities under a common policy under the control of a High Authority. The economic entities concerned with that process, the true subjects of that Treaty, were labelled 'undertakings',[84] a term that, given the prescriptive nature of the Treaty, appeared 142 times throughout its text.[85]

Despite its importance, the ECSC Treaty did not define what it meant by 'undertaking', in contrast with, for example, the products covered by its scope of application, listed in its first three annexes. It is suggested that, at the time, that may not have seemed necessary. The term meant to identify business players irrespective of legal form at a time when coal and steel firms in several countries, particularly in Germany, had a complicated legal status under legislation passed by the Allied Forces aimed at dismantling the conglomerates that were believed to have assisted Hitler's territorial ambitions.[86] It would be reasonable to expect that the authors of the ECSC Treaty wanted a concept that was broad enough to cover any vehicle irrespective of its legal configuration. The intention was clearly to ensure that all coal and steel industries were placed under the scope of Treaty irrespective of their legal status under national law.

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[82] Treaty establishing the European Coal and Steel Community, signed on 18 April 1951, English Special edition, 1972.

[83] The last paragraph of the preamble read: 'RESOLVED to substitute for age-old rivalries the merging of their essential interests; to create, by establishing an economic community, the basis for a broader and deeper community among peoples long divided by bloody conflicts; and to lay the foundations for institutions which will give direction to a destiny henceforward shared.'

[84] As explained in the Introduction, 'undertaking' is generally used in this thesis like any other of its language equivalents. In a stricter sense, English was not an official language of the ECSC Treaty. Moreover, the translation sent to the United Nations was 'enterprise' (United Nations, 1957 Treaty Series 261 at 140). The term 'undertaking' would appear only at the time of the UK Accession treaty in 1972.

[85] This is the number of times that the term 'Unternehmen' appears in the German version of the ECSC Treaty. The term 'undertaking' appears 155 times in the English text, but with different meanings.

[86] For a recent account of that process see Daniel Crane, 'Fascism and Monopoly', (2020) 118 *Michigan Law Review* 1315.

While understandable, vague legal concepts eventually require courts to specify their meaning. As a result, the notion of 'undertaking' came before the Court relatively early in two sets of cases decided between 1959 and 1961. The discussions did not refer to competition law, but the answers would influence that area and hence deserve a comment here.

2.1.1 The *SNUPAT* cases

The meaning of the term 'undertaking' first came before the Court in the two *SNUPAT* appeals, decided together in 1959.[87] The discussion concerned a levy imposed by the High Authority on purchases of scrap, a vital input for most steel factories but also a by-product. Under that levy the re-use of scrap ('chutes propres') was exempted, but that applied only where the scrap came from the 'same undertaking', raising the question of whether purchases between affiliates of a group should qualify for the exemption. In that context SNUPAT and SAFE, two French companies within the Régie Renault, an integrated commercial and industrial group ultimately owned and controlled by the French state, argued that they were the 'same undertaking' and consequently should be exempted from that levy. The High Authority disagreed, and the matter was taken to the Court.

In their submissions, the entities detailed the degree of integration of their activities, a situation which they contended predated the War. They also claimed that the High Authority had accepted that exemption in the case of other legally separate entities of their rivals Breda Siderurgica S.p.A. ('Breda'), and its subsidiary Koninklijke Nederlandse Hoogovens en Staalfabrieken NV ('Hoogovens'). The High Authority disagreed, considering each legal entity to be a separate undertaking. With respect to the exemption for Breda and Hoogovens, it argued that in that case the scrap was re-used at the same production site (the 'local integration' justification), an argument that was not available to SNUPAT and SAFE, whose facilities were far from each other.

[87] Judgments of 17 July 1959, *SNUPAT v High Authority*, 32-33/58, ECLI:EU:C:1959:18 and *SAFE v High Authority*, case 42/58, ECLI:EU:C:1959:20 (hereinafter both jointly referred to as '*SNUPAT I*')

In his Opinion on the case,[88] AG Lagrange examined the matter from a formal perspective and noted that the scrap transactions were documented as sale and purchase contracts between the various entities of the Régie Renault under private law. He also argued that an exception based on a vague 'group exemption' would cause uncertainty. His advice was followed by the Court, which noted that the notion of 'group' would interfere with the application of the mechanism and result in discrimination, as rivals would face different costs unrelated to their efficiency. Based on an approach that would not be followed today, the judgment noted that

> 'It would be manifestly contrary to the requirements of the Treaty if, as a result of an intervention on the part of the High Authority, the production costs of steel manufactured in whole or in part from ferrous scrap were to depend on the legal, administrative or financial structure of industrial groups.'[89]

Remarkably, the judgment avoided the uncomfortable discussion of the notion of 'undertaking' by refusing to review the exemption that had been granted to Breda and Hoogovens, which, as mentioned above, had been considered being the 'same undertaking' despite being separate legal entities. That weak link in the reasoning of the Court was spotted by an understandably annoyed SNUPAT which, following the first judgment, requested the High Authority to recalculate the levy, factoring in the payments of what it considered to be its unduly exempted rivals.[90] When that claim was rejected by the High Authority because of the 'local integration' justification, SNUPAT took the matter to court – again – in *SNUPAT II*.[91]

In that second case, Hoogovens intervened in support of the High Authority and provided a wealth of detail and arguments on the degree of integration of its factories, inviting the Court to visit its industrial premises. However, both AG Lagrange (who had reserved his position on this point in the first case) and the Court agreed with the claimant. More importantly, this time the Court was unable to avoid addressing head on the question of whether the term

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[88] Opinion of 29 May 1959 in *SNUPAT* and *SAFE*, 32, 33 and 42/58, ECLI:EU:C:1959:11.

[89] Judgment in *SNUPAT I*, at page 144 of the PDF text on the curia webpage. Nowadays this approach based on formal discrimination would be considered misguided, a consolidated perspective being generally considered useful to avoid distortions derived from corporate structures.

[90] The amount of the levy was calculated with reference to a price differential that was shared by all producers and therefore was lower if other entities paid more.

[91] Judgment of 22 March 1961, *SNUPAT v High Authority*, 42,49/59, ECLI:EU:C:1961:5 (*SNUPAT II*).

'undertaking' may identify a group of companies or should be limited to each legal entity, a point that it addressed with the following terms:

> 'The concept of an undertaking for the purpose of the Treaty may be identified with that of a natural or legal person, since the Treaty uses this concept primarily to define persons with rights and obligations arising under Community law.
>
> It could be accepted that several distinct companies may constitute a single undertaking within the meaning of Article 80 of the Treaty only if the Treaty contained an express provision to that effect.
>
> In the absence of such a provision it cannot be presumed that two separate and distinct companies can constitute a single undertaking for the purposes of the Treaty, more particularly when they each have distinct legal personality in the eyes of their national law; on the other hand, if the contrary argument were accepted, the identification of the undertakings referred to in Article 80 would frequently be impossible.'[92]

On that basis, the Court accepted SNUPAT's claim and required the High Authority to recalculate the levy to be paid by that company after including the levies of the entities that had unduly benefitted from the 'local integration' exemption.[93] More importantly for the purposes of this thesis, the Court resolved the question under a classic, form-based reasoning where only entities with legal personality would be able to assume legal obligations and enjoy rights.

2.1.2 The Klöckner-Werke and Hoesch cases

Later that same year, two German groups, Klöckner-Werke and Hoesch, raised similar claims under parallel arguments – in essence, that the scrap levy should not apply to transactions

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[92] *SNUPAT II*, page 80.

[93] The case would not end there, at least not immediately. Breedband NV, the sister company of Hoogevens, filed a third-party request against the judgment insisting on the same points that had already been dismissed. This application was declared inadmissible by the Court, as Breedband did not justify why it had not been able to take part in the *SNUPAT II* proceedings. See Judgment of 12 July 1962, *Breedband and others v High Authority*, 42 and 49/59 TO, ECLI:EU:C:1962:24).

inside economic groups. The main difference was that these entities were German, whose law on groups of companies was more developed.

When arguing their case, the applicants did their best to distinguish their situation from that of SNUPAT by explaining their level of integration.[94] Besides these factual considerations, the applicants invoked the German law on groups of companies and even their 1957 Competition Act, whose Article 22.5 indirectly recognised the reality of 'Konzerne', at least in the field of merger control.[95] They also tested two alternative arguments – either to consider the 'economic unit' as the relevant undertaking, or that the notion should apply to the ultimate parent company of a group. The High Authority, on its part, argued that the notion of undertaking proposed by the applicants would result in unsolvable problems given the diverse intra-company arrangements across the Community.

In his Opinion, AG Lagrange took the position that the matter had already been resolved in *SNUPAT I* and especially in *SNUPAT II*. This was accepted by the Court, which declared that

> 'An undertaking is constituted by a single organization of personal, tangible and intangible elements, attached to an autonomous legal entity and pursuing a given long term economic aim.' [96]

Any doubt concerning the treatment of groups of entities was clarified in the following terms:

> 'In this light it cannot be denied that the conditions for the existence of a legally autonomous undertaking are also fulfilled in the case of a legal person whose interests

[94] As explained in their appeals, the affected entities had been mere divisions of the Klöckner and Hoesch groups, with no separate legal personality. Following the de-cartelisation measures adopted after the war, the plants were registered as separate entities fully owned by their respective groups, which continued to control their operations. Actually, by the time the case was heard, the legal separation had ended, as in 1959 the formally separate entities had been reunited with their parent companies. At the time of the imposition of the levy, however, they were separate legal entities, and on that basis the taxes were levied.

[95] This provision took into consideration 'Konzerneunternehmen' in the context of merger control, which related to the acquisition of shares by a company alongside purchases made by other entities of the same 'Konzern'.

[96] Judgment of 13 July 1962, *Klöckner-Werke and Hoesch*, 17 and 20/61, ECLI:EU:C:1962:30.

> are closely bound up with those of other such persons whose purposes are determined by directives from outside.'

That logic was declared to apply 'even in the case of a group of undertakings controlled by a parent company and having a closely integrated production cycle in which the output of the group as a whole and not that of the individual subsidiaries is taken into account.' That sealed the idea that the notion of undertaking should be applied to each separate legal entity or corporate vehicle, rather than to the economic group, a perspective that would remain unchanged for several decades.

It is reasonable to wonder what would have happened if these claims had been heard before the *SNUPAT* cases, which were largely argued in the light of French law, and, moreover, with an Opinion drafted by the French Advocate General. It should be recalled that at that time there were just two Advocate Generals at the Court of Justice, one French and the other German. In fact, it was a close call, since several German groups had lodged an appeal against a letter from the High Authority before SNUPAT, but that claim had been declared inadmissible by the Court.[97] Had that appeal been considered, the definition of the concept of undertaking might have gone in a very different direction, as it finally did many years later.

2.1.3 Conclusions on the ECSC case law on the notion of undertaking

As explained above, the Court opted in *SNUPAT* and *Klöckner-Werke* for a notion of undertaking as an economic operator with a separate legal personality, rejecting expressly that groups of companies would be treated as a unit. That choice is understandable at the time. The Court must have had in mind the legal challenges involved in launching the European

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[97] Judgment of 17 July 1959, *Mannesmann AG, Hoesch-Werke AG, Klöckner-Werke AG, Rheinische Stahlwerke AG and Aktiengesellschaft für Berg- und Hüttenbetriebe v High Authority*, 23/58, ECLI:EU:C:1959:17. That position on admissibility was corrected in *SNUPAT I* where the Court, while maintaining its position that these letters were not decisions, noted that '(f)rom the moment when the principles set out in the abovementioned letters were applied by the administration, they formed part of the interpretation and application of Decision No 2/57' and their interpretation had 'affected the applicant's rights', with the consequence that the issue should be examined. For a discussion on these judgments from the viewpoint of admissibility, see the meticulous analysis of Rosa Greaves, 'The first Advocate General, Maurice Lagrange' in Noreen Burrows and Rosa Greaves, *The Advocate General and EU Law*, OUP, 2007 at 69.

Communities. A formal reading of the law on legal entities provided clarity and certainty, and the legal entity paradigm could provide that.

It may be questioned if the doctrine in these cases would apply directly in EU competition law matters, as it had been built under the ECSC Treaty and, remarkably, concerned the application of a tax-like mechanism, where arguably legal form might be considered more relevant than in a competition case. In that respect it may be noted that in *SNUPAT II* the Court seemed to assume a single concept of 'undertaking' that would apply to the entire scope of the ECSC Treaty, as can be seen from its reference to '(t)he concept of an undertaking *for the purpose of the Treaty* may be identified with that of a natural or legal person…' (emphasis added). However, the later *Klöckner-Werke* judgment appeared to confine its findings to the equalization scheme for scrap, as suggested by the first sub-header of the judgment on substance (entitled 'The concepts of 'undertaking' and 'purchase' for the purposes of the application of the equalization scheme for scrap') and, especially, the following paragraph, placed at the end of its reasoning on this matter, after having equated 'undertaking' with a separate legal entity:

> 'The abovementioned concept of an undertaking, as applied here *for the purposes of the equalization scheme*, constitutes a legally justified criterion which should serve to determine the legal persons upon whom charges under public law fall.' (emphasis added)

At the risk of reading too much into a 1962 judgment, the above citations suggest that the Court might have noticed at the time that the notion of undertaking should be handled with care, and a finding made in a tax case might not apply so well to a different field of law.[98] That said, it would take the Court many years to provide a definition that would free the term from the shackles placed on it as a result of being directly equated with the concept of a legal entity, as discussed in the following section.

[98] As eloquently put by an author at the time, 'the ECSC Treaty knows no uniform concept of an enterprise.' Gerhard Bebr, 'The Concept of Enterprise under the European Communities: Legal Effects of Partial Integration' (1961) 26 *Law and Contemporary Problems* 454 at 461.

2.2 The evolution of the notion of undertaking in the field of competition law

The EEC Treaty, signed on 25 April 1957, brought about much deeper integration than that contemplated under the earlier ECSC. With a far wider scope, it had a more sophisticated legal architecture that was less reliant on a High Authority applying the Treaty directly to economic operators, providing a greater role for secondary law instruments. Its rules on competition also reflected that logic and the Commission no longer had the exclusive power to apply the prohibitions.[99]

In contrast to the ECSC Treaty, the term 'undertaking' was almost exclusively reserved to the provisions on competition. The provisions of the EEC Treaty concerning freedom of establishment used 'companies', a term that, unlike 'undertakings', was expressly defined.[100]

The fact that the term 'undertaking' is basically reserved for the provisions on competition and the use of other terms has been read by the Court as a recognition that the authors of the Treaties wished to confer on it a defined meaning in the field of competition law.[101] The point has to be understood in the light of the tendency of the Court to rely on what it deems to be the intention of 'the authors of the Treaty', as the frequent references to this expression suggest. However, it is debatable whether the original authors had in mind a notion along the lines of

[99] Art 1 of Regulation 17/62 acknowledged the direct applicability of Art 101, paragraph 1, of the TFEU, no prior decision being needed for that purpose; however, Art 3 maintained the exemption monopoly of the Commission, which would only be repealed by Regulation 1/2003 (cf Art 3 of Regulation 17/62, [1962] OJ L 13/204 and Art 1.2 of Regulation 1/2003, [2003] OJ L 1/1). For an early discussion on the differences between the ECSC and EEC competition rules Fernand Spaak and Jean N Jaeger, 'The Rules of Competition within the European Common Market' (1961) 26 (3) *Law and Contemporary Problems* 485. For a more recent review of the original purpose of EEC competition rules and their relationship with ECSC provisions see Anca D Chirita, 'A Legal-Historical Review of the EU Competition Rules', (2014) 63 *International and Comparative Law Quarterly* 281.

[100] Article 58 of the EEC Treaty in its original version defined 'companies' as 'companies under civil or commercial law including cooperative companies and other legal persons under public or private law, with the exception of non-profit-making companies.' This provision has since been amended. The current Article 54 of the TFEU defines companies jointly with 'firms' as 'companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making.'

[101] Judgment of 18 July 2013, *Schindler and Others v Commission*, C-501/11 P, ECLI:EU:C:2013:522 at 102; Judgment of 10 April 2014, *Commission v Siemens AG Österreich and Others*, C-231/11 P to C-233/11 P, ECLI:EU:C:2014:256 at 42; Judgment of 10 April 2014, *Areva and Others v Commission*, C-247/11 P and C-253/11 P, ECLI:EU:C:2014:257 at 123; Judgment of 6 October 2021 (Grand Chamber) *Sumal v Mercedes Benz Trucks España*, C-882/19, ECLI:EU:C:2021:800 at 39.

that found in the current case law. On the contrary, an examination of the early case law reveals that the term 'undertaking' was not given its current meaning until relatively recently.

2.2.1 The original notion of undertaking in EU competition law

In the early years of competition law, 'undertaking' was used loosely as another term for a legal entity. It is unclear if this resulted from the position adopted by the Court in the *SNUPAT* and *Klöckner-Werke* judgments discussed in the preceding section, which were not quoted by these early EEC competition judgments. Anyway, examples of that assimilation abound. One noteworthy example is the Commission 1969 decision in *Christiani & Nielsen,*[102] where the intra-group exemption was first recognised. As discussed later in this dissertation,[103] the decision considered that the agreements between Christiani & Nielsen The Hague and Cristiani & Nielsen Copenhagen should be exempt from Article 101 TFEU. However, each of these separate legal entities was identified as a separate 'undertaking'.

Somewhat exceptionally, the Commission declared in its *Commercial Solvents* decision that the US entity of that name and its subsidiary Istituto Chemioterapico Italiano should both be considered to be a single 'undertaking', since they were an 'economic unity' as a result of the 51% shareholding that the former held in the latter.[104] However, in the later appeal, the Court made no reference to that argument.[105] Subsequent judgments such as those in the *Centrafarm* cases defined parents and their subsidiaries as separate undertakings forming an economic unit and referred to any agreements or practices between them as 'between the undertakings.'[106]

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[102] Decision 69/195/CEE of 18 June 1969 *Christiani & Nielsen*. OJ L 165 (1969), p. 12. The case concerned a licence agreement, whereby Christiani & Nielsen Kopenhagen would license its experience, patents and know-how to its fully-owned subsidiary Christiani & Nielsen Den Haag. The agreement was notified for negative clearance under Regulation 17/62.

[103] Section 4.4.

[104] Decision of 14 December 1972 (IV/26.911 - *ZOJA/CSC - ICI*), [1972] OJ L 299/51, section II.A *in fine*.

[105] Judgment of 6 March 1974, *Istituto Chemioterapico Italiano and Commercial Solvents v Commission,* 6/73, ECLI:EU:C:1974:18, paras. 36-41.

[106] Judgments of 31 October 1974, *Centrafarm BV et Adriaan de Peijper v Sterling Drug Inc.*, 15/74. ECLI:EU:C:1974:114 and *Centrafarm BV et Adriaan de Peijper v Winthrop BV,* 16/74, ECLI:EU:C:1974:115, see esp operative part.

2.2.2 The construction of the single entity doctrine in competition law

While not formally identifying economic actors as 'undertakings', a group perspective soon emerged in the field of competition law under the 'single entity' label.[107]

As explained in Chapter 1 of this dissertation, single entity doctrines had emerged in various areas of law to address situations where it was appropriate to treat several legally independent entities as one. While related to the 'piercing of the veil', these doctrines differ as they do not generally require fraud; instead, they overcome the rigidity of the concept of separate legal personality by looking at economic players from the perspective of substance rather than form.

The single entity approach was first relied on by the Commission in the abovementioned decision in *Christiani & Nielsen*[108] to acknowledge the intra-group exemption, that is, the exclusion of agreements between two separate legal entities from the prohibition contained in Article 101 TFEU. That finding was based on the logic that the two 'undertakings' (as named in the decision) in question formed an 'economic unit' and therefore any agreements between them would escape the prohibition in Article 101 TFEU.

Shortly thereafter, the Court itself endorsed that logic in *Béguelin*[109] and, especially, in *ICI*,[110] which examined the participation of Imperial Chemical Industries Ltd in the *Dyestuffs* cartel.[111] Despite having its seat outside the EEC at the time, the conduct was attributed to the parent company, as it had been determined that the latter's subsidiaries had not independently decided on their own conduct in the market; instead, they had merely implemented the instructions given by their parent.

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[107] Case law and especially translations have not been very consistent with this expression. The most used terms were initially 'economic unit' and later 'single economic unit'; however, 'unit' has often been replaced by 'entity', as in 'single economic entity'. All these terms are considered to be equally valid in this thesis.

[108] See fn 102 above.

[109] Judgment of 25 November 1971, *Béguelin Import Co. v S.A.G.L. Import Export*, 22/71, at 11.

[110] Judgment of 14 July 1972, *Imperial Chemical Industries Ltd. v Commission*, 48/69, ECLI:EU:C:1972:70, paras. 132-137. See also Judgment of 14 July 1972, *J. R. Geigy AG v Commission*, 52/69, ECLI:EU:C:1972:73, at 44, 45.

[111] Decision of 24 July 1969, *Dyestuffs*, [1969] OJ L 195/11.

Attributing the infringement to ICI as a parent company required the Court, on the one hand, to assert jurisdiction over entities located outside the EEC, a thorny issue at that time[112] which forced the Court to sketch out an effects doctrine,[113] and, on the other, to link the actions carried out by ICI's subsidiaries to their parent. This latter aspect of the case led to the Court's first major application of the single entity doctrine, which it used in three different ways: to proclaim parental liability, to endorse the intragroup exemption and to disregard criticism concerning service of notifications made through a subsidiary.

The first of those elements would lead to the following words of the Court, repeated in many judgments over the years:

> '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 carry out, in all material respects, the instructions given to it by the parent company.[114]

The Court also took the opportunity to endorse the intragroup exemption.[115] This was not an issue in that case and may be seen as an attempt of the Court to put forward a comprehensive doctrine of the concept of economic unit, with arguably both adverse and positive components for the entities subject to it. And finally, the Court's acceptance of notifications, while not expressly presented as a consequence of the single entity doctrine, would seemingly form part of this same approach.[116] In the end, as the Commission noted in its submissions to the Court,

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[112] See Frederick Alexander Mann's scathing criticism of this judgment in 'The Dyestuffs Case in the Court of Justice of the European Communities', (1973) 22(1) *The International and Comparative Law Quarterly* 35.

[113] ICI at 126-128. This doctrine would later evolve mainly through *Woodpulp I* (Judgment of 27 September 1988, *A. Ahlström Osakeyhtiö and Others v Commission*, 89, 104, 114, 116, 117 and 125 to 129/85, ECLI:EU:C:1988:447) and *Intel* (Judgment of 6 September 2017, C-413/14P, *Intel v Commission*, ECLI:EU:C:2017:632).

[114] *ICI* at 133. Some months later, *Continental Can* relied on this approach to justify attributing an infringement to a US company alongside its subsidiary in the EU in Judgment of 21 February 1973, Case 6/72, *Europemballage and Continental Can v Commission*. ECLI:EU:C:1973:22, at 15.

[115] *ICI* at 135.

[116] Ibid at 42. See on this matter section 5.1.1 below.

‘while the existence of a group-relationship can have favourable consequences for undertakings as regards the application of Community competition law, it must be admitted on the other hand that unfavourable consequences can also follow.’[117]

In subsequent years the single entity doctrine was used for various purposes, and more recently has morphed into the doctrine of the undertaking, as the use of that term to identify economic operators became common. The following sub-section explores the remarkable process through which the name given to economic entities contributed to changing the way in which they were understood.

2.2.3 The battle to label economic entities as undertakings

As discussed above in section 2.2.1, the term ‘undertaking’ in the field of competition law was initially loosely used to identify separate legal entities, despite the early emergence of a single entity doctrine. Mention was made of the rare precedent in *Istituto Chemioterapico Italiano,* where the Commission (but not the Court) suggested that the term may be used to denote economic players.

Around ten years later, the Court first used the term ‘undertaking’ to identify a group of linked entities in *Hydrotherm.*[118] The case concerned an alleged breach of a distribution contract for radiators between, on the one hand, a natural person (Mr. Andreoli) and two legal entities under his control (Compact, and Officine St Andrea) and, on the other, Hydrotherm Gerätebau GmbH, a distributor. In the proceedings before the national courts, the latter argued that the agreement was contrary to Article 101 TFEU and could not benefit from the then-existing block exemption regulation for distribution agreements,[119] since there were more than two

[117] Ibid at page 632 of the PDF version.

[118] Judgment of 12 July 1984, *Hydrotherm*, 170/83, ECLI:EU:C:1984:271.

[119] At the time, Regulation 67/67 of 22 March 1968. OJ, English Special Edition 1967, p. 10.

parties on one side.[120] Countering this argument, AG Lenz relied on the single entity doctrine, according to which the relevant block exemption would also apply to agreements

> 'in which several legally independent persons are involved on one side, if they act as a single entity for the purposes of the agreement because they are closely linked to one another and no competition exists between them, only an internal allocation of functions whereby one participant produces goods and another supplies them'.[121]

That reasoning was well within the logic of the single entity doctrine, and clearly AG Lenz made no suggestion that those 'single entities' composed of various independent persons should be defined as forming an 'undertaking'. Rather surprisingly, however, the judgment proclaimed that

> '(i)n competition law, the term "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 consists of several persons, natural or legal. The requirement of Article 1 (1) of Regulation No 67/67 is therefore fulfilled if one of the parties to the agreement is made up of undertakings having identical interests and controlled by the same natural person, who also participates in the agreement.'[122]

While later judgments and several authors would quote *Hydrotherm* as confirming that an undertaking might be defined as a group of entities, its terminology was rather inconsistent in that respect. Thus, this judgment referred to the applicants in the case as 'undertakings having identical interests and controlled by the same natural person', impliedly treating each legal entity as a separate undertaking. By way of example, the paragraph immediately after the one quoted above declared that

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[120] Article 1 of Regulation 67 read: "Without prejudice to the application of Council Regulation No 17 and in accordance with Article 85 (3) of the Treaty the Commission may by regulation declare that Article 85(1) shall not apply to categories of agreement to which only two undertakings are party..."

[121] Opinion of 20 June 1984, *Hydrotherm*, 170/83, ECLI:EU:C:1984:222 at p 3025.

[122] *Hydrotherm*, 11.

> 'Regulation No 67/67 must be applied even if several legally independent undertakings participate in the agreement as one contracting party provided that those undertakings constitute an economic unit for the purposes of the agreement'.[123]

Whatever its original intentions, *Hydrotherm* was ignored in subsequent judgments of the CJEU, a *damnatio memoriae* that would only be lifted over a decade later.

In the years that followed, the perception of economic groups under competition law evolved. Two factors deserve a mention in that respect: the fight against cartels and the related policy to make parent entities liable in that respect, and the adoption of the Merger Regulation, a true game-changer in many respects which made much more visible the treatment of economic groups as single entities. It is no coincidence that, just a few months after the entry into force of the Merger Regulation in 1990,[124] the Court defined an undertaking as an 'economic entity' in *Höfner* with the following seminal words:

> 'In the context of competition law (…), the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed (…)'.[125]

The above definition expressed the determination of the Court to take a different approach to economic players based on three elements. First, it would define them as an entity, that is, an identifiable centre of attribution under the law to which legal rules could potentially be addressed. Second, they would be defined under a functional perspective, irrespective of their legal form or financing structure, which in the context of the case assumed a principle of equal treatment for state owned entities. Third, the notion was to apply across the board of 'competition law', as a horizontal component across its multiple functions. A tall order indeed for what was ultimately a mere *obiter* in a case concerning a public law entity.

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[123] *Hydrotherm*, 12. Cfr the operative part of the judgment.

[124] The original Merger Regulation (Regulation 4064/89, of 21 December) came into force on 21 September 1990.

[125] Judgment of 23 April 1991, *Höfner and Elser v Macrotron*, C-41/90, ECLI:EU:C:1991:161 at 21. This definition would eventually find its way into legislative texts such as Art. 1 of Protocol 22 of the EEA Agreement and Article 2.1 (10) ECN+ Directive.

Remarkably, *Höfner* was not immediately viewed by the Court, and especially the CJ, as requiring that the term 'undertaking' should be applied to legal entities in a group of companies such as those to which the traditional single entity doctrine had been applied in the past. That path would be trodden following a long dialogue between the General Court and the Court of Justice in the years that followed which is worth recalling here.

The process started with the General Court's judgment in *Shell*, one of the appeals against the *Polypropylene* decision,[126] where it was noted that Article 101 TFEU

> '(…) is aimed at economic units which consist of a unitary organization of personal, tangible and intangible elements which pursues a specific economic aim on a long-term basis and can contribute to the commission of an infringement of the kind referred to in that provision.'[127]

On appeal, the Court confirmed the GC's judgment, but removed any reference to that statement.[128]

Two years later in *Viho*[129] the GC took the argument one step further. The case concerned the exemption of agreements forming part of a single entity from the prohibition contained in Article 101 TFEU. In that context, the GC relied on *Hydrotherm* (which by that time had lain dormant for more than ten years) and its own decision in *Shell* with the following terms:

> 'The Court of Justice has also held that "in competition law, the term '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 consists of

[126] Commission Decision of 23 April 1986 IV/31.149 – *Polypropylene*, [1986] OJ L 230/1.

[127] Judgment of 10 March 1992, *Shell v Commission*, T-11/89. ECLI:EU:T:1992:33 at 311. Note however that the decision of the Commission in that case (quoted in the preceding fn) had defined each separate entity as an 'undertaking'. See eg its para 102 which read: 'In the Shell group, the undertaking responsible for the coordination and strategic planning in the thermoplastics sector is the 'service' company Shell International Chemical Company. It was this undertaking which participated in the meetings with the other majors and acted as the channel of communication between the cartel and the various Shell operating (manufacturing and selling) companies in the EEC. These companies took part in the national or local meetings'.

[128] Judgment of 8 July 1999, *Shell v Commission*, C-234/92 P, ECLI:EU:C:1999:361.

[129] Judgment of 12 January 1995, *Viho v Commission*, T-102/92, ECLI:EU:T:1995:3.

> several persons, natural or legal" (judgment in Case 170/83 *Hydrotherm v Compact* [1984] ECR 2999, paragraph 11). Similarly, the Court of First Instance has held that "Article 85(1) of the EEC Treaty is aimed at economic units which consist of a unitary organization of personal, tangible and intangible elements which pursues a specific economic aim on a long-term basis and can contribute to the commission of an infringement of the kind referred to in that provision" (judgment in Case T-11/89 *Shell v Commission* [1992] ECR II-757, paragraph 311). Therefore, for the purposes of the application of the competition rules, the unified conduct on the market of the parent company and its subsidiaries takes precedence over the formal separation between those companies as a result of their separate legal personalities.' [130]

The foregoing paragraph suggested that an agreement between a parent company and its subsidiary could not be one 'between undertakings'. That approach was criticised by AG Lenz[131] and, again, not relied on in the appeal judgment of the Court of Justice, which however reproduced that part of the GC's judgment in its own.[132]

The merging of the concepts of undertaking and economic entity progressed some years later with the 2005 judgment of the Grand Chamber of the CJEU in *Dansk Rørindustri*, which overturned the doctrine laid down in *SNUPAT* and *Klöckner-Werke*.[133] Here the applicant criticised the GC for having declared that multiple legal entities were an 'undertaking', a term that in his view required an entity with separate legal personality. While dismissing that

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[130] Ibid at 50.

[131] Opinion of 25 April 1996, ECLI:EU:C:1996:164, at 59. Note that AG Lenz had written the Opinion in *Hydrotherm*, see fn 121.

[132] Judgment of 24 October 1996, *Viho v Commission*, C-73/95 P, ECLI:EU:C:1996:405. The CJ judgment does not even discuss either *Hydrotherm* or *Shell*, the decisions on which the GC had used, but earlier case-law based on the existence of a 'single economic unit', with no reference to the notion of 'undertaking', impliedly not endorsing the identification between these two notions. Its paragraph 18 limited itself to concluding that '(t)he Court of First Instance was therefore fully entitled to base its decision solely on the existence of a single economic unit'. The GC also insisted in its views later in *Tokai* (Judgment of 15 June 2005, *Tokai v Commission*, T-71/03, ECLI:EU:T:2005:220, para 59) and *Akzo I* (Judgment of 12 December 2007, *Akzo*, T-112/05, ECLI:EU:T:2007:381, at 58).

[133] See Judgment of 28 June 2005 (Grand Chamber), *Dansk Rørindustri v Commission*, C-189/02, ECLI:EU:C:2005:408, at 101-113. The necessity of legal personality for public undertakings had been dismissed earlier in the *Italian Tobacco* case. See Judgment of 16 June 1987, *Commission v Italy*, 118/85, ECLI:EU:C:1987:283, at 11.

challenge, the CJ again avoided defining that 'economic unit' as an 'undertaking' or quoting *Hydrotherm*.[134]

The assimilation of groups of companies and undertakings by the CJ would finally be made in *CEES*,[135] a request for a preliminary ruling regarding the treatment of petrol stations. Notably, the issue of whether multiple legal entities should be treated as one was not central to the case; anyway, in its judgment the Court of Justice quoted for the first time *Hydrotherm* alongside *Höfner* to explain that

> '(…) the term '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 consists of several persons, natural or legal*.'[136]

Subsequent judgments, markedly *Akzo I*[137] and the Grand Chamber Judgment in *Alliance One*[138] would merge the definition in *Höfner* and its application to groups of entities, imperfectly heralded in *Hydrotherm*, with the following words:

> '(…) in accordance with settled case-law, the concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed. That concept must be understood as designating an economic unit even if in law that unit consists of several natural or legal persons.'

2.2.4 Debating the principle of personality

One remarkable consequence of calling economic groups undertakings was that they became addressees of the rules, and by implication, as a centres of attribution. That truly revolutionary process is discussed in greater detail in chapter 6 of this dissertation. However, it is

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[134] *Dansk Rørindustri* at 130.

[135] Judgment of 14 December 2006, *CEES v CEPSA*, C-217/05, ECLI:EU:C:2006:784.

[136] Ibid at 40.

[137] Judgment of 10 September 2009, *Akzo Nobel*, C-97/08 P, ECLI:EU:C:2009:536 at 59 ("…the parent company and its subsidiary form a single economic unit and therefore form a single undertaking…").

[138] Judgment of 19 July 2012 (Grand Chamber), *Alliance One*, C-628/10P, ECLI:EU:C:2012:479, para. 42.

appropriate to look briefly here at the impact this terminology impacted the understanding of the principle of personal responsibility (this is, that only the person that has committed an infringement alone is liable for these actions save expressly provided otherwise) in competition law.

This principle, whose origin may be traced back to criminal law, was first brought before the Court in *Anic Partecipazioni*,[139] one of the appeals against the *Polypropylene* decision.[140] The Commission accused the parties of having participated in a single continuous infringement, and in that context AG Cosmas suggested that the principle of personal liability developed in criminal law should be applied to the case.[141] As one would expect in 1997, the principle was understood to mean that this 'personal' liability would require identifying a 'person', either natural or legal, to whom the conduct of the economic unit should be attributed. That person would be the one directing the activities of the undertaking, or put simply, the one managing that entity. That was the perspective adopted by the Court with the following words:

> 'where an economic entity infringes the competition rules, it falls, in principle, *to the natural or legal person managing that entity* to answer for the consequences of its acts.'[142]

The above formulation, reiterated in subsequent judgments,[143] assumed a traditional perspective on the principle of personality, which would seek to identify a specific 'person' as the liable entity. The reference to a 'management' power suggests that liability would rest only with the person having the power to determine the commercial conduct of the economic entity,

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[139] Judgment of 8 July 1999, *Commission v Anic Partecipazioni SpA*, C-49/92 P, ECLI:EU:C:1999:356.

[140] Cit supra fn 126.

[141] Opinion of AG Cosmas of 15 July 1997 in *Commission v Anic Partecipazioni*, C-49/92, ECLI:EU:C:1997:357 at 74.

[142] CJ Judgment in *Anic Partecipazioni* at 78 (emphasis added).

[143] Judgments of 16 November 2000, *KNP BT v Commission*, C-248/98 P, ECLI:EU:C:2000:625, para 71; 16 November 2000, *Cascades SA v Commission*, C-279/98 P, ECLI:EU:C:2000:626, para 78; 16 November 2000, *Stora Kopparbergs Bergslags v Commission*, , C-286/98 P, ECLI:EU:C:2000:630, para 37; of 16 November 2000, *SCA Holding Ltd v Commission*, C-297/98 P, ECLI:EU:C:2000:633, paragraph 25.

or in other terms, the person in control, rather than a derived or vicarious liability of an individual holding that office.

This classic or traditional perspective would not survive long, coming under challenge in the *Cement* case. In its decision on that case,[144] the Commission had imputed the conduct to a legal entity other than the original infringer under a theory of succession, as discussed elsewhere in this thesis.[145] In the subsequent appeal it was argued that succession could only take place where the legal entity identified as infringer had disappeared.[146] However, in its judgment in *CBR*, the GC accepted this twist with the argument that both the original infringer and the successor were part of a group of companies and therefore could be assumed to belong to the 'same economic entity'.[147] On appeal, despite the opposition of AG Ruiz-Jarabo Colomer,[148] the Court of Justice confirmed this finding, despite its apparent contradiction with the principle of personal liability whereby, as *Anic* had explained, liability would rest with the original legal entity identified as an infringer.[149]

The above finding was made without much elaboration on what this all meant for the principle of personality in the infringement. However, just three years later, the Court addressed that issue in *ETI.*[150] It was, again, a case of succession, where the Italian NCA was seeking to hold the Italian public entity ETI liable for the actions of the earlier Amministrazione autonoma dei monopoli di Stato ('AAMS'), whose activities had been assumed by ETI in 1999.[151] As in

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[144] Decision 94/815/EC of 30 November 1994 (IV/33.126 and 33.322 - *Cement*), [1994] OJ L 343/1.

[145] Chapter 4, section 4.5.

[146] *Anic*, at 145.

[147] Judgment of 15 March 2000, *Cimenteries CBR and Others v Commission*, T-25, 26, 30-39, 42-46, 48, 50-65, 68-71, 87, 88, 103, 104/95, ECLI:EU:T:2000:77, at 1335.

[148] Opinion of AG Ruiz-Jarabo Colomer of 11 February 2003, *Aalborg Portland A/S and others v Commission*, 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, ECLI:EU:C:2003:85, at 63-64 and 72.

[149] Judgment of 7 January 2004, *Aalborg Portland A/S and Others v Commission*, 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, ECLI:EU:C:2004:6, at 355-357.

[150] Judgment of 11 December 2007 (Grand Chamber), *ETI and Others v Autorità Garante della Concorrenza e del Mercato*, C-280/06. ECCLI:EU:C:2007:775.

[151] The nature of the AAMS as an undertaking had been discussed in an earlier case, where Italy refused to disclose its accounts under the argument that the AAMS did not have a separate personality, providing the CJEU with an opportunity to confirm the irrelevance of that fact (Judgment of 16 June 1987, *Commission v Italy*, 118/85, ECLI:EU:C:1987:283).

Cement, the succession doctrine would initially not allow that, since the legal entity that had committed the infringement still existed.[152] The desire of the NCA to charge ETI (and, presumably, not to impute liability to AAMS) placed the issue of 'personal liability' at the centre of the debate, and led the Court to change the paradigm and, instead of imputing liability to a natural or legal person, to placing the responsibility on the shoulders of the 'undertaking'. In the end, paragraphs 38 and 39 of the *ETI* judgment, somewhat convolutedly, declared that the principle of personal responsibility should apply to the undertaking as such.[153]

It might be thought that this was just unusual wording required by a special case and the doctrine on the principle of personal responsibility would revert to its original formulation.[154] However, the new wording was used shortly after in *Akzo I*, despite AG Kokott's cautious defence of the earlier terminology,[155] and has since then been become a permanent fixture in decisions discussing the entities who should be held responsible for infringements of the competition rules.[156] Its current formulation stresses that the undertaking is the only 'person' that matters in the application of the competition rules. As it would be declared in clearer terms in *Siemens Österreich:*

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[152] See Section 4.1.4, discussing the doctrine of succession. In this case, AAMS still existed, exploiting a commercial activity in the gambling sector.

[153] The text reads: 'It is apparent from the case-law that Community competition law refers to the activities of undertakings (…) and that the concept of an undertaking covers any entity engaged in an economic activity, irrespective of its legal status and the way in which it is financed (…). When *such an entity* infringes competition rules, it falls, according to the principle of personal responsibility, to that entity to answer for that infringement (…)' (emphasis added).

[154] The idea that courts sometimes need to come up with strange formulations in borderline cases is not new. As famously said, 'hard cases make bad law' (*Winterbottom v Wright* (1842) 10 M&W 109).

[155] See Opinion of AG Kokott of 23 April 2009, *Akzo Nobel and Others v Commission*, C-97/08 P, ECLI:EU:C:2009:262, para 39 and cfr with the judgment of 10 September 2009, *Akzo Nobel and Others v Commission*, C-97/08 P, ECLI:EU:C:2009:536, para 56.

[156] Judgment of 20 January 2011, *General Química SA and Others v Commission*, C-90/09 P, ECLI:EU:C:2011:21, para 36; Judgment of 29 March 2011 (Grand Chamber), *ArcelorMittal v Commission*, C-201/09 P and C-216/09 P, ECLI:EU:C:2011:190, para 95 (despite the reminder of the old formulation by AG Bot, see Opinion of 26 October 2010 in *ArcelorMittal Luxembourg v Commission*, C-201/09 P and C-216/09 P, ECLI:EU:C:2010:634 para 181); Judgment of 19 July 2012 (Grand Chamber) *Alliance One International and others v Commission*, C-628/10 P and C-14/11 P, ECLI:EU:C:2012:479, para 42; Judgment of 10 April 2014, *Commission v Siemens AG Österreich and Others*, C-231/11 P to C-233/11 P, ECLI:EU:C:2014:256, para 44 and Judgment of 27 April 2017, *Akzo Nobel NV and Others v Commission*, C-516/15 P, ECLI:EU:C:2017:314, para 49.

> 'It follows from the foregoing that the rules governing EU competition law, including those relating to the Commission's power to impose penalties, the EU law principle of personal liability for an infringement and the principle that the penalty must be specific to the offender and the offence, which must be complied with when the power to impose penalties is being exercised, relate only to the undertaking per se, not the natural or legal persons forming part of the undertaking.' [157]

2.2.5 Recent developments on the notion

Following the unification between the single entity doctrine and the notion of undertaking, on the one hand, and the rewriting of the principle of personal responsibility on the other, the notion of undertaking has emerged as a true centre of attribution, challenging the role of legal personality in the application of competition rules.

That process has raised difficult questions, some of which are discussed in subsequent chapters of this dissertation. The following paragraphs set out to present three recent pronouncements that attest to the current stage of this remarkable process: *Versalis*, *Akzo 2* and *Sumal*.

2.2.5.a Versalis

Versalis,[158] a judgment decided on appeal in 2015 and discussed in more detail later in this dissertation,[159] is worthy of note for three main reasons. First and foremost, it epitomises the current thinking of the Court on the procedural implications of separate legal personality. Second, as with so many other developments in the notion of 'undertaking', it results from a difficult dialogue between the General Court and the Court of Justice. Third, its doctrine

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[157] Judgment of 10 April 2014, *Commission v Siemens AG Österreich and Others*, C-231/11 P to C-233/11 P, ECLI:EU:C:2014:256, at 56.

[158] Judgment of 5 March 2015, *Commission v Versalis and Eni and Versalis and Eni v Commission*, C-93/13 P and C-123/13 P, ECLI:EU:C:2015:150.

[159] Section 4.1.2 a.

challenges the protection afforded to legal entities as 'owners' of procedural rights, potentially raising more questions.

The story of *Versalis* commenced in *ARBED*, where the CJ had criticised the GC for having accepted that a statement of objections served on a subsidiary may result in a decision addressed at its parent.[160] That meant in the end taking the view that procedural rights should follow a 'legal entity' approach rather than an 'economic unit' or undertaking perspective. That approach, however, seemed to contradict the group perspective followed in relation to recidivism, where parent companies could see their fines increased because of past infringements of their subsidiaries, established in procedures and appeals where the parent entity had not intervened. In order to protect the procedural rights of these separate legal entities, the GC required that this increase in fines could only be applied if the parent entity had been able to defend itself in the earlier procedures leading to the decisions on which the increase in the fine was based. That resulted in the correction of the fines imposed in several cases.[161]

While convincing from a procedural rights standpoint, this approach risked interfering with the policy of parental liability. That led the CJ, following an appeal by the Commission, to correct the GC's doctrine, declaring that it was not necessary that the parent entity had participated in the procedure leading to the original fines, despite the uptake on the fine, so long as the subsidiary was already at the time under the control of the same parent entity.[162]

By that decision, the Court was inevitably weakening the legal entity perspective that its earlier rulings had followed with respect to procedural rights. This was a small step and arguably just procedural, but one that suggests that undertakings may eventually be regarded

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[160] Judgment of 2 October 2003, *ARBED SA v Commission*, C-176/99 P, ECLI:EU:C:2003:524.

[161] This doctrine was applied in several instances. See Judgment of 13 July 2011, T-144/07, T-147/07, T-148/07, T-149/07, T-150/07 and T-154/07, *ThyssenKrupp Liften Ascenseurs NV and others v Commission*, ECLI:EU:T:2011:364, at 319-322; Judgment of 13 December 2012, *Versalis and Eni v Commission*, T-103/08, ECLI:EU:T:2012:686, at 273-274 and Judgment of 12 December 2014, *Eni v Commission*, Case T-558/08, ECLI:EU:T:2014:1080, at 296-299.

[162] Judgment of 5 March 2015, *Commission v Versalis and Eni and Versalis and Eni v Commission*, C-93/13 P and C-123/13 P, ECLI:EU:C:2015:150, at 92.

as the true procedural party, in line with the position advocated in *Höfner* concerning the irrelevance of legal formalities.

2.2.5.b Akzo II

The second recent case of note is *Akzo II*,[163] which is examined in greater detail in section 6.1.2 below. Its importance relates to the way in which it changed the concept of parental liability, which it expanded beyond the presumption established in *Akzo I*. More specifically, its core question was whether a parent may be liable for the actions of a subsidiary, despite the latter no longer being responsible for those actions because of the expiry of the relevant limitation period; in other words, whether parental liability derived from the liability of the original infringer or it was a direct claim against the parent.

In *Akzo II* the Court had to confront conflicting precedents, especially its own Grand Chamber decisions in *ArcelorMittal*[164] and *Tomkins*[165] and several judgments handed down as the case progressed before it, in addition to the opinion of AG Wahl in that case,[166] which presented parental liability as derivative, meaning that the parent entity could not be liable if the claim against the affiliate was time-barred. This logic was negated by the Court under the argument that the notion of undertaking made the parent company 'individually liable for an infringement of the EU competition rules which it is itself deemed to have infringed, because of the decisive influence which it exercised over the subsidiary',[167] ending the debate on the derivative nature of parental liability.

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[163] In this dissertation, *Akzo I* stands for the judgments of GC of Judgment of 12 December 2007, *Akzo*, T-112/05, ECLI:EU:T:2007:38 and of the CJ of 10 September 2009, *Akzo Nobel and Others v Commission*, C-97/08 P, ECLI:EU:C:2009:536 that formulated the presumption of exercise of dominant influence, and *Akzo II* denotes the GC Judgment of 15 July 2015, *Akzo Nobel NV and Others v Commission*, T-47/10, ECLI:EU:T:2015:506 and the judgment of the CJ of 27 April 2017, *Akzo Nobel NV and Others v Commission*, C-516/15 P, ECLI:EU:C:2017:314.

[164] Judgment of 29 March 2011 (Grand Chamber), *ArcelorMittal v Commission*, C-201/09 P and C-216/09 P, ECLI:EU:C:2011:190.

[165] Judgment of 22 January 2013 (Grand Chamber), *Commission v Tomkins*, C-286/11 P, ECLI:EU:C:2013:29.

[166] Opinion of AG Wahl of 21 December 2016, *Akzo Nobel*, C-516 P, ECLI:EU:C:2016:1004, at 81-91.

[167] CJ judgment in *Akzo II* at 56.

With that finding, *Akzo II* took another significant step towards the acceptance of the liability of a group perspective, further weakening the role of the legal entity, this time at the intersection between parental liability and the effects of limitation periods, two of the areas where the group perspective best shows its true colours, as discussed elsewhere in this dissertation.

2.2.5.c Sumal

Finally, a word needs to be said about *Sumal*,[168] discussed in more detail in section 4.2.2 of this dissertation, especially in what it represents it in the evolution of the Court's case-law on the notion of undertaking.

Sumal answers the question if, and under what conditions, private applicants may seek redress from the subsidiaries of an entity identified in a public enforcement decision. As further discussed in this thesis, public enforcement decisions are (at least formally) not addressed at the undertaking itself but to specific legal entities. However, under an economic entity logic, it could be argued that, since the undertaking is the 'subject' of competition rules, (as suggested by the application to it of the principle of personality), any competition law related claims may be indistinctly addressed to any legal entity within an undertaking.

Sumal has been generally hailed as a decision where the Court would have accepted that paradigm and consequently the possibility to claim damages from affiliates of the entity identified in the public enforcement decision.[169] However, a closer look reveals a much more nuanced answer. Despite lip service on using 'the concept of undertaking to designate the perpetrator of an infringement of competition law, who is liable to be punished by application of that provision, rather than other concepts such as those of "company" or "legal person"',[170] the Court understood that

[168] Judgment of 6 October 2021 (Grand Chamber) *Sumal v Mercedes Benz Trucks España*, C-882/19, ECLI:EU:C:2021:800.

[169] Stefan Tuinenga, 'The Road Ahead for Liability in Damages Actions: Case C-882/19 *Sumal*', (2022) *Journal of European Competition Law & Practice* 1 (lpac030) at 2.

[170] Ibid at 39.

> 'the possibility for the victim of an anticompetitive practice of invoking, in the context of an action for damages, the liability of a subsidiary company rather than that of the parent company cannot automatically be available against every subsidiary of a parent company targeted in a decision of the Commission punishing conduct that amounts to an infringement.'[171]

As the judgment explained, such derived liability would require a 'link' between the infringer parent entity and the subsidiary. That link is confusingly discussed in the judgment through several inconsistent parameters,[172] but in the end would require that the two legal entities sell the 'same products'.[173] Remarkably, the Court sought to justify the need for these 'links' on the notion of undertaking, defining it as encompassing those legal entities which shared these criteria. As a result, it divorced the notion of undertaking from that of a group of companies defined by control, with the consequence that the so-called 'conglomerate groups' (groups of companies pursuing independent activities) should be understood to comprise several separate economic units or undertakings. That would result in an absence of liability of the subsidiaries of the economic group that carry out economic activities entirely unconnected to those of the infringer.[174]

As later discussed in this dissertation, the solution adopted by the Court in this case stands in middle ground between a legal entity paradigm (under which an affiliate should not have been considered liable) and an economic group perspective (whereby any affiliate controlled by the infringer or by an entity controlling the infringer could have been held automatically liable as a component of the undertaking). Asked to opt between these paradigms, the Court chose to affirm a group perspective limited to just a part of the economic group, arguably raising more questions than those it has solved.

Among such questions, arguably the most relevant for this dissertation concerns whether the finding that a group of companies may contain several undertakings should only be followed

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[171] Ibid at 46.

[172] Ibid at 45, 46, 51 and 52.

[173] Ibid at 52.

[174] Ibid at 47.

in inverse liability claims or if it should also be used for other purposes such as, for instance, the intragroup exemption, recidivism or the calculation of turnover for fining purposes. This aspect of *Sumal* is discussed later in this thesis; suffice it here to note the importance of that element in the evolution of the notion of undertaking.[175]

2.3 Conclusions on the evolution of the notion

Some conclusions can be reached from this brief account of how the notion of undertaking has evolved.

First, its original meaning was unclear, and the early case law ruled out a definition that would uncouple the notion from legal personality. Irrespective of whether the approach in *SNUPAT* and *Klöckner-Werke* was meant to apply to the EU competition rules, the law in the early period of EU competition law used the term liberally to designate separate legal entities, with the Court refusing to give it an independent meaning.

Second, and independently of the denomination that was used, the logic that competition rules should apply to economic players regardless of form emerged early in the process and was implemented through single entity doctrines, applied on a case-by-case basis to make parent entities liable under defined circumstances and exempt agreements within groups of companies. That dynamic gained traction around 1990 in the context of the fight against cartels, which called for a more assertive policy on parental liability, and with the new perspective on groups following the adoption of the Merger Regulation. Shortly after, the *Höfner* doctrine was laid down, which started a process where 'undertaking' would be born as a legal term with a defined meaning. That process, arguably completed ten years later, provided the notion with quasi-personality traits, as suggested by the recognition, a remarkable

[175] In the weeks before the date for delivering this thesis, another intriguing question on the single economic entity logic has reached the Court in case C-425/22, *MOL v Mercedes-Benz*. In short, the referring court asks whether the single entity doctrine may be invoked by a claimant, who owns several affiliates that have suffered damage as a result of the *Trucks* cartel, to attract jurisdiction to the courts of its seat independently of where the goods were purchased or delivered. This case could give the Court an opportunity to clarify if the single entity doctrine may only be relied with respect to the infringer or if it could be invoked in its favour by the victim.

oxymoron indeed, that the principle of personal responsibility should not apply to persons but to the undertaking as such.

In contrast with the situation in the 1950s, where the Court had chosen a formal reading of the notion of undertaking in a context where clarity was especially important, the Court had a different mindset at the turn of the century. Competition law required an expansive reading to appropriately address groups of companies, and the EU's legal order allowed overcoming legal limitations existing under national law. The opportunity to adopt a wide reading of what the Treaty's authors may have had in mind was there, and the Court, after much hesitation, decided to pursue it, convinced that it would facilitate competition law enforcement and, perhaps, overcome some of the inconsistencies that affect the law that concerns legal entities.

The road has proven rich with potholes, U-turns, and debates. The Grand Chamber has been required to intervene on numerous occasions. Long battles between the GC and the CJ and incendiary warnings from various Advocates-General have pushed in different directions over the years. There is however a line, a vision, that emerges from the process and testifies to the construction of a legal notion that challenges one of the sacred cows of all legal systems: the need to rethink the supremacy of the legal entity as only addressee of legal obligations.

This process is still unfinished. The case law on the notion of undertaking has not only evolved to a given point – it *continues* to evolve. As subsequent chapters of this dissertation will show, the inconsistencies concerning the notion of undertaking seem to expand as 'the tough get going'. In that respect, the review of the most recent jurisprudence paints a vivid picture of the legal notion of undertaking as a work in progress, with many questions – and indeed some new – come to the fore.

Despite the reservations that moving goalposts present for the operation of the law, it must be accepted that giving birth to a new centre of attribution comes at a cost in terms of legal certainty which has, in all appearance, been accepted as commensurate with the value of the prize. Defining the notion of undertaking is ultimately a massively complicated project initiated many years ago by the case law, which does not always follow a straight path. And this is likely to continue, as the ultimate goal - a workable, legal definition of economic entities as subjects of competition rules - is still some distance away.

CHAPTER THREE – ANATOMY OF THE UNDERTAKING

This chapter looks at the structure of the 'undertaking', as this concept is understood in EU competition law. It sets out to examine its components, that is, the elements that make up the corporeal image that we have of these entities, and, in particular, the links that exist between them and that bind them together. This will define the boundaries of the entity, making it possible to measure its size.

The examination looks separately at the two main 'limbs' of the definition of 'undertaking' laid down in *Höfner*,[176] namely its nature as an entity identifiable as such regardless of its multiple constituent elements, and the economic activity run by it. Thus, its first section discusses the components of the 'entity' looking separately at the position of individuals, agents, legal persons (with a specific reference to groups of companies and joint ventures) and the special case of state-owned enterprises or SOEs. A second section looks at economic activity as an element of identification and explores whether the recent pronouncements of the CJEU in *Sumal* concerning 'conglomerate' groups change anything. These two sections are followed by a discussion on the rules that measure the size of an undertaking before some conclusions are given in the fourth section.

3.1 The undertaking as an organisation.

Under the single entity doctrine, the 'entity' limb of the notion of undertaking posits that economic agents should be identified as a unit despite containing multiple entities, often with separate legal personality. These separate structures would be initially bound by control, where this means the capacity to exercise decisive influence over these components in pursuit of a unified commercial strategy.

[176] 'It must be observed, in the context of competition law, (…) that the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed (…).' Judgment of 23 April 1991, *Höfner and Elser v Macrotron*, C-41/90, ECLI:EU:C:1991:161, at 21.

This perspective conflicts with the fact that the various components of an undertaking are themselves legal entities, formally independent creatures by law. That conflict lies at the heart of this dissertation and is explored later in Chapters 4, 5 and, in particular, 6. Before examining that tension, the links that bind individuals and legal entities to these economic units will now be described.

3.1.1 Individuals and undertakings

Individuals relate to undertakings in various ways. Professionals may be considered to be separate undertakings, possibly alongside the legal structures controlled by them. Employees or dependent workers are assumed to be integrated within the undertaking, but this is not necessarily so with self-employed workers. These different situations are discussed in the following paragraphs.

3.1.1.a Professionals and entities under their control

The notion that individuals or natural persons may qualify as undertakings under EU competition law if carrying out economic activities as professionals is beyond question today, having been applied in multiple cases to doctors,[177] lawyers[178] or accountants.[179]

A particular case is that of natural persons who control legal entities involved in the economic activity in question. In these cases, both the individual and the legal entities may be treated as a single economic unit. An early example of this is the decision of the Commission in *Reuter/BASF*, in which Dr. Reuter, a research chemist specialising in polyurethanes, acted through Reuter-Holding GmbH, which possessed 50% of the shares in Elastomer AG.[180] Also, in *Hydrotherm* the Court treated Dr. Andreoli as being in the same economic entity as two companies owned by him, Compact and Officine Sant'Andrea.[181] A similar logic has been

[177] Judgment of 12 September 2000, *Pavlov*, C-180/98, ECLI:EU:C:2000:428, at 77.

[178] Judgment of 19 February 2002, *Wouters*, C-309/99, ECLI:EU:C:2002:98, at 49. See also *Arduino* of the same date (C-35/99, ECLI:EU:C:2002:97) and the judgment of 5 December 2006 (Grand Chamber), *Cipolla*, C-202/04, ECLI:EU:C:2006:758.

[179] Judgment of 28 February 2013, *Ordem dos Técnicos Oficiáis de Contas*, C-1/12, ECLI:EU:C:2013:127, at 38.

[180] Decision of 26 July 1976, *Reuter/BASF*, 76/743/CEE, [1976] OJ L 254/40.

[181] Judgment of 12 July 1984, *Hydrotherm*, 170/83, ECLI:EU:C:1984:271.

applied more recently in *Micula*, a State aid decision, but this case concerned two brothers.[182] That specific finding was challenged by the addressees of the decision and at the time of writing is on appeal to the General Court, as it was not examined in the first round of appeals.[183]

Micula is a reminder of the difficulties of evaluating the impact of family ties in this context. In *Aristrain*, the Court found that the mere fact that the share capital of two separate companies was held by the same person or the same family was insufficient to treat those entities as a single economic unit.[184] However *Dansk Rørindustri*, a Grand Chamber ruling handed down two years later, seemed more open to treating these structures as an undertaking.[185] More recently, in *HaTeFo*, the Court read the Commission Recommendation on SMEs[186] as requiring that the turnover of the SME be calculated by combining various entities in which several members of the same family had stakes "where it is clear from the analysis of the legal and economic relations between them that, through a natural person or a group of natural persons acting jointly, they constitute a single economic unit."[187] These examples suggest that each case will be decided on its own facts.

3.1.1.b Employees and self-employed workers

Employees are understood to be part of an undertaking and therefore competition law does not apply to agreements that they may be party to. The Court has expanded that logic to include

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[182] Decision (EU) 2015/1470, Arbitral award *Micula v Romania* of 11 December 2013. [2015] OJ L 232/43, at 81-91.

[183] Judgment of 18 June 2019, T-624/15, T-694/15 and T-704/15, *European Food SA and others v Commission*, ECLI:EU:T:2019:423) and on appeal Judgment of 25 January 2022, C-638/19 P, *Commission v European Food and Others*, ECLI:EU:C:2022:50). Following the latter decision, this element of debate was referred back to the GC for its ruling.

[184] Judgment of 2 October 2003, *Aristrain v Commission*, C-196/99 P, ECLI:EU:C:2003:529, at 99.

[185] Judgment of 28 June 2005 (Grand Chamber), *Dansk Rørindustri and others v Commission*, C-189/02 P. ECLI:EU:C:2005:408, at 103-130.

[186] Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises, [2003] OJ L 124/36. That instrument seeks to establish a concept that may apply across EU law, including the competition rules. Note that the English version of this document uses the term 'enterprise' instead of 'undertaking', and the judgment does the same.

[187] Judgment of 27 February 2014, *HaTeFo v Finanzamt Haldensleben* C-110/13, ECLI:EU:C:2014:114, operative part of the judgment.

agreements that are the result of collective bargaining,[188] a rule that has been applied even where workers negotiate terms of employment through corporate vehicles.[189]

In recent times, questions have been raised with respect to self-employed workers, which are considered independent and therefore potentially treated as standalone undertakings for the purposes of competition law. That has created difficulties as regards collective negotiations, which are admitted for traditional dependent workers but could be seen as horizontal price-fixing if engaged in by undertakings. In *FNV Kunsten*,[190] a case concerning professional musicians who occasionally replaced members of an orchestra, the Court confirmed that approach, while bravely acknowledging that 'it is not always easy to establish the status of some self-employed contractors as undertakings'[191] and inviting the referring court to consider whether the musicians were truly independent undertakings or 'false self-employed' professionals entitled to be treated as employees, regardless of their status under national law.[192]

Following this judgment, the treatment of self-employed workers has become a thorny issue, with particular attention being paid to digital platforms.[193] In parallel, some courts in Member States have recognised their status as 'workers', as it has happened with Uber's drivers in the

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[188] Judgment of 21 September 1999, *Albany*, C-67/96, ECLI:EU:C:1999:430.

[189] Judgment of 16 September 1999, *Criminal proceedings against Jean Claude Becu,* Case C-22/98, ECLI:EU:C:1999:419). Limitations imposed by these organisations beyond the management of work relations may be subject to other EU rules, as was made clear in subsequent decisions in that particular field (Judgment of 11 February 2021, *Katoen Natie Bulk Terminals NV*, C-407/19 and C-471/19, ECLI:EU:C:2021:107). See also the controversial decision of the EFTA Court in *Holship Norge* (Judgment of 19 April 2016, Case E-14/15) that sought to apply the competition rules to trade unions. On this point generally, see Shaun Bradshaw, 'Is a trade union an undertaking under EU competition law?', (2016) 12:2-3 *European Competition Journal* 320.

[190] Judgment of 4 December 2014, *FNV Kunsten,* C-413/13, ECLI:EU:C:2014:2411.

[191] Ibid at 32.

[192] It is worth mentioning that the US Supreme Court looked at a similar situation in *American Federation of Musicians v. Carroll,* 391 U.S. 99 (1968), accepting that these practices would fall under the US exemption for collective dealings.

[193] See Mark Anderson & Max Huffman, 'The Sharing Economy Meets the Sherman Act: Is Uber a Firm? a Cartel? or Something in Between?' (2017) 3 *Columbia Business Law Review* 859; Ioannis Lianos et al, 'Re-thinking the competition law/labour law interaction: Promoting a fairer labour market', 2019 10(3) *European Labour Law Journal* 291; Maria José Schmidt-Kessen et al, '"I'll call my Union", said the driver - Collective bargaining of gig workers under EU competition rules', (2020) 20-43 *Copenhagen Business School Law Research Paper*.

UK[194] or Glovo's cyclists in Spain.[195] In 2022 the Commission opened a consultation to address this matter and later adopted a communication that sought to clarify the treatment of collective action of these workers under competition law. This document argues that Article 101 TFEU should not normally apply if the workers are economically dependent, work alongside dependent employees or work through digital platforms, and declares outside the Commission's enforcement priorities collective agreements with counterparties of a certain strength or pursuant to EU or national legislation.[196]

3.1.2 Commercial agents

Commercial agents are a hybrid figure between an independent business player that competes in the market for intermediation services and an auxiliary organ of their principal, which they represent on the latter's market.[197] That hybrid nature is reflected in the Vertical Guidelines, which consider that part of their relationship with a principal (the conditions on which the goods or services would be traded by the agent, which we could term the 'external' part of the relationship) would fall outside the scope of Article 101 TFEU. This is relevant to the discussion of the notion of undertaking since the exclusion of the 'external' part of the relationship is justified under a single entity logic: in pursuit of these activities the agent is 'an auxiliary organ forming an integral part of [the principal's] undertaking'[198] or, to quote the 2022 Vertical Guidelines, it 'no longer acts as an independent economic operator'.[199] However, the same is not true for other aspects of that same relationship (the business agreements between the parties, or the 'internal' part of the relationship), where principal and agent act as separate business players.[200]

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[194] UK Supreme Court, *Uber BV and others v Aslam and others* [2021] UKSC 5.

[195] Tribunal Supremo of Spain, Judgment of 25 September 2020, 4746/2019, ECLI:ES:TS:2020:2924.

[196] Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons, [2022] OJ C 374/2.

[197] For a recent delimitation of agency agreements under US and UK law, see Rachel Leow, 'Understanding agency: a proxy power definition', (2019) 78(1) *Cambridge Law Journal* 99.

[198] Judgment of 1 October 1987, *Vereniging van Vlaamse Reisbureaus*, 311/85, ECLI:EU:C:1987:418 at 20.

[199] Vertical Guidelines, 30.

[200] Guidelines on Vertical Restraints, [2022] OJ C 248/1, paras 41-45.

While the initial doctrine of the Commission and the Courts stressed the 'integration' of the agent in the economic unit as the element justifying the partial exclusion from Article 101, the most recent doctrine of the Commission[201] and the Court[202] tend to focus on the risks assumed by the agent rather to differentiate 'genuine' agency agreements from 'non-genuine'[203] relationships, raising the question on whether the original 'integration' perspective is still valid. It is submitted that this is not because of a change in the underlying logic; at most, one could refer to an increased reliance on a factual point that usefully exposes the 'competitive neutrality' that would exist between the parties.[204]

In recent times, attention has been paid to the role of agency agreements in the intermediation provided by platforms. Here, the concern is that an approach that is exclusively based on the commercial risk that the agent would bear, which internet intermediaries often do not assume, may result in these relationships not being scrutinised under Article 101 TFEU.[205] This has resulted in the 2022 Vertical Guidelines taking the not entirely consistent position of maintaining the concept of risk as the underlying logic for the exclusion of agency agreements from Article 101 TFEU while, at the same time, proclaiming that agreements entered into by undertakings active in the online platform economy should not be considered agency agreements.[206]

The fact that 'genuine' commercial agents act on behalf of their principals means that undertakings that use them could be liable for infringements committed through them, as with management or employees. The question has been raised whether this logic might extend beyond agency agreements to other relationships characterised by a strong level of dependence

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[201] Ibid, 30-32.

[202] See especially Judgment of 14 December 2006, *CEES v CEPSA*, C-217/05, ECLI:EU:C:2006:784. On this judgment see Pablo Ibañez Colomo, "The 'Repsol saga': Background note on 'genuine' agency agreements in Spanish competition law", *e-Competitions* I, no. 503 (2016).

[203] This genuine/non-genuine terminology was used in the 2000 Vertical Guidelines ([2000] OJ C 291/1). While it was abandoned in the subsequent vertical guidelines, it is retained here for clarity.

[204] Pınar Akman, 'Online Platforms, Agency, and Competition Law: Mind the Gap', (2019) 43 *Fordham International Law Journal* 209.

[205] See in this respect Pınar Akman, 'Online Platforms…' cit; Luca Villani, 'To be agents or not to be agents, that is the question: The impact of the online platforms revolution on the notion of agency under EU competition law', (2020) IV(2) *Market and Competition Law Review* 75.

[206] Cfr sections 3.2.1 and 3.2.3 of the 2022 Vertical Guidelines.

such as subcontractors.[207] At the time of writing this logic is being tested in the reference for a preliminary ruling in *Unilever* which is pending before the CJEU.[208]

3.1.3 Legal entities as undertakings

Leaving aside self-employed workers and professionals, most undertakings are personified through legal entities. The subsections below discuss some configurations.

3.1.3.a Standalone legal entities

Economic entities may be run by a standalone legal entity. In these cases, the undertaking and the legal entity may be treated as representing the same reality for most practical purposes. In the event of enforcement, the legal entity would appear as the corporate body that personifies the undertaking. That said, one-entity undertakings are rare above a relatively small size, which makes it necessary to consider groups of companies.

3.1.3.b Groups of companies under sole control

Legal entities may control other entities which are legally separate (often called 'affiliates' or 'subsidiaries'). The ones in control are called 'parent companies', a term which misleadingly stretches the analogy with natural persons.[209] In fact, most if not all undertakings above a certain size are run by constellations of legal entities, mostly companies.

Groups of companies take many different forms. The following paragraphs assume groups of companies under sole control, as this concept is understood in relation to the merger rules, that

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[207] Judgment of 21 July 2016, *VM Remonts and Others*, C-542/14, ECLI:EU:C:2016:578. See Bruce Wardaugh, (2017) 5 'Punishing parents for the sins of their child: extending EU competition liability in groups and to subcontractors', *Journal of Antitrust Enforcement* 22.

[208] Case C-680/20, [2021] OJ C79/22. In his Opinion of 14 July 2022, ECLI:EU:C:2022:586, AG Rantos has explored the possibility that distributors other than commercial agents may be considered a 'single entity' alongside their supplier.

[209] Misleading in the sense that, at least in modern societies, parents do not 'own' their children, nor buy those of others.

is, where an ultimate parent entity has the capacity to unilaterally determine the commercial behaviour of all other entities in the group.

The treatment of groups of companies varies depending on legal systems and the area of law. In an extreme application of the legal entity approach, each person would be understood as being fully independent and would separately conclude its own contracts, pay its own taxes and assume its separate liability. From an economic entity perspective, which would tend to be the position taken under EU competition law, these groups could be treated as an entity.

It may initially be understood that a group of companies as defined should be considered for all purposes under competition law as an undertaking. That perspective is followed in the field of merger control: under the Merger Regulation, all the entities under the control of an 'undertaking concerned' are assumed to be a part of it both for the purposes of turnover calculation and when determining the existence of a concentration, which requires taking control of a non-controlled entity.

Outside the area of merger control, it may be argued if group of companies may in certain situations contain several separate independent undertakings. Two grey areas may be identified in this regard: the situation of subsidiaries pursuing independent market strategies, and the treatment of conglomerate groups whose components pursue entirely different business activities.

On the first matter, the case law of the CJEU routinely links the treatment of subsidiaries as part of an undertaking to their lack of autonomy, often recalling the words of the Court in *ICI*, where it was held that the economic unity would require

> 'that 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.'[210]

[210] Judgment of 14 July 1972, *Imperial Chemical Industries v Commission*, 48/69, ECLI:EU:C:1972:70 at 133.

That is however not necessarily the case with all groups of companies. As the Court has observed in the related area of public procurement,

> '… groups of undertakings can have different forms and objectives, which do not necessarily preclude controlled undertakings from enjoying a certain autonomy in the conduct of their commercial policy and their economic activities (…).'[211]

The above logic has been used to accept that separate subsidiaries may, if acting independently, submit public bids without it being understood that they would be distorting these procurement processes.[212] This raises the question whether, in the field of competition law, these 'independent' subsidiaries, with the capacity (or even, in some cases, a regulatory obligation, as is the case in the energy sector between distribution and generation activities[213]) to operate autonomously on the market should be treated as separate undertakings. While in *Ecoservice*[214] the Court seemed to close the door to applying Article 101 TFEU to agreements between entities in a group of companies despite the independence of its constituent companies, one wonders whether this will be the last word on this subject. This matter is discussed in more detail in chapter 4.4 of this thesis.

The second area of doubt concerns the treatment of so-called 'conglomerate' groups of companies that pursue entirely separate economic activities in different markets. These structures may be distinguished from the above case of independent entities as their separateness would not merely rest on a policy that may be changed at any time, but a structural situation where the various components of a group of entities should be expected to act independently. While until recently it was generally assumed that these groups constituted an economic unit irrespective of their disparateness, the recent judgment in *Sumal* has challenged this understanding with its proclamation that indicates that a 'conglomerate' group

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[211] Judgment of 19 May 2009, *Assitur*, C-538/07, ECLI:EU:C:2009:317 at 31.

[212] Judgments of 19 May 2009, *Assitur*, C-538/07, ECLI:EU:C:2009:317; 23 December 2009, *Serrantoni*, C-376/08, ECLI:EU:C:2009:808; 22 October 2015, *Impresa Edilux*, C-425/14,ECLI:EU:C:2015:721; 8 February 2018, *Lloyd's of London*, C-144/17, ECLI:EU:C:2018:78.

[213] Article 35 of Directive (EU) 2019/944 on common rules for the internal market for electricity, [2019] OJ L 158/125.

[214] Judgment of 17 May 2018, *Ecoservice*, C-531/16, ECLI:EU:C:2018:324, at 28, 29.

of companies might contain several 'economic units'.[215] This issue is discussed later in this same chapter at section 3.2.

3.1.3.c Jointly controlled entities

Besides entities under sole control, whose behaviour is or may be individually decided by a parent company, EU competition law identifies jointly controlled entities (frequently called joint ventures or JVs) as those economic agents whose actions are determined by two or more independent parent companies which, while not able to unilaterally decide on the JV's actions, could prevent them from behaving in a certain way by vetoing commercial decisions.[216]

There are different categories of jointly controlled entities, ranging from a loose structure for cooperation between two economic players to a fully autonomous and self-standing market player of its own, and their treatment under competition law inevitably differs. Save as otherwise indicated, the comments that follow are based on the idea of 'fully functional' JVs, as they are defined under the merger rules, that is, those 'performing on a lasting basis all the functions of an autonomous economic entity', whose creation is identified in the Merger Regulation as a 'concentration'.[217]

The traditional approach under competition law has been to consider fully functional joint ventures as separate undertakings from their jointly controlling undertakings. This explains for instance that merger control rules treat the acquisition of sole control on a jointly controlled entity as a concentration, assuming that such a transaction involves taking control (*in casu*, a different 'quality' of control[218]) and therefore that the JV was a separate undertaking before that transaction.

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[215] Judgment of 6 October 2021 (Grand Chamber) *Sumal v Mercedes Benz Trucks España*, C-882/19, ECLI:EU:C:2021:800, at 45, 47.

[216] The above is of course a simplification. On this issue see generally Luís Silva Morais, *Joint Ventures and EU Competition Law*, Hart, 2013.

[217] Merger Regulation, Art 3(4). See also Jurisdictional Notice, at 91ff.

[218] Jurisdictional Notice at 83.

The same logic would apply under Article 101 TFEU, which would potentially apply to the agreements between a parent entity and a jointly controlled affiliate (which again presupposes a separate undertaking), as the Commission has affirmed in the past.[219]

The traditional understanding that joint ventures and their parents should be considered separate undertakings has been obscured recently in relation to parental liability, where it has been held that the jointly controlling parents should respond for the deeds of their venture under the logic that they would form with it an economic unit. This was first determined in *Du Pont* and *Dow Chemical*,[220] where the parent companies of these groups were declared to be liable under the theory that they were the same undertaking as their jointly controlled affiliate DuPont Dow Elastomers LLC ('DDE'), a participant in the *Chloroprene Rubber* cartel.[221] In their appeals against that decision, Du Pont and Dow argued that the notion of 'economic unit' that the Commission was relying upon was inconsistent with that existing under the Merger Regulation,[222] an argument which was answered by the Court in the following terms:

> 'Where two parent companies each have a 50% shareholding in the joint venture which committed an infringement of the rules of competition law, it is only for the purposes of establishing liability for participation in the infringement of that law and only in so far as the Commission has demonstrated, on the basis of factual evidence, that both parent companies did in fact exercise decisive influence over the joint venture, that those three entities can be considered to form a single economic unit and therefore form a single undertaking for the purposes of Article 81 EC.'[223]

The above text would suggest that the parent and the jointly controlled affiliate may be defined as a single economic unit, but with two limitations: first, this would only apply for the

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[219] See Decision of 16 January 1991, *IJsselscentrale*, [1991] OJ L 28/32, at 12-13; Decision of 15 May 1991, *Gosmé/Martell*, [1991] OJ L 185/23, at 30.

[220] Judgments of 26 September 2013, *EI du Pont de Nemours v Commission*, C-172/12 P, ECLI:EU:C:2013:601 and of the same date, *Dow Chemical v Commission*, C-179/12 P, ECLI:EU:C:2013:605. Note that this doctrine had been applied earlier by the GC in its judgments of 27 September 2006, *Avebe BA v Commission*, T-314/01, ECLI:EU:T:2006:266, para 136 and of 12 July 2011, *Fuji Electric Co. Ltd v Commission*, T-132/07, ECLI:EU:T:2011:344 para 181.

[221] Decision of 5 December 2007, COMP/38.629 – *Chloroprene Rubber* [2008] OJ C 251/11 (summary decision).

[222] *EI du Pont de Nemours v Commission*, at 34; *Dow Chemical v Commission* at 42.

[223] Judgment in *EI Du Pont*, para 47; Judgment in *Dow*, para 58.

purposes of establishing their liability (and potentially not for other uses of the notion of undertaking such as, for instance, the intragroup exemption); and second, only where the Commission had demonstrated, on the basis of factual evidence, that both parent companies did in fact exercise decisive influence over the joint venture (which suggests that, unlike other cases of parental liability, that influence may not be presumed).

The above reading, whereby parental liability of a JV would be an exception to the notion of undertaking, could have squared the circle by making the two parents liable without putting too much into question the notion of undertaking. However, in *LG Electronics* the Court refused to follow such as reductionist approach. The case concerned computer and TV monitor tubes, which were sold by LG and Philips. During the first part of the infringement period the two companies sold the products in question separately but subsequently they joined forces and sold them through a joint venture. The Commission considered both parents liable for both periods, applying the same logic as in *Du Pont* and *Dow*. However, in addition to that, the Commission calculated the fine by adding the sales of the joint venture to the turnover of the parent entities. When LG and Philips objected to this method arguing that parent entities and their JV were independent undertakings which should be considered separate for all purposes other than parental liability, the Court rejected the argument and confirmed the Commission's approach, casting doubt on when a JV could or could not be considered the same undertaking as its parents on matters other than parental liability.[224]

The confusion has not remained confined to parental liability and turnover calculation. In its 2022 Draft Horizontal Guidelines the Commission has proposed that certain agreements between parent entities and the joint venture itself should be excluded from the scope of Article 101 TFEU. In support of this approach, it has referred to the *Du Pont*, *Dow* and *LG Electronics* judgments mentioned above.[225] This matter is discussed in greater detail in chapter 4 below when the intragroup exemption is examined.

[224] Judgment of 14 September 2017, *LG Electronics and Koninklijke Philips Electronics*, C-588/15 P and C-622/15 P, ECLI:EU:C:2017:679, paragraphs 71 and 76.

[225] It may be recalled that the Commission already tried this in its 2010 Draft Horizontal Guidelines, but in the end removed this reference from the definitive version. See Draft Horizontal Guidelines SEC(2010) 528/2, at 11.

Following the above developments, there appears to be a trend towards treating joint ventures as part of the same undertaking as their parents. Confusingly, however, each parent would remain a separate entity, and this approach would only be taken within the scope of the JV's activities – something that will not always be easy to define. That approach would, on the other hand, be inconsistent with that followed in merger control, which provides us with an initial indication that the meaning of 'undertaking' may not necessarily always be the same in the different areas of competition law.

3.1.4 State-owned entities

A third category of undertakings, besides individuals and companies, is constituted by entities under State control which carry out economic activities, generally called 'state-owned enterprises' or 'SOEs'.[226]

EU competition law initially treats these entities as it would privately owned undertakings. Article 106 TFEU makes them (alongside those enjoying special or exclusive rights) subject to the Treaty rules, especially those in the field of competition, provided that this does not obstruct the performance of the tasks entrusted to them. Article 345 TFEU provides that '(t)he Treaties shall in no way prejudice the rules in Member States governing the system of property ownership',[227] which is interpreted as not just as guaranteeing the sovereignty of Member States in respect of property rights but, importantly, to prevent any discrimination on the basis of the public or private ownership of businesses, as its precursor, Article 83 of the ECSC Treaty, stated more openly.[228]

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[226] It is inevitable to mention here the *OECD Guidelines on Corporate Governance of State-Owned Enterprises*, OECD Publishing 2015, section III. Among the academic literature, see Antonio Capobianco and Hans Christiansen, 'Competitive Neutrality and State-Owned Enterprises: Challenges and Policy Options', *OECD Corporate Governance Working Papers*, No 1, OECD Publishing 2011; Frederic Jenny, *Entreprises Publiques, Neutralité Concurrentielle Et Droit De La Concurrence*. (August 2015). Available at SSRN: https://ssrn.com/abstract=2894886; and Michael Albers, 'Achieving Competitive Neutrality Step-By-Step', (2018) 41 (4) *World Competition* 495.

[227] On this provision, see Bram Akkermans and Eveline Ramaekers, 'Article 345 TFEU (ex Article 295 EC), Its Meanings and Interpretations', (2010) 16(3) *European Law Journal* 292.

[228] Article 83 ECSC was worded as follows: "The establishment of the Community shall in no way prejudice the system of ownership of the undertakings to which this Treaty applies." In support of this interpretation, see the judgment of 6 July 1982, *France v Commission*, 188/80, ECLI:EU:C:1982:257 at 21; Judgment of 4 September 2014, *Corsica Ferries*, C-533/12P, ECLI:EU:C:2014:2142 at 21. This interpretation is also reflected in Recital 19

SOEs take various legal forms, something which should be irrelevant under *Höfner*.[229] Many are created as companies or groups of companies under private law, as in the case of Électricité de France or EDF, which was privatised around 2004,[230] and recognising them as undertakings is a relatively straightforward task. More problematic is the case of entities that are embedded in the public administration. In *Italian Tobacco*,[231] the Court confirmed that the *Amministrazione Autonoma dei Monopoli di Stato* (the Italian tobacco monopoly body) should be considered to be an 'undertaking' for the purposes of the Transparency Directive,[232] despite lacking legal personality. It was probably relevant that this entity could be identified as separate and actually kept independent accounts.[233] Similarly, the Court accepted in *Höfner* that the German Federal Office for Employment (*Bundesanstalt für Arbeit*) was an 'undertaking' but again that structure was separately embodied under German law.[234] The case of public structures lacking an independent legal status (and especially with no separate accounts) as SOEs might be disputed.

In the specific area of merger control, Recital 22 of the Merger Regulation permits the identification of separate 'economic units' within the public sector for the purposes of the rules on concentrations where these structures show 'an independent power of decision, irrespective of the way in which their capital is held or of the rules of administrative supervision applicable to them'. While the text of Recital 22 would seem to limit this mechanism to the calculation of turnover thresholds, the Commission has read it in a way that enables it to identify such 'independent powers of decision' as separate 'undertakings

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of Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors, [2014] OJ L 94/243 or Recital 134 of Regulation 575/2013 on prudential requirements for credit institutions and investment firms, [2013] OJ L 176/1.

[229] 'In the context of competition law (…), the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed (…)'. Judgment of 23 April 1991, *Höfner and Elser v Macrotron*, C-41/90, ECLI:EU:C:1991:161, at 21.

[230] The privatisation of EDF was challenged by the Commission in its Decision 2016/154 of 22 July 2015, [2016] OJ L 34/152, which was challenged before the European Courts, being finally resolved by the GC's Judgment of 16 January 2018, *Électricité de France v Commission*, T-747/15, ECLI:EU:T:2018:6.

[231] See Judgment of 16 June 1987, *Commission v Italy (AAMS)*, 118/85, ECLI:EU:C:1987:283.

[232] Commission Directive 80/723 Transparency of Public Undertakings [1980] OJ L 195/35, later replaced by Commission Directive 2006/111/EC, [2006] OJ L 318/17.

[233] *AAMS*, para 13.

[234] As noted in AG Jacobs' Opinion in that case it was 'eine rechtsfähige Körperschaft des öffentlichen Rechts mit Selbstverwaltung'. Opinion of AG Jacobs of 15 January 1991, *Höfner*, C-41/90, ECLI:EU:C:1991:14, at 40.

concerned', therefore requiring that combinations between them are notified to it if the relevant thresholds are met, thereby assuming a role of policing reorganisations of the public sector either within Member States or third countries.[235]

One could ask whether the identification of multiple undertakings in the public sector as provided in Recital 22 of the Merger Regulation should be used outside the scope of the merger rules, and therefore whether public undertakings for competition law purposes featuring an 'independent power of decision' should be treated as being separate. Arguably, such an approach may not only be used to calculate their turnover for fine-setting purposes, but more importantly, to exclude the intragroup exemption for agreements between SOEs instructed by different authorities forming part of the same State, either EU Member States or third countries. In this respect, it may be argued that the decision to extend the tools of the Merger Regulation to other areas of competition law should not be taken lightly; as noted earlier in this chapter, merger control seems to apply different criteria when defining the notion of concentration compared to other areas. That said, Recital 22 itself is directly based on Article 345 of the Treaty, which would arguably be a good reason for extending its application to other areas of competition law. Given the significance of and interest in the application of the competition rules to SOEs, it is to be expected that this question will come before the Courts at some point.

3.2 The economic activity limb and the treatment of conglomerate groups

The second limb of the definition of undertaking laid down in *Höfner* defines an undertaking by reference to an 'economic activity'. This part of the definition is used to differentiate

[235] See also Consolidated Jurisdictional Notice, [2008] OJ C 95/1 at 51-53, 153, 192 and 194. Relevant decisions which assume this approach include the Decision of 12 November 2009, M.5549, *EDF/SEGEBEL* and of 10 March 2006, M.7850 – *EDF/CGN/NNB GROUP OF COMPANIES (Hinkley Point)*. A special mention should be made to the Decision of 27 February 2020, M.9410 – *SAUDI ARAMCO/SABIC*, a merger between two public Saudi entities. In recent times, this policy has faced difficulties with respect to third countries. In M.10083 *CHINA BAOWU | TAIYUAN IRON & STEEL GROUP* ([2021] OJ C6/10), the notification of a transaction (impliedly of two entities with independent powers of decision) was withdrawn and implemented without the Commission having found a way to challenge it. See on this matter Alexandr Svetlicinii, 'Consolidation of the State-Owned Enterprises in China: A Missed Opportunity for the EU Merger Control?', (2021) 13(1) *Journal of European Competition Law & Practice* 17.

market players from other entities through their actions and thus encapsulates the 'functional' ingredient of the definition in *Höfner*.

The case law of the CJEU has traditionally used this component to exclude certain initiatives (mainly those carried out by the State or closely linked to public policy) from the scope of EU competition law, a matter discussed in chapter 5 of this dissertation. The following paragraphs limit themselves to considering the role of this defining element of the undertaking and what it can tell us about its identity and boundaries.

The two-pronged definition in *Höfner* suggests that the mere presence of a structure that is solely controlled, or as referred to in this work, a group of companies, does not result in an undertaking. For such an entity to exist, in addition to such a structure, the Court has indicated that the entity would 'pursue a specific economic aim on a long-term basis,'[236] or present a 'unity of conduct on the market'.[237]

The reference to a specific aim and a unity of action or a begs the following question: should the undertaking so defined be identified with *a specific economic activity* or would it be sufficient for it to carry out *economic activities* in general? This distinction is relevant because if the first option is chosen, groups of companies that pursue unconnected economic activities (such as the so-called 'conglomerate' groups) should be considered to encompass several undertakings. This has recently been endorsed by the CJEU, sitting as a Grand Chamber, in *Sumal*:

> '(…) it is also appropriate to observe that the organisation of groups of companies that may constitute an economic unit may be very different from one group to another. There are, in particular, some groups of companies that are 'conglomerates', which are active in several economic fields having no connection between them.

[236] Judgment of 1 July 2010, *Knauf Gips KG v Commission*, C-407/08 P, ECLI:EU:C:2010:389, at 84.

[237] Judgment of 6 October 2021 CJEU (Grand Chamber) *Sumal*, C-882/19, ECLI:EU:C:2021:800 at 41. See on this point Eva Fischer und Peter Zickgraf, ‚Zur Reichweite der wirtschaftlichen Einheit im Kartellrecht' (2022) 186 *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht* 125 at 136.

(…)

> Therefore, the same parent company may be part of several economic units made up, depending on the economic activity in question, of itself and of different combinations of its subsidiaries all belonging to the same group of companies. If that were not the case, a subsidiary within such a group could be held liable for infringements committed in the context of economic activities entirely unconnected to its own activity and in which they were in no way involved, even indirectly.'[238]

The above paragraphs raise multiple questions. The intensity of the independence of distinct economic activities is often a matter of degree, and administrable standards will be needed to apply it. From an accounting standpoint, that separation may be simply not possible. In *Sumal* the use of different (and not entirely compatible) epithets concerning the separation ('economic activity entirely unconnected', 'economic field', 'same products') indicates that the Court itself may not have a precise boundary in mind.

Leaving aside the difficulties of applying this approach, a related question is whether the identification of separate 'economic units' (the CJEU appeared to avoid using the term 'undertaking' in this case) is to be applied across the board in EU competition law (and therefore fines may only be calculated having regard to the sales of a part of the conglomerate's sales, and agreements between disparate entities in a group may fall under Article 101 TFEU) or should be restricted to the specific purposes of subsidiary liability. In that respect, for the reasons explained in more detail in section 4.2.2 of this thesis, it is submitted that a division of groups of companies into separate units has for now only been decided for descending liability situations.

One important takeaway from the above is that the concept and boundaries of the undertaking may not be identical depending on the context where it is invoked. In that respect, *Sumal* would provide another example, besides the joint venture and SOE cases earlier discussed,[239]

[238] Judgment of 6 October 2021 CJEU (Grand Chamber) *Sumal v Mercedes Benz Trucks España*, C-882/19, ECLI:EU:C:2021:800, at 45, 47.

[239] Section 3.1.3.c and 3.1.4.

that the notion of undertaking, and especially its boundaries, is not the same across its uses. Further, as discussed in more detail in Chapter 4, this would not only be a divergence from the use of the notion in relation to Article 101/102 TFEU and merger control, but also with respect to the various uses of the notion *within* Articles 101 and 102. This issue will be examined further later in this thesis.

3.3 Measuring the size of the undertaking

Size matters in EU competition law. It is used (often alongside market share) as a proxy for market power, albeit an imperfect one, in several block exemption regulations and the horizontal and vertical guidelines to define safe harbours.[240] It is also employed in the *Notice on Effect on Trade* to measure appreciability.[241] Size is also a central feature of the Merger Regulation, defining its scope (an element in crisis at the time of writing following the Commission's new interpretation of Article 22 of the Merger Regulation[242]). Last but by no means least, it is a basic parameter for the calculation of fines under Article 23 of Regulation 1/2003 and other sanctioning provisions.

Despite its relevance, the measurement of the size of the undertaking presents various difficulties, which may usefully be grouped together as those related to boundaries and those concerned with metrics.

The first set of difficulties concerns the delimitation of an undertaking and includes difficult questions, some of which have been raised earlier in this chapter, including whether jointly controlled entities should be included as part of the same undertaking, the uncertainties that

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[240] Turnover thresholds in block exemption regulations are less important nowadays, having been largely replaced by market share boundaries, but some remain. See eg Art 2(2) of Regulation 2022/720 (the Vertical Block Exemption Regulation) [2022] OJ L 134/4.

[241] Guidelines on Effect on Trade [2004] OJ C 101/81, at 51.

[242] On 26 March 2021 the Commission published a communication changing its policy under Art 22 of the Merger Regulation whereby it accepted that Member States may refer to it concentrations not subject to notification under national merger rules (later published in OJ [2021] C 113/1). The communication invites Member States to refer to the Commission transactions below any quantitative threshold provided under national law, and therefore makes it possible for the Commission to examine any transaction, even if already completed, which challenges the threshold system of the Merger Regulation. Soon after its publication, the Commission accepted the referral of a transaction (Case M.10188 *Illumina/Grail*). Following the appeal, the General Court has confirmed the powers of the Commission (Judgment of 13 July 2022, T-227/21, *Illumina v Commission*, ECLI:EU:T:2022:447, appeal announced at the time of writing).

affect the delimitation of SOEs in the light of Recital 22 of the Merger Regulation and the possibility of identifying separate undertakings in a 'conglomerate' group of companies.

A second hurdle consists in the lack of a definitive set of accounting rules to calculate the size of business entities. There is indeed a small army of imperfectly aligned Directives, Regulations, Notices and national rules that specify the size of one or other structure for a variety of purposes, but these concern the legal entities and not the businesses as such. The following paragraphs discuss this confusing array of different rules.

3.3.1 The Accounting Directive

When measuring the size of an undertaking, its turnover is the first port of call. Turnover is without doubt the most important metric for the purposes of competition law, being used for purposes such as calculating fines,[243] determining the scope of the Merger Regulation,[244] or specifying exclusions to block exemption regulations,[245] among others.

As an accounting concept, turnover has been harmonised in the EU through the Accounts Directive,[246] ensuring a high level of consistency among Member States. That said, it should be noted that the Accounts Directive does not define the turnover of undertakings as this notion is understood under competition law,[247] although it does define the consolidated turnover of groups of certain forms of companies.[248] However, and while useful, consolidated sales do not necessarily coincide with those of undertakings.

Although a good starting point, the Accounts Directive has several shortcomings. Being a Directive, there is a degree of discretion in its implementation, leading to differences in the treatment of accounts among Member States. Its scope, limited to certain specific legal

[243] Art 23 of Regulation 1/2003.

[244] See Art 1 of the Merger Regulation, defining 'Community dimension'.

[245] See above fn 240.

[246] Directive 2013/34/EU of 26 June 2013 on Annual and Consolidated Accounts, [2013] OJ L 182/19 (the Accounting Directive).

[247] The Accounting Directive does not directly define 'undertakings' but uses that term extensively to refer to the corporate vehicles listed in its Annexes 1 and 2.

[248] See Art 21 et seq. of the Accounts Directive.

vehicles, leaves out other structures that carry out economic activities. Moreover, its rules on consolidation do not coincide with those provided for either in the Merger Regulation[249] or other competition law instruments.[250] Despite the above, the Court has acknowledged the importance of accounts prepared in accordance with the Accounts Directive both for the purposes of the Merger Regulation[251] and for the calculation of fines,[252] noting in both cases that the rules of the Directive could be used as a valuable starting point without necessarily providing a definitive answer.

3.3.2 The Merger Regulation

The Merger Regulation contains rules that are used to calculate the size of economic groups for the application of its jurisdictional thresholds, which diverge in various respects from those in the Accounts Directive in various aspects, including: (i) the Accounts Directive applies to certain legal entities[253] but not to others; (ii) the rules on consolidation differ, especially with respect to the treatment of joint ventures; (iii) as earlier noted, national law implementing the Accounts Directive leaves some discretion to Member States, which may lead to accounting differences; and (iv) corporate accounts may not reflect transactions implemented after their date, which should be taken into account under the Merger Regulation.[254]

The relative clarity of the rules on the calculation of turnover for the purposes of the Merger Regulation raise the question if they may be used for other competition law purposes, such as the calculation of fines. While this might appear tempting, it is submitted that this would not be appropriate, given that the rules in the Merger Regulation were designed for a different purpose to Articles 23 and 24 of Regulation 1/2003, which concern sanctions.

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[249] Article 5 of the Merger Regulation and section IV of the Jurisdictional Notice ([2008] OJ C 95/1) provide for specific rules for the calculation of turnover.

[250] See eg Art 8 of Regulation 330/2010, [2010] OJ L 102/1.

[251] Judgment of 14 July 2006, *Endesa v Commission*, T-417/05, ECLI:EU:T:2006:219, at 115. See also Jurisdictional Notice, at 169-71.

[252] Judgment of 26 November 2013 (Grand Chamber), *Groupe Gascogne SA v Commission*, C-58/12 P, ECLI:EU:C:2013:770, at 54. For further discussion on turnover calculation in fines, see Section 4.3 below.

[253] The entities are listed in Annex 1 of the Accounts Directive.

[254] Jurisdictional Notice, section 4.2.

3.3.3 The SME Recommendation

Another tool for measuring the size of economic groups is the *SMEs Recommendation*,[255] which defines these players (confusingly dubbed here 'enterprises' instead of 'undertakings'[256]) through a combination of three criteria: turnover, headcount and balance sheet. Of particular interest as regards the question of consistency are its rules on 'linked enterprises', which define groups of companies under specific criteria which arguably differ from those used in other areas of competition law, despite it being mentioned in some competition law instruments.[257]

3.3.4 Other rules on the size of undertakings

Besides the above, other provisions are used to establish the size of undertakings for various competition law purposes. Reference has already been made to Article 2(2) of Regulation 2022/720, which defines a quantitative threshold for the exemption of vertical agreements, continuing a long tradition where block exemption regulations contained specific (and not necessarily always consistent) rules, especially on consolidation. While turnover thresholds have in recent years been deleted from most block exemption regulations and replaced with market share thresholds, block exemptions still contain rules defining 'connected undertakings', a term used to identify legal entities that control other entities. As a result, they provide for some form of consolidation based on specific criteria that, while following the approach to consolidation contained in the Accounts Directive, offer different solutions.[258]

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[255] Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises, [2003] OJ L 124/36.

[256] Art 1 of the Recommendation defines enterprises as 'any entity engaged in an economic activity, irrespective of its legal form. This includes, in particular, self-employed persons and family businesses engaged in craft or other activities, and partnerships or associations regularly engaged in an economic activity.'

[257] See eg Vertical Guidelines, para 28 and General Block Exemption Regulation in State aid (Regulation 651/2014, [2014] OJ L 187/1). In 2021 the Commission carried out an evaluation aimed at identifying whether any changes to the 2003 definition were required and concluded that such changes were not necessary (SWD(2021) 280 final).

[258] See eg Art 1(2) of Regulation 316/2014 on technology transfer agreements, [2014] OJ L 93/17; Art 1(2) of Regulation 1217/2010 on research and development agreements, [2010] OJ L 335/36 and Art 1(2) of Regulation 1218/2010 on specialisation agreements, [2010] OJ L 335/43.

3.4 Conclusions on the anatomy of the undertaking

As the preceding sections have shown, the concept of undertaking, as defined in EU competition law, is capable of being described with precision. Its components may be explained and identified, as well as the links that bind them together. That should permit the boundaries of the undertaking to be clearly and logically established.

Nevertheless, the examination of its component parts has also exposed some potential inconsistencies that complicate tracing its boundaries. Leaving aside inevitable borderline elements such as the treatment of commercial agents, workers, or family groups, which may need to be addressed on a case-by-case basis, three major problems have been identified: joint ventures, conglomerate groups and state-owned entities. While each raise very different issues, they all have something in common: they result in an economic unit having very different boundaries, at least for some of the purposes of the notion of undertaking.

The difficulties detected in identifying the boundaries of the concept of 'undertaking', and especially the realisation that it might be defined differently depending on the specific area of competition law in question, strongly suggest that there may not be one notion of undertaking in EU competition law, but several. In particular, the concept applied in the merger control field would be different from that used in cases under Articles 101 and 102 TFEU, at least with respect to the treatment of jointly controlled entities and SOEs, and perhaps also with respect to the situation of commercially independent subsidiaries.

The recent decision in *Sumal* has taken these differences to a new level by suggesting that conglomerate groups of companies may contain separate economic units, providing yet another situation where the notion of undertaking under Article 101 would diverge from that used in merger control cases. Further, the context of that decision strongly indicates that this approach may not apply to other situations broadly falling under Article 101 TFEU, other than as regards downward liability. That raises the question whether, in contrast to what has been generally assumed, the notion might lead to different results in different contexts. Responding to that question requires to examine the different ways in which the concept of undertaking is used and this is what the next chapter of this dissertation will attempt to do.

On the other hand, the examination of the different accounting rules has also exposed difficulties in measuring the size of undertakings, despite the impressive advances made in recent years. Part of the problem is linked to the legal/economic entity divide; in the end, legal entities have corporate accounts, and economic entities rely on those and have often no specific financial information. Further, an examination of the accounting rules, especially as regards the question of consolidation, shows a lack of coherence, which complicates measuring the size of an undertaking. This raises the question whether the construction of the notion of undertaking may be aided, or eventually hampered, by developments in the legislative camp (mostly outside the realm of competition law) which may support, or conversely hamper, the treatment of economic agents, as it would appear to be the case with measuring their size or, as discussed, when looking at neighbouring areas such as public procurement, which appears to follow a different logic. These elements shall be recalled in later sections of this thesis.

CHAPTER 4 – THE NOTION OF UNDERTAKING DEFINED THROUGH ITS FUNCTIONS. (1). THE SINGLE ENTITY LIMB.

Besides identifying the subjects of EU competition law, the notion of undertaking has several functions. It may be used to underpin parental liability, to strengthen succession theories, to exempt intragroup activities from the prohibition on anticompetitive agreements, to support a group-wide approach to the calculation of fines or to exclude State-led activities from the scope of the competition rules altogether.

These uses or functions arguably do not directly define the notion of undertaking, but what it is used for. However, by doing so they reveal its logic, which is extremely welcome, given the absence of a consistent meaning of the notion in the laws of Member States.

Having recourse to the uses of the term to distil the essence of what the notion of undertaking means raises some questions. Given that these goals are varied and have developed independently from each other, each casts a different light. Group liability, succession theories, consolidated perspectives of groups or carving out State initiatives from market laws have their own logic and have each evolved separately. These uses may well have been strengthened by the notion of undertaking, but they cannot be said to derive from it. In fact, the opposite is true: the notion of undertaking has been built using these constructions as its foundations. As a result, while examining these varied uses is essential to grasp the true meaning of the notion, there is a risk of ending up with a multifaceted concept, which contradicts the prevailing assumption that there is one notion of undertaking that, as the CJEU declared in *Höfner*, applies 'in the context of competition law'.[259]

Surprisingly, a comprehensive examination of the various functions of the notion of undertaking and how they have shaped its meaning does not appear to have been fully attempted to date. There is indeed significant research on each of them (especially on parental liability, probably driven by the practical impact of these theories on large corporate groups),

[259] Judgment of 23 April 1991, *Höfner and Elser v Macrotron*, C-41/90, ECLI:EU:C:1991:161 at 21.

but relatively little work has been done on benchmarking its various uses and identifying potential inconsistencies between them.[260]

Chapters 4 and 5 of this thesis seek to contribute to filling that gap by looking respectively at each of the two 'limbs' of the definition of the notion of undertaking set out in *Höfner*. This chapter will discuss the use that has been made of the structural element based on the single entity doctrine, and chapter 5 will analyse the functional component of that definition by looking at the 'economic activity'.

4.1. The multiple functions of the single entity doctrine

Under the single entity doctrine, the notion of 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 consists of several persons, natural or legal, and that such an economic entity consists of a unitary organisation of personal, tangible and intangible elements, which pursue a specific economic aim on a long-term basis and can contribute to the commission of an infringement'.[261]

The definition of the undertaking as a unit or entity, even where it consists of several persons, is a permanent fixture in the case law of the CJEU since at least *CEES*.[262] As noted in Chapter 2, its origins go back to the single economic entity paradigm, used by the EU Courts long

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[260] Among the attempts made to benchmark different uses of the notion and questioning the unity of the notion see Alison Jones, 'The Boundaries of an Undertaking in EU Competition Law' (2012) 8(2) *European Competition Journal*, 301 at 315 ff and 'Drawing the Boundary Between Joint and Unilateral Conduct: Parent–Subsidiary Relationships and Joint Ventures', in Ezrachi, Ariel (ed) *Research Handbook on International Competition Law*, Edward Elgar, 2012, at 404 ff; More recently, see Alison Jones, Brenda Sufrin and Niamh Dunne, *Jones & Sufrin's EU Competition Law – Text, Cases and Materials*, 7th ed, OUP 2019, at 159 ff, (with particular reference to the concept of an undertaking developed in the attribution of liability line of cases and that of the intragroup exemption), Also Carsten Koenig, 'The Boundaries of the Firm and the Reach of Competition Law: Corporate Group Liability and Sanctioning in the EU and the US', in Marco Corradi and Julian Nowag (eds), *The Intersections between Competition Law and Corporate Law and Finance*, Cambridge University Press, 2021 (comparing parental liability and the use of notion in the setting of fines).

[261] Judgment of 1 July 2010, *Knauf Gips KG v Commission*, C-407/08 P, ECLI:EU:C:2010:389, at 84.

[262] Judgment of 14 December 2006, *Confederación Española de Empresarios de Estaciones de Servicio v Compañía Española de Petróleos SA*, C-217/05, ECLI:EU:C:2006:784, at 40.

before the undertaking was defined in *Höfner*, and still used by the Court when discussing the first limb of the notion of undertaking.[263]

The single entity doctrine is a correction of the legacy imputation model based on legal personality. As discussed in chapter 1 of this dissertation, that model has several inconsistencies, some of which relate to the separate treatment of legal persons acting in a unitary manner. To address those limitations, the Court held in *Höfner* that the notion of undertaking designates economic players *regardless of their legal status*, challenging the separation provided for under the laws pursuant to which any entity is constituted.

The single entity doctrine is used for multiple purposes in EU competition law. The sections that follow explore several of them: the transmission of liability within legal entities in groups of companies, especially parental liability; the calculation of fines; the exclusion of the prohibition on anticompetitive agreements; expansive succession theories; and finally, merger control.

The review that follows does not explore every aspect of these uses of the notion; instead, the goal is to identify what each of them can reveal about the notion of undertaking. The final part of this chapter sets out some provisional conclusions.

4.2 The communication of liability among separate legal entities

A particularly important use of the single economic entity doctrine challenges the separation between legal entities, a classic hallmark of company law, by holding liable legal entities other than the specific perpetrator of the conduct in question. This is referred to here as the 'communication of liability' function of the notion of undertaking.

Communication of liability has developed mainly, although not exclusively, in relation to parental liability. This is not surprising; as discussed in chapter 1 of this thesis, there is a universal trend towards making ultimate controlling entities responsible for the deeds of their affiliates in a swathe of legal areas beyond competition law, such as human rights abuses,

[263] See as a recent example Judgment of 6 October 2021 (Grand Chamber) *Sumal v Mercedes Benz Trucks España*, C-882/19, ECLI:EU:C:2021:800 at 31, 43 and 67.

environmental protection or liability claims. Therefore, it was only natural that this approach should also be taken in the field of competition law, given the reluctance to let legal form obscure economic realities in this area.

While arguably parental liability is the most important example of transmission of liability in an economic group, it is not the only one. At the other end of the corporate structure, downward or affiliate liability has recently come into the spotlight following *Sumal.*[264] In such cases, the policy issue is not whether corporate groups should be hit on the head to increase deterrence and promote parental oversight but whether, under an expansive theory of the economic unit, all legal entities in a group may be equally liable, as if they were many doors to a single house. The response of the Court to that question has added useful (while confusing) ingredients to the concept of an undertaking, providing yet another example of the importance of the uses of this concept in order to comprehend its meaning. There is also a third scenario, which concerns the potential liability of other entities in a group such as 'sister' companies. These three situations are separately analysed below.

Before examining these issues, some preliminary comments are in order: first, the paragraphs below look only at communication of liability (that is, where one entity bears a fine imposed on the other), leaving aside for the moment other effects of the single entity doctrine which are often treated at the same time, such as the impact of single entity considerations on the calculation of fines, which are discussed under a separate heading. Second, while most of the discussion on parental liability concerns public enforcement, what follows below also applies to private claims under the equivalence principle laid down in *Skanska.*[265] Third, the subsections below concern only the application of Articles 101 and 102 TFEU, since the case law on communication of liability in other areas of EU competition law (such as State aid) is not sufficiently developed to influence in any way the debate on the notion of undertaking.

[264] Judgment of 6 October 2021 (Grand Chamber) *Sumal v Mercedes Benz Trucks España*, C-882/19, ECLI:EU:C:2021:800.

[265] Judgment of 14 March 2019, *Vantaan kaupunki v Skanska Industrial Solutions*, C-724/17, ECLI:EU:C:2019:204, at 47.

4.2.1. Parental liability[266]

Parental liability is a commonly-used term to refer to the principle that legal entities which enjoy decision-making powers over their subsidiaries may be liable for the actions of the latter. The expression comes from family law, a field in which it has long been understood that parents, as the natural carers of their children, may be liable for the deeds of the latter under a commonly accepted theory of vicarious liability. Its use in the world of corporate law results from the ubiquitous analogy that has long been drawn between natural and legal persons which, incidentally, is a source of much confusion, not least if liability should be strictly vicarious or fault based.

Parental liability (used hereafter in the company law sense) is regularly relied on in multiple fields of law. In recent times it has gained prominence in international human rights and environmental claims, as national jurisdictions seek to enforce principles of international justice in these areas. At the EU level it has in some cases been applied outside the realm of competition law.[267]

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[266] The bibliography on parental liability in EU competition law is vast. Among the most interesting papers see Aitor Montesa and Ángel Givaja, 'When Parents Pay for their Children's Wrongs: Attribution of Liability for EC Antitrust Infringements in Parent-Subsidiary Scenarios' (2006) 29(4) *World Competition* 555; John D. Briggs & Sarah Jordan, 'Presumed Guilty: Shareholder Liability for a Subsidiary's Infringements of Article 81 EC Treaty', (2017) *Business Law International* 8; Erik H Pijnacker Hordijk and Simone J. H. Evans, 'The AKZO Case: Up a Corporate Tree for Parental Liability for Competition Law Infringements' (2010) 1(2) *Journal of European Competition Law & Practice* 126; Ana Perestrelo de Oliveira and Miguel Sousa Ferro, 'The sins of the son: parent company liability for competition law infringements', (2010) 1(3) *Revista de Concorrência e Regulação* 53; Alexander Svetlicinii, 'Who is To Blame? Liability of 'Economic Units' for Infringements of EU Competition Law' (2011) *European Law Reporter* 52; Laura La Rocca, 'The controversial issue of the parent-company liability for the violation of EC competition rules by the subsidiary', (2011) 32 *European Competition Law Review* 68; Stefan Thomas, 'Guilty of a 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', *Journal of European Competition Law Practice*, (2012) 3 (1) 11; Yves Botteman, '"You Can't Beat the Percentage" – The Parental Liability Presumption in EU Cartel Enforcement,' (2012) *European Antitrust Review* 3; 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 (5) *Fordham International Law Journal* 1481; Bruce Wardaugh, 'Punishing parents for the sins of their child: extending EU competition liability in groups and to subcontractors', (2017) 5 *Journal of Antitrust Enforcement* 22; Andriani Kalintiri, 'Revisiting Parental Liability in Competition Law', (2018) 43 *European Law Review* 145.

[267] Judgments of 9 February 2006, C-127/04, *O'Byrne v Sanofi*, ECLI:EU:C:2006:93 and of 20 June 2013, *Impacto Azul*, C-186/12, ECLI:EU:C:2013:412. On the latter Stephan Rammeloo, 'The Judgment in CJEU C-186/12 (*Impacto Azul*): Company Law, Parental Liability and Article 49 TfEU – A Plea for a 'Soft Law' Oriented EU Law Approach on Company Groups', (2014), 11(1) *European Company Law* 20.

It is appropriate to differentiate between three situations where a parent company may be argues to have to respond for the actions of an affiliate. One would be where a 'mastermind' parent entity decides and implements a strategy using the subsidiary as an instrument. Taking a classic approach to attribution, this may be a case of direct liability, the subsidiary being a mere tool in the hands of its parent company. The second situation would involve holding the parent liable for actions it may even be unaware of, but which it could have avoided given its control over the entity having directly committed the breach, assuming a failure to exercise appropriate oversight, which would be a form of fault. Third, it may be claimed that parent entities should be charged under a theory of vicarious liability, a form of strict liability akin to that followed with respect to parents under family law, who may be liable irrespective of any proof as to whether they were aware of the conduct or an examination whether they could have avoided the infringement.

The 1972 judgment of the Court in *ICI*[268] is a useful example of the first category. In that case, the addressee of a fine sought to rely on the legal separation of the various subsidiaries that had implemented the conduct and argued that the actions should be imputed to them rather than to it. However, in that case the Court noted that the parent company was not only 'able to exercise decisive influence over the policy of the subsidiaries as regards selling prices in the common market' but had *actually used* those powers to increase prices three times, sending its affiliates 'orders as to the prices which they were to charge and the other conditions of sale which they were to apply in dealing with their customers'.[269] As noted by the Court, in that situation the subsidiaries did not 'decide independently upon its own conduct on the market, but [carried] out, in all material respects, the instructions given to [them] by the parent company' and therefore 'the formal separation between these companies, resulting from their separate legal personality, cannot outweigh the unity of their conduct on the market for the purposes of applying the rules on competition'.[270]

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[268] Judgment of 14 July 1972, *Imperial Chemical Industries v Commission*, 48/69, ECLI:EU:C:1972:70, paras. 131-142.

[269] Ibid, 137, 138.

[270] Ibid, 140.

While this case concerned a relatively straightforward example of implementing a strategy through mediate entities, *ICI* laid the foundations of parental liability in a wider sense in this field and as such has been relied on multiple times to this day in a remarkable, if not rare, example of a quote by the Court of earlier decisions regardless of material identity. It was, in that respect, a useful candidate for the proposition that parent companies may be liable when implementing actions through subsidiaries lacking an independent will.

A similar situation regarding the exercise of decisive influence by the parent came before the Court eleven years later in *AEG*.[271] In this case, the main issue was around proving the parent company's involvement in the conduct at stake, impliedly assuming that this would be the only possible ground for imputation. However, the Court mentioned *en passant* that proof of that actual exercise of control may be 'superfluous' in the case of a wholly-owned subsidiary, since it would 'necessarily' follow the policy dictated to it by the parent company.[272] This was clearly an aside in the broader context of abundant proof of involvement. However, the suggestion that the exercise of decisive influence could be presumed in cases of full ownership would be picked up in later cases.

In subsequent years, the policy decision was made to expand parental liability. Among the factors that contributed to that decision, two deserve mention: the enactment of the Merger Regulation in 1989, which opened the door to a new perspective on economic groups as the natural addressees of competition law,[273] and the political decision to substantially increase the level of fines, especially with respect to cartels.[274] These two factors would ultimately shift the approach to parental liability beyond the confines of *ICI*.

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[271] Judgment of 25 October 1983, *Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunken v Commission*, 107/82, ECLI:EU:C:1983:293.

[272] Ibid, at 50.

[273] See Chapter 2. See also Wouter P.J. Wils, 'The undertaking as subject of E.C. competition law and the imputation of infringements to natural or legal persons', (2000) 25 European Law Review, 99, discussing the relevance of the notion of decisive influence in merger control and the policy rationale of widening parental liability in the fight against cartels.

[274] As regards that process, see Christopher Harding and Julian Joshua (eds), *Regulating Cartels in Europe* (2nd ed) Oxford University Press 2010 and especially Chapter V, 'A Narrative of Cartel Regulation in Europe, 1970 to the Present Time', pp 119-148.

An important step in that process took place in *Cartonboard*.[275] At that time the Commission still assumed that companies could only be imputed if their participation had been established.[276] However, in the appeal, Stora argued that the single entity doctrine underpinning *ICI* could not be applied to the conduct of one of its subsidiaries, as it was an independent actor. Responding to that argument, the GC noted that

> 'since the applicant has not disputed that it was *in a position to exert a decisive influence* on Kopparfors' commercial policy, it is, according to the case-law of the Court of Justice, unnecessary to establish whether it actually exercised that power.'[277]

With this declaration, the GC appeared to suggest that parent companies may be held liable even if they have not participated in the infringement either directly or indirectly, relying exclusively on their power to influence the subsidiary. Being 'in a position' to exercise such influence would suffice. In support of that idea, the GC quoted opportunistically the statement noted above in paragraph 50 of the *AEG* judgment,[278] which, as will be recalled, had indicated that acts of wholly-owned subsidiaries could be presumed to follow the policy laid down by the parent company.

In the subsequent appeal, the Court confirmed the GC's decision, but without endorsing its approach on this specific point.[279] It read the GC's judgment as not having declared that the mere finding of a 100 % shareholding sufficed for a finding of parental liability, noting that

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[275] Decision 94/601, *Cartonboard*, [1994] OJ L246/1. On the relevance of this case to the evolution of parental liability, see Andriani Kalintiri, 'Revisiting Parental Liability in Competition Law', (2018) 43 *European Law Review* 145, at 149.

[276] Ibid at 143.

[277] Judgment of 14 May 1998, *Stora Kopparbergs Bergslags AB v Commission*, T-354/94, ECLI:EU:T:1998:104, at 80 (emphasis added).

[278] That same paragraph had been used in *BPB* to attribute liability in a dominance case. See Judgment of 1 April 1993, *BPB Industries Plc and British Gypsum Ltd v Commission of the European Communities*, T-65/89, ECLI:EU:T:1993:31 at 149, a point that was not discussed in the appeal against this ruling (Judgment of 6 April 1995. *BPB Industries plc and British Gypsum Ltd v Commission of the European Communities*, C-310/93 P, ECLI:EU:C:1995:101). Parental liability has more recently been raised in a dominance context in *Slovak Telekom*; see Judgment of 25 March 2021, *Deutsche Telekom AG v European Commission*, C-152/19 P, ECLI:EU:C:2021:238, appeal from the judgment of the GC of 13 December 2018, *Deutsche Telekom AG v European Commission*, T-827/14, ECLI:EU:T:2018:930.

[279] Judgment of 16 November 2000, *Stora Kopparbergs Bergslags AB v Commission*, C-286/98 P, ECLI:EU:C:2000:630.

the GC had pointed to other additional factors, and that it was for the appellants to reverse the presumption that the conduct in question had been determined by the parent company. That meant that the actual exercise of decisive influence was still required; however, that could be proven indirectly and being 'in a position to exert decisive influence' could be one of the elements used to reach that conclusion. However, it would still be necessary to prove that 'the parent company had in fact exercised decisive influence over its subsidiary's conduct'.[280]

The strength of that presumption would be expanded several years later in *Akzo I*.[281] It is important to note that at the time of the judgment of the General Court (December 2007), the doctrine on the notion of undertaking had substantially evolved since *Cartonboard*. Briefly, during that period the Court of Justice had expressly rejected the treatment in *SNUPAT* of undertakings and legal entities as synonymous,[282] confirmed that multiple legal persons could form an undertaking[283] and, earlier that same year, declared that the principle of legal personality applied to the undertaking and not to each legal entity.[284] That was the context in which the GC declared in *Akzo I* that

> '(…) it is not (...) because of a relationship between the parent company and its subsidiary in instigating the infringement, or a fortiori, because the parent company is involved in the infringement, but because they constitute a single undertaking [...] that the Commission is able to address the decision imposing fines to the parent company of a group of companies' (…) in the specific case of a parent company holding 100% of the capital of a subsidiary which has committed an infringement, there is a simple

[280] Ibid at 29. Note that the CJEU's judgment in this case was issued in November 2000, the same year that Wouter Wils, then a member of the Commission's legal service, had proposed that parental liability be based on the capacity to exercise decisive influence and not its exercise. See Wouter Wils, 'The Undertaking…' cit. above at fn 273.

[281] Akzo has been involved in numerous cases that have come before the Courts. In this dissertation, *Akzo I* stands for the judgments of the GC of 12 December 2007, *Akzo*, T-112/05, ECLI:EU:T:2007:38 and of the CJ of 10 September 2009, *Akzo Nobel and Others v Commission*, C-97/08 P, ECLI:EU:C:2009:536 that formulated the presumption of exercise of dominant influence, while *Akzo II* denotes the GC judgments of 15 July 2015, *Akzo Nobel NV and Others v Commission*, T-47/10, ECLI:EU:T:2015:506 and of the CJ of 27 April 2017, *Akzo Nobel NV and Others v Commission*, C-516/15 P, ECLI:EU:C:2017:314, which are discussed below at section 6.1.2.

[282] Judgment of 28 June 2005 (Grand Chamber), *Dansk Rørindustri v Commission*, C-189/02 P, ECLI:EU:C:2005:408.

[283] Judgment of 14 December 2006, *CEES*, C-217/05, ECLI:EU:C:2006:784.

[284] Judgment of 11 December 2007 (Grand Chamber), *ETI v Autorità Garante della Concorrenza e del Mercato*, C-280/06. ECLI:EU:C:2007:775

> presumption that the parent company exercises decisive influence over the conduct of its subsidiary (…) and that they therefore constitute a single undertaking'.[285]

In the subsequent appeal, the Court fully upheld what is today widely known as the *Akzo* presumption.[286] As the GC had done, the Court based its judgment on the definition of the undertaking as an economic unit, even if composed of several legal entities, the case law on the principle of personal responsibility and of course the earlier doctrine on parental liability. Having recalled these legal constructions, with regards to parental liability it declared that

> '(…) 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, (…) the parent company and its subsidiary form a single economic unit and therefore form a single undertaking for the purposes of the case-law (…) 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*.
>
> In those circumstances, *it 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 (…)'[287]

From a practical standpoint, *Akzo I* confirmed that a parent company may be held liable despite the absence of either direct involvement or even knowledge of the conduct under the notion of undertaking. The controlling legal entity would not be liable because it had

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[285] Judgment of 12 December 2007, *Akzo Nobel and Others v Commission*, T-112/05, ECLI:EU:T:2007:38 at 58.

[286] Judgment of 10 September 2009, *Akzo Nobel and Others v Commission*, C-97/08 P, ECLI:EU:C:2009:536.

[287] Ibid, 59 and 61 (emphasis added)

participated in the conduct, instigated it, supported it or even failed to oversee the conduct of the affiliate, but rather because it was a 'single undertaking' with it, a determination that only required to prove that the parent possessed decisive influence and, assumedly, that the subsidiary would lack a separate will.

Later decisions would significantly clarify the nature of this presumption and extend its reach. In *Arkema* the Court applied it below a 100% shareholding;[288] in *Alliance One* the Court held that the principle of equal treatment would be breached if the presumption was applied to some parent entities while proof of actual involvement was required from others.[289] *Du Pont* and *Dow Chemical* confirmed that parental liability also applied to jointly controlling entities.[290] *Siemens Österreich* articulated more clearly the irrelevance of separate legal persons where all formed part of the same economic entity and thus constitute the undertaking that infringed Article 101 TFEU and corrected the GC with respect to the allocation of the fine among the entities forming part of an undertaking.[291] *Akzo II* clarified that the liability of the parent company should not be considered to derive from that of the subsidiary.[292] More recently, *Goldman Sachs* confirmed (if there was ever any doubt) that parental liability stemmed from the capacity to exercise decisive influence and therefore was reliant on voting rights rather than ownership as such.[293] And, finally (for now), in *Deutsche Telekom* the Court accepted that all that needs proving is whether the parent company had the *possibility* of exercising such decisive influence over its subsidiary,[294] exactly what the GC had proposed in *Stora* twenty four years ago.

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[288] Judgment of 29 September 2011, *Arkema v Commission*, C-520/09 P, ECLI:EU:C:2011:619, 42 and 48.

[289] Judgment of 19 July 2012 (Grand Chamber) *Alliance One International and others v Commission*, C-628/10 P and C-14/11 P, ECLI:EU:C:2012:479.

[290] Judgments of 26 September 2013, *EI du Pont de Nemours v Commission*, C-172/12 P, ECLI:EU:C:2013:601 and of the same date, *Dow Chemical v Commission*, C-179/12 P, ECLI:EU:C:2013:605.

[291] Judgment of 10 April 2014, *Siemens Österreich*, C-231/11 P to C-233/11 P, ECLI:EU:C:2014:256, at 45.

[292] Judgment of 27 April 2017, *Akzo Nobel NV and Others v Commission*, C-516/15 P, ECLI:EU:C:2017:314 at 56-57 and 66. This judgment is further discussed in Chapter 6, section 6.1.2.

[293] Judgment of 12 July 2018, *Goldman Sachs v Commission*, T-419/14, ECLI:EU:T:2018:445. On appeal, judgment of 27 January 2021, *Goldman Sachs v Commission*, C-595/18 P, ECLI:EU:C:2021:73.

[294] Judgment of 25 March 2021, *Deutsche Telekom AG v European Commission*, C-152/19 P, ECLI:EU:C:2021:238, at 77.

The combined effect of these developments is a long way from *ICI*, where an instrumental subsidiary did not decide independently upon its own conduct on the market but carried out in all material respects the instructions given to it by the parent company, having expanded to a territory in which, as explained, the notion of undertaking is used to make parent companies liable for the actions of the entities on which they exercise, or arguably just possess, decisive influence. In a way, this liability rests halfway between liability for fault and vicarious liability, as it is not based on either proposition. As noted, it does not require, nor may be excused by proving, fault in the management of the controlled entity, as would normally be required for non-strict liability. In the end, parent entities are liable simply because of being the same undertaking, and they may only be released from it by proving, as the Court noted in *Akzo I*, when 'the parent company, which has the burden of rebutting that presumption, adduces sufficient evidence to show that its subsidiary acts independently on the market', increasingly read as it not being the same undertaking.

The EU doctrine on parental liability has been criticised by numerous authors[295] and occasionally by Advocates-General of the Court.[296] Most argue that only in exceptional circumstances should an entity be liable for conduct that it has not participated in. Besides this question of principle, the difficulties in rebutting the presumption of control are often highlighted. This is understandable since the Court itself has noted that the presumption of the exercise of decisive influence must be rebuttable so as not to infringe fundamental rights, which is significant in view of the increased importance of the EU Charter of Fundamental Rights[297] in the enforcement of the competition rules.[298]

It might be useful to look at parental liability in EU competition law separately from a policy and from a legal perspective. From the first standpoint, making parent companies liable on the sole basis of their decisive influence under the theory of the undertaking involves them in

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[295] See the publications at fn 266 above, mostly critical with the doctrine, and especially Nele Behrends, *Das Unionsmodell der wirtschaftlichen Einheit in Kartelldelikstrecht*, Mohr Siebeck, 2019.

[296] Opinion of AG Bot of 26 October 2010 in *ArcelorMittal Luxembourg v Commission*, C-201/09 P and C-216/09 P, ECLI:EU:C:2010:634, at 204.

[297] [2012] OJ C 326/391.

[298] On the tension between the *Akzo I* presumption and the European Convention of Human Rights see Andreas Scordamaglia-Toussis, *EU Cartel Enforcement – Reconciling Effective Public Enforcement with Fundamental* Rights. Wolters Kluwer, 2013, at 344.

compliance, aligns their power to determine the conduct in question with their responsibility and facilitates the payment of the fine. Broadening parental liability would also fit in with broader trends of justice in various areas beyond competition law, where the formal separation of companies is increasingly under challenge, informed by a broad mandate to look at the underlying economic reality rather than the legal form. In sum, the policy reasoning is understandable, much as it is also debatable.

From a legal perspective, however, the doctrine is abstruse, to say the least. *Akzo I* and its progeny are based on two contradictory paradigms. On the one hand, they rely on a 'single entity' logic, pursuant to which it is assumed that the undertaking is the entity to which the competition rules are addressed,[299] and under which the principle of personality in the infringement applies to the economic unit, as earlier discussed.[300] Being parent and subsidiary the same entity, the enforcement of Articles 101 and 102 TFEU on either of them indistinctly is justified, and the Commission would enjoy wide discretion regarding that choice.[301] On the other hand, however, the Court looks simultaneously at the situation from the perspective of separate legal entities ('legal person approach') and takes the position that a parent company (as a separate entity) may be held liable for conduct initially attributable to the subsidiary (as a distinct entity within its group of companies), if certain conditions (notably, possessing decisive influence) are present.[302] The *Akzo I* presumption would, from this second perspective, facilitate (or, for some critics, dispense with the necessity of) proving the exercise of decisive influence, but in the end it would follow a 'legal entity' approach, where liability ultimately rests with the legal entities, not with the 'undertaking' as it is proclaimed.

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[299] In the words of the Court, 'The authors of the Treaties chose to use the concept of an undertaking to designate the perpetrator of an infringement of competition law, who is liable to be punished pursuant to Articles 81 EC and 82 EC, and not other concepts such as the concept of a company or firm or of a legal person, used, inter alia, in Article 48 EC'. See *inter alia* Judgment of 10 April 2014, *Siemens Österreich*, C-231/11 P to C-233/11 P, ECLI:EU:C:2014:256, at 42.

[300] Section 2.2.4.

[301] Judgment of 1 February 2018, *Deutsche Bahn AG and Others v Commission*, C-264/16 P, ECLI:EU:C:2018:60, para 38 and case-law quoted therein. Cf judgment of 6 October 2021 (Grand Chamber) *Sumal v Mercedes Benz Trucks España*, C-882/19, ECLI:EU:C:2021:800, at 63.

[302] In the words of the Court, 'in certain circumstances, a legal person who is not the perpetrator of an infringement of the competition rules may nevertheless be penalised for the unlawful conduct of another legal person, if both those persons form part of the same economic entity and thus constitute the undertaking that infringed Article 81 EC'. Judgment of 10 April 2014, *Siemens Österreich*, C-231/11 P to C-233/11 P, ECLI:EU:C:2014:256, at 45.

Leaving this main contradiction aside, the doctrine of parental liability in EU competition law has evolved to a situation where it rests on the possession of decisive influence, and not its exercise. In that respect it would be useful if the Court would stop referring back to *ICI* and the lack of independence of the affiliate, which rests on an entirely different logic.[303] In fact, the irrelevance of the actual use of decisive influence and the dismissal of its derivative nature after *Akzo II*[304] makes the presumption probably redundant since, even if a legal entity perspective were followed, the exercise of control is no longer required for parental liability to exist.

4.2.2. Inverse liability

The notion that those possessing decisive influence over other legal entities may be liable for their actions may not convince many, but ultimately relies on a link between power and responsibility. A very different question is whether that logic should also be followed in the reverse situation, that is, whether the affiliate controlled by a parent company may be liable for the actions of the latter.

The answer to that question usefully exposes the consequences of the two approaches referred to above: the 'legal entity and the 'economic entity' perspective assumed by the doctrine of the undertaking. For the first viewpoint, which assumes separate centres of imputation, parental liability is understandable from the perspective of accountability. Subsidiary liability would however lack any such logic, as an entity with no power would be asked to bear a burden placed on it by the one controlling it.[305] However, from a strict single entity perspective, all companies may be assumed to be indistinctly liable for an infringement

[303] See e.g. judgment of 12 July 2018, *The Goldman Sachs Group v Commission*, T-419/14, ECLI:EU:T:2018:445: "In accordance with settled case-law, it is unnecessary to restrict the assessment of the exercise of decisive influence to matters relating solely to the subsidiary's commercial policy on the market stricto sensu".

[304] See the discussion above at section 2.2.5.b and later at 6.1.2.

[305] Fischer and Zickgraft have argued that subsidiary liability provides an indirect incentive to preventively prevent antitrust conduct by the parent, which may provide some justification from a policy standpoint (Eva Fischer und Peter Zickgraf, ‚Zur Reichweite der wirtschaftlichen Einheit im Kartellrecht' (2022) 186 *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht* 125 at 189).

committed by any of them, thereby resembling a big house with many doors, all of which provide equally valid access to liability.

The limited development of inverse or downward liability with respect to upward or parental claims is understood given the historic reliance of EU competition law on public enforcement, competition authorities understandably being more interested in climbing up the liability ladder and hitting corporate groups on their head than biting their toes. It is hence not surprising that it has only emerged on the shoulders of private enforcement, an area where a 'house with many doors' perspective offers useful possibilities. In particular, applicants seeking damages may have a better shot at a legal entity which may be used to 'anchor' the case to a given jurisdiction. That was precisely the case in *Provimi,*[306] where the High Court of England and Wales accepted claims for damages derived from the *Vitamins* cartel[307] against Roche Products Ltd and Rhodia Limited, subsidiaries of two of the legal entities named in the infringement decision. Many years later, *Sumal*[308] offered the Court of Justice an opportunity to develop the law in that same direction.

Sumal was the result of the 2016 Commission Decision in *Trucks*.[309] Like in *Provimi,* the Decision was addressed to specific legal entities, but the private enforcement claim was

[306] [2003] EWHC 961. For a detailed comment on this decision see Mark Furse, 'Provimi v Aventis: Damages and Jurisdiction' (2003) 2 *Competition Law Journal* 119. See also Richard Whish, David Bailey, *Competition Law*, 8th ed, 2015, OUP at 330; Piet Jan Slot and Martin Farley, *An Introduction to Competition Law*, 2nd ed Bloomsbury, 2017 at 292. The doctrine in *Provimi* has recently been restated following *Sumal* in *JJH Enterprises v Microsoft*, [2022] EWHC 929 (Comm).

[307] Commission Decision of 21 November 2001, Case COMP/E-1/37.512 — *Vitamins* [2003] OJ L 6/1. The legal entities identified in the decision were F. Hoffmann-La Roche AG, and Aventis SA.

[308] Judgment of 6 October 2021 (Grand Chamber) *Sumal v Mercedes Benz Trucks España*, C-882/19, ECLI:EU:C:2021:800. For a detailed comment see Charlotte Reichow, 'The Court of Justice's *Sumal* Judgment: Civil Liability of a Subsidiary for its Parent's Infringement of EU Competition Law' (2021) 6(3) *European Papers* 1325 and Benedikt Freund: **'**Heralds of Change: In the Aftermath of *Skanska* (C-724/17) and *Sumal* (C-882/19)', (2022) 53(2) *International Review of Intellectual Property and Competition* 246. For a critical view of the judgment see Catarina Vieira Peres de Fraipont and Inês Neves, 'The Theory of Economic Unit and the 'Downward' Liability of Subsidiaries for the Sins of Their Parent Companies: Better Not! (C-882/19 Sumal)', (2022) 6(1) *European Competition and Regulatory Law Review* 98. See also the special issue published by *Concurrences* (*On-Topic - Private enforcement in Europe after Sumal*) with contributions from Niklas Brueggemann, Mercedes Pedraz Calvo, Marion Provost and Mélanie Thill-Tayara and Laurence Idot (further details in bibliography).

[309] Commission Decision of 19 July 2016, case AT.39824 - *Trucks*. [2017] OJ C 108/6.

brought against others[310] on the basis that those affiliates were as much a part of the 'undertaking' as the parent companies themselves. As one would expect, the defendant subsidiaries sought refuge behind a legal entity approach and argued that they were separate beings that had not themselves infringed Article 101 TFEU, having not even been identified in the Decision. Several Spanish courts sided with the applicants, but not all of them.[311]

While this issued was before the national courts, the CJEU ruled in *Skanska*[312] that determining the entity that may be called on to answer for the civil consequences of a breach of Article 101 TFEU was directly governed by EU law.[313] Since EU law lacked clear authority in that legal system on descending liability, Spanish courts had no choice but to ask the Court to determine whether, as a matter of EU law, follow-on claims may be brought against subsidiaries.

In his Opinion,[314] AG Pitruzzella addressed the issue with the tools that the Court had historically used; in other words, his answer was built on the confusing mishmash of the single entity doctrine intertwined with the legal entity approach. In so doing, he noted that a distinction should be made with respect to parental liability: while in upward liability scenarios the fact that the parent company determines (or is presumed to determine) the conduct of the affiliate would suffice to impute the conduct to it, in downward liability cases a 'link' between the affiliate in question and the economic activity affected by the infringement would be needed. That link may consist, for example, in the sale by the affiliate of the cartelised goods.[315] Somewhat awkwardly, the Opinion associated this additional requirement to the *functional* component of the notion of undertaking (that is, to the economic activity

[310] Note that in *Provimi* the claim had been addressed to both the entities identified in the decision and their subsidiaries. In *Sumal* however the claim was made only against the Spanish subsidiaries, presumably to avoid procedural complications attached to the presence of international defendants.

[311] For an examination of the procedure at a national level and the questions before the Court, see Marcos Araujo Boyd, 'Should Children Pay for Their Parent's Sins? The Sumal Preliminary Reference', (2021) 12 (1) *Journal of European Competition Law & Practice* 25 and references therein.

[312] Case C-724/17, *Skanska Industrial Solutions and Others*, ECLI:EU:C:2019:204.

[313] Ibid, at 28.

[314] Opinion of AG Pitruzzella of 15 April 2021, *Sumal*, C-882/19, ECLI:EU:C:2021:293.

[315] Ibid at 57. This link had been required in the written submissions filed by the Commission, as para 21 of the Opinion notes.

pursued by the undertaking), suggesting that only legal entities that share a defined economic activity among themselves should be treated as an economic unit and be jointly liable.[316]

The judgment of the Court picked the suggestion on the need for a link. In its words,

> 'the possibility for the victim of an anticompetitive practice of invoking, in the context of an action for damages, the liability of a subsidiary company rather than that of the parent company *cannot automatically be available against every subsidiary* of a parent company targeted in a decision of the Commission punishing conduct that amounts to an infringement (…).'[317]

The above paragraph essentially meant that not all affiliates of a group of companies may be used as addressees of liability claims made against the 'undertaking'. Only certain subsidiaries could be used for that purpose. By so doing, the Court was rejecting an expansive approach to the concept of undertaking that would entirely disregard the existence of separate legal entities, i.e. the 'house with many doors' perspective referred to above, as applicable to the entire group of companies. Yet at the same time the Court wanted to uphold the idea that the undertaking was the only liable entity and that the choice of one or other legal vehicle within an undertaking should be irrelevant, all being *ope legis* equally liable.[318]

In order to answer this riddle, in *Sumal* the Court made a bold move. Instead of presenting the need for a 'link' between two separate legal entities as a requirement to avoid any subsidiary being automatically liable, the Court sought an answer through the notion of 'undertaking' and, especially, its functional component, that is, the requirement that it pursue a specific economic activity:

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[316] Footnote 69 of the Opinion shows that the Court asked the parties to discuss several precedents from UK courts which had made reference to this link, including *Roche Products Ltd. & Others v Provimi Ltd* [2003] EWHC 961 (Comm) (2 May 2003); *Cooper Tire & Rubber Co & Others v Shell Chemicals UK Ltd & Ors* [2009] EWHC 2609 (Comm) (27 October 2009); *Vattenfall AB and Others v Prysmian SpA* [2018] EWHC 1694 (Ch D) and *Media-Saturn Holding GmbH & Others v Toshiba Information Systems (UK) Ltd & Ors* [2019] EWHC 1095 (Ch) (2 May 2019).

[317] *Sumal*, at 46 (emphasis added).

[318] *Sumal*, esp at 42, 44 and 63.

> '(…) As the Advocate General observes, in essence, in point 58 of his Opinion, the concept of an 'undertaking' used in Article 101 TFEU is a functional concept, in that the economic unit of which it is constituted must be identified having regard to the subject matter of the agreement at issue (see, to that effect, judgments of 12 July 1984, *Hydrotherm Gerätebau*, 170/83, EU:C:1984:271, paragraph 11, and of 26 September 2013, *The Dow Chemical Company v Commission*, C-179/12 P, EU:C:2013:605, paragraph 57).[319]
>
> Therefore, the same parent company may be part of several economic units made up, depending on the economic activity in question, of itself and of different combinations of its subsidiaries all belonging to the same group of companies. If that were not the case, a subsidiary within such a group could be held liable for infringements committed in the context of economic activities entirely unconnected to its own activity and in which they were in no way involved, even indirectly.'[320]

With the above words, the Court squared the circle: all subsidiaries of the undertaking were automatically liable and any of them may be chosen by any claimant (or a public enforcement agency). However, this would not apply to any affiliates of a group of companies by control, as hitherto assumed, but only to a part of that group defined by a 'specific economic aim'.[321]

This Procrustean[322] logic followed the premise that subsidiaries unconnected with the infringement should not be automatically liable because their parent company had been targeted in a Commission decision. In addition to being controlled by the infringing

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[319] *Sumal*, at 46. The connection between these judgments and the reasoning of the Court is not immediately apparent. Besides a quote aimed at presenting these criteria as established under prior case law it seems to suggest that the context where the question is placed may influence the answer or, in other words, that the notion of undertaking may not be identical in one or other case or situation (more on this later).

[320] *Sumal*, at 47. This paragraph should also be read with para 45, where the Court referred specifically to 'conglomerates', defined as groups which are active in several economic fields having no connection between them.

[321] *Sumal*, at 41, with a quote from *Knauf Gips* (judgment of 1 July 2010, *Knauf Gips* v *Commission*, C-407/08 P, ECLI:EU:C:2010:389, paragraphs 84 and 86).

[322] As the Merriam-Webster dictionary explains, 'Procrustes was one of many villains defeated by the Greek hero Theseus. According to Greek mythology, Procrustes was a robber who killed his victims in a most cruel and unusual way. He made them lie on an iron bed and would force them to fit the bed by cutting off the parts that hung off the ends or by stretching those people who were too short. Something *Procrustean,* therefore, takes no account of individual differences but cruelly and mercilessly makes everything the same.'

undertaking, subsidiary liability required a specific relationship with the business and arguably even the infringement in question. There would be no 'house with many doors' encompassing the entire group of companies; at most, there might be a wing in the broader house linked with narrow corridors.

As concerns the nature, and indeed the logic, of the link that would be required to make the subsidiary liable, *Sumal* was remarkably inconsistent. Besides the reference to a 'specific economic aim' noted above, *Sumal* also mentioned 'economic activity' and 'economic field'.[323] These labels would suggest that a subsidiary may be liable if it is active in the same economic area. However, the Court seemed to have in mind a second narrower link with the *infringement* itself, requiring 'that the anticompetitive agreement concluded by the parent company, for which it has been punished, concerns the *same products* as those marketed by the subsidiary'.[324]

Beside the imprecise definition of these links, the main question resulting from *Sumal* with respect to the notion of undertaking is whether the need to slice 'conglomerate groups' into separate 'undertakings' would apply only to downward liability situations or extended to other uses of the notion, such as for instance the calculation of fines or the intragroup exemption. The reliance on the notion of undertaking, with quotes of earlier pronouncements and references to the Damages Directive,[325] reads as if that declaration should apply across the board to all instances where the notion is applied. Indeed, the judgment does not at any point suggest that this logic should be restricted to downward liability only, contrasting with the mention in *Du Pont* and *Dow* that the finding that jointly controlling parents and their affiliates may be the 'same undertaking' was 'only for the purposes of establishing liability for participation in the infringement'.[326]

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[323] As earlier noted, the Court had asked the parties to discuss the 'links' identified by UK courts in several cases. See fn 316 above.

[324] *Sumal*, at 52 (emphasis added).

[325] *Sumal*, at 39, 40.

[326] Judgments of 26 September 2013, *EI du Pont de Nemours v Commission*, C-172/12 P, ECLI:EU:C:2013:601 at 47 and of the same date, *Dow Chemical v Commission*, C-179/12 P, ECLI:EU:C:2013:605 at 58.

Despite that first impression, the judgment seems to be based on the premise that subsidiaries should initially not be liable unless there is a link, however imprecisely it may have been defined. The notion of undertaking in *Sumal* is subject to this initial step being fulfilled. If so, its conclusion (the Procrustean forcing of some entities into a predefined mould whereby groups of entities should be deconstructed) makes sense for downward liability but would not be required for other uses. If the above assumption is correct, then *Sumal* should be read as proposing a notion of undertaking that changes according to each specific function, as it was the case in *Du Pont* and *Dow*. That said, the fact that this has not been expressed clearly suggests that the Court has left the door open to applying this approach in other contexts too.

Whether for a defined purpose or for all of its uses, *Sumal* ushers in a new chapter in the evolution of the notion of undertaking, one in which its two main components (the structural element or single entity doctrine and the functional component or the economic activity) should be read together, with the potential result that, at least for some purposes, groups of companies defined with respect to 'control' may contain several 'economic units' or undertakings.

4.2.3. Sibling liability

A third scenario of liability transmission within an economic group consists of sister or sibling company claims. Again, the term is borrowed from family law, and refers here to actions against entities in the corporate family tree which are neither parents nor subsidiaries of the infringer initially identified, but other legal persons controlled by the same 'parent', and therefore a 'sibling' of the infringer.

A leading case in this regard is *Aristrain*, where the Commission had imputed to an entity of the group in question (Aristrain Madrid) its own conduct and that of Aristrain Olaberría given the difficulties in identifying a parent company. While this was accepted by the GC,[327] on appeal the Court corrected that judgment and considered it was wrong to rule 'that it is possible to impute to a company all of the acts of a group even though that company has not

[327] Judgment of 11 March 1999, *Aristrain v Commission*, T-156/94, ECLI:EU:T:2004:261., at 138-142. Note that in those years the GC took a broader approach to communication of liability than the CJ.

been identified as the legal person at the head of that group with responsibility for coordinating the group's activities'.[328] The facts on which the judgment was based were, however, quite specific, and it may be wondered whether this was a case where an economic unit had not sufficiently been established, rather than one that closed the door on the possibility of any sibling liability.[329]

The principles laid down in *Aristrain* have been, if not openly corrected, interpreted more flexibly in subsequent cases. A salient example is the CJEU (Grand Chamber) judgment in *Dansk Rørindustri*, in which the GC had treated a constellation of entities as a combined undertaking, giving the Court an opportunity to formally overrule the old ECSC *SNUPAT* and *Klöckner-Werke* case law which treated that notion as the same as a specific legal entity.[330] More recently, in *Knauf Gips*[331] the Court examined the treatment of multiple companies owned by 21 natural persons, who were members of the Knauf family, and another company formed by four other members, all of which could, therefore, be considered to be sibling entities, as in *Aristrain.* In this case both the GC and the CJ treated this loose group as an economic unit following an examination of a 'body of consistent evidence', including the identity of the shareholders in all the entities, common management, the family contract and the way the various entities had presented themselves in the administrative procedure, dismissing the argument that the doctrine laid down in *Aristrain* had not been followed.[332]

A different situation was considered by the Court in *Jungbunzlauer*, where a legal entity (Jungbunzlauer AG) was held liable despite not being the parent of the producer of the cartel goods (Jungbunzlauer GmbH) on the basis that it had been entrusted by the group of

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[328] Judgment of 2 October 2003, *Aristrain v Commission*, C-196/99 P, ECLI:EU:C:2003:529, at 98.

[329] Christian Kersting, 'Liability of sister companies and subsidiaries in European competition law' (2020) 41(3) *European Competition Law Review* 125, at 131.

[330] Judgment of 28 June 2005 (Grand Chamber), *Dansk Rørindustri and others v Commission*, C-189/02 P. ECLI:EU:C:2005:408, at 103-130. See chapter 2 for a discussion on the evolution of the notion and section 3.1.1.a for further discussion on these corporate structures.

[331] Judgment of 1 July 2010, *Knauf Gips KG v Commission*, C-407/08 P, ECLI:EU:C:2010:389, on appeal from Judgment of 8 July 2008, *Knauf Gips v. Commission*, T-52/03, ECLI:EU:T:2008:253.

[332] *Knauf-Gips* (CJ) at 74. From an accounting perspective see the operative part of the judgment of 27 February 2014, *HaTeFo v Finanzamt Haldensleben* C-110/13, ECLI:EU:C:2014:114.

companies with its management, an approach that the GC agreed with.[333] The difference in this case is of course that Jungbunzlauer AG was not imputed as a sibling but as the entity actually exercising decisive influence, a situation which is ultimately closer to parental liability than a communication of responsibility to a sibling.

It is hard to know how these principles will evolve. As noted in *Sumal*, the concept of an 'undertaking' and, through it, that of 'economic unit', automatically entail the application of joint and several liability amongst the entities of which the economic unit is made up at the time that the infringement was committed,[334] and consequently any sister entities may be joined to an action. However, that same judgment imposed strict (if unspecific) criteria with respect to involvement regarding the same products for upward liability to kick in.

It is submitted that the reason for relying on the notion of undertaking in these situations would be relevant to the answer. In short, as noted above, parental liability is ultimately based on the idea that entities exercising decisive influence may be liable for the deeds of the entities under their control. While explained as a derivation from the notion of undertaking (and especially from its structural component, the single entity doctrine), it recognises and addresses legal separation among the entities. Its ultimate logic is therefore the existence of control.

Downward liability, to which sibling liability may be compared, stems from a different logic. Affiliates respond since they are part of the same entity, but only if they are somehow connected to the infringement itself. That connection justifies the fact that, much in the same way that competition authorities enjoy discretion to join them to the action, courts in civil claims could enforce the consequences of a breach against them. While this is dependent on the various legal persons forming an 'economic entity', the requirement of a 'link' reveals the

[333] Judgment of 27 September 2006, *Jungbunzlauer AG v Commission*, T-43/02, ECLI:EU:T:2006:270, at 127. The case was not appealed to the CJ.

[334] *Sumal*, at 44. That paragraph also quotes the judgments of 26 January 2017, *Villeroy & Boch v Commission*, C-625/13 P, ECLI:EU:C:2017:52 at 150 and of 25 November 2020, *Commission v GEA Group*, C-823/18 P, ECLI:EU:C:2020:955, at 61, in that same sense.

continued relevance of the legal person perspective, belying an expansive reading of the notion of undertaking and the single entity paradigm.

4.3 The single entity approach in fine-setting

A second use of the economic entity doctrine in EU competition law concerns the calculation of fines, which for some purposes is based on the total sales of the undertaking and not just those of a specific legal entity.

The recourse to the sales of the 'undertaking' for fining purposes finds support in the text of the sanctioning provisions in the field of competition law, which have used that term since Regulation 17/62.[335] It should however be noted that, when that Regulation was adopted, the term 'undertaking' denoted the specific legal entity subject to enforcement, and not that of the economic group it may belong to. The accounting rules adopted in subsequent years also used that term to identify each separate legal entity, and not, as is now understood in the field of competition law, any group comprising several legal entities, a terminological anomaly that has reached to these days and explains the fact that the competition rules that address accounting and consolidation situations, such as Article 5 of the Merger Regulation and Article 1(2) of the new Vertical Block Exemption Regulation,[336] use the term 'undertaking' in a way that diverges from that laid down in *Höfner*.

Despite the above, the Court has on multiple occasions declared that the notion of undertaking that underlies Article 23 of Regulation 1/2003, which is the legal provision concerning fines for breaches of Articles 101 and 102 TFEU, is the same as that used for other purposes in competition law.[337] The Court has furthermore endorsed the Commission's policy of using consolidated accounts as the most adequate way of measuring the true economic capacity of

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[335] Arts 15, 16 of Regulation 17/62, [1962] OJ L 13/204, English special edition Series I Volume 1959-1962, p. 87.

[336] Regulation (EU) 2022/720, [2022] OJ L 134/4.

[337] See, among others, judgment of 10 April 2014, *Areva and Others v Commission*, C-247/11 P and C-253/11 P, ECLI:EU:C:2014:257, at 124; judgment of 4 September 2014, *YKK Corporation and others v Commission*, C-408/12 P, ECLI:EU:C:2014:2153, at 59; judgment of 14 March 2019, *Vantaan kaupunki v Skanska*, C-724/17, ECLI:EU:C:2019:204, at 47; judgment of 6 October 2021 (Grand Chamber) *Sumal v Mercedes Benz Trucks España*, C-882/19, ECLI:EU:C:2021:800, at 38-39.

an economic operator for the purposes of Article 23 of Regulation 1/2003, despite the potential inconsistencies of doing so.[338] This is best exemplified in the judgment of the Court in *Groupe Gascogne*[339] where, despite the cautious words of warning of AG Sharpston,[340] the Court declared that

> '(…) the EU accounting consolidation rules in force seek to give a true and fair view of the assets, liabilities, financial position and profit or loss of the companies which are members of a group. Article 1(1)(a) to (c) of Directive 83/349 therefore imposes an obligation to prepare consolidated accounts on any parent undertaking which, inter alia, has a majority of the voting rights in a subsidiary undertaking, has the right to appoint or remove the members of the administrative or supervisory body of such an undertaking or has the right to exercise a 'dominant influence' over such an undertaking.'[341]

With respect to the fact that the assumptions made for these calculations may not necessarily match the criteria that are followed for other uses of the notion of undertaking, as for instance parental liability, the Court noted that

> 'As the General Court held in paragraph 112 of the judgment under appeal, attributing a subsidiary's infringement to the parent company and prohibiting a fine being imposed in excess of 10% of the turnover of the undertaking concerned are two separate issues serving different purposes.'[342]

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[338] As explained in chapter 3 of this dissertation, the Accounts Directive concerns certain vehicles and does not provide for the sales of the 'undertaking' as this term is defined in competition law.

[339] Judgment of 26 November 2013 (Grand Chamber), *Groupe Gascogne SA v Commission*, C-58/12 P, ECLI:EU:C:2013:770.

[340] Opinion of AG Sharpston of 30 May 2013, *Groupe Gascogne v Commission*, C-58/12 P, ECLI:EU:C:2013:360, at 55-58.

[341] Judgment in *Groupe Gascogne*, 54. Consolidated accounts may be corrected if departing from the 'economic reality' of the undertaking: '(…) it is for the company which considers that the consolidated turnover does not reflect the economic reality to submit evidence capable of refuting the existence of a power of control by the parent company'. *Groupe Gascogne*, 57 *in fine*.

[342] Ibid, 57.

The use by the Court of the notion of undertaking for fining purposes has resulted in numerous pronouncements that seek to balance the procedural rights of legal entities in relation to fine setting with the approach based on disregarding legal structures, as implied by the single entity perspective. The examination of this material gives us some useful ideas about the difficulties that this process entails, as the following sections will show.

When looking at the impact of a group approach on the calculation of sanctions, it is appropriate to recall that the Fining Guidelines adopted by the Commission[343] follow a two-step process. First, a 'basic amount' based on the value of the sales of goods or services to which the infringement directly or indirectly relates is set. That figure is initially not affected by the economic entity perspective other than to the extent that it may require sales made by various legal entities to be added together. Then, in a second step, that initial amount is adjusted to take into account various elements: aggravating and mitigating circumstances, deterrence, the 10% limit, possible leniency benefits and finally the infringer's ability to pay. Of these varied elements, the group perspective potentially impacts the calculation in four of the above adjustments:

- First, in respect of *aggravating factors*, the Commission may consider any breaches committed in the past by other entities of the undertaking group for the purposes of *recidivism*. This expands the likelihood of these findings, especially when this logic is applied to large conglomerate groups and there are flexible or no time limits.

- Second, the *deterrence* factor is used to increase fines against large groups on the basis that their entire economic capacity should be considered to ensure an appropriate sanction.

- Third, the 10% limit is also applied to the consolidated sales of the group of companies at stake and not to the individual turnover of the entity that may have been selected.

[343] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (Fining Guidelines), [2006] OJ C 210/2.

- Finally, the group perspective will inevitably be considered when assessing the ability or inability to pay.

The following subsections examine these four adjustments in that order.

4.3.1. Recidivism[344]

It is standard practice for fines for the breach of EU competition law to use a group approach to recidivism. Thus, apart from the situation where a given legal entity has been fined for a previous breach, where another entity in the same 'undertaking' or economic unit has committed an earlier breach, the aggravating factor of recidivism may be applied.

This approach was first endorsed by the General Court in *Michelin II*,[345] where the Commission had increased the fine taking into consideration the earlier *Michelin I* case.[346] It will be noted that the legal entity involved in the initial abuse (Nederlandsche Banden-Industrie-Michelin) was different to the one concerned in the second case (Manufacture française des pneumatiques Michelin). However, the GC confirmed the application by the Commission of a single economic entity approach, noting that both legal entities were more than 99% owned by the same parent entity, to which the Commission could have addressed the decision anyway.[347]

Michelin concerned the same product and a broadly similar conduct, but in subsequent years, the Commission would apply the same logic to infringements committed by distinct subsidiaries active in very different markets.[348] These decisions were adopted in the years

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[344] On recidivism in competition law, see Ludovic Bernardeau, *La recidive en droit de la concurrence*, Bruylant, 2017, esp pp 43 ff; Juan Jorge Piernas López, 'The Aggravating Circumstance of Recidivism and the Principle of Legality in the EC Fining Policy: Nulla Poena Sine Lege?', (2006) 29 *World Competition* 441; Marc Barennes and Gunnar Wolf, 'Cartel Recidivism in the Mirror of EU Case Law', (2011) 2(5) *Journal of European Competition Law & Practice* 423.

[345] Judgment of 30 September 2003, *Michelin v Commission*, T-203/01, ECLI:EU:T:2003:250.

[346] Judgment of 9 November 1983, *NV Nederlandsche Banden Industrie Michelin v Commission*, 322/81, ECLI:EU:C:1983:313.

[347] *Michelin II* at 290. Note that the GC identified the single entity doctrine with the notion of undertaking, something the CJ was not doing at that time. The GC judgment in *Michelin II* was not appealed.

[348] See for instance Judgment of 12 December 2007, *BASF and UCB v Commission*, T-101/05 and T-111/05, ECLI:EU:T:2007:380, at 64; Judgment of 30 September 2009, *Hoechst v Commission*, T-161/05,

when the Courts were developing the undertaking as an economic unit and perfecting theories of parental liability, and recidivism fit nicely into that framework. The Courts initially took a deferential attitude, extolling the discretion that the Commission should have in setting fines and accepting the policy as reasonable, dismissing criticism about elements such as the many years that could have passed between one infringement and another or the retroactive application of recidivism. In the end, this factor was accepted for reasons of deterrence, much along the lines of parental liability, arguably overlooking potential tensions with fundamental rights of legal entities.[349]

Recidivism has provided fertile ground for examining the tension between the group and the legal entity perspective that coexist in the enforcement of Articles 101 and 102 in two main respects. On the one hand, the Courts have applied it differently to parents and affiliates. On the other, they have struggled with how to ensure the protection of the rights of legal entities, especially their right to be heard, something that is not entirely consistent with the definition of the undertaking as an entity. These two developments cast light on the tension that pervades this field and deserve a closer look.

4.3.1.a. Imputing recidivism to parents and affiliates

One apparent paradox affecting the group perspective on recidivism is that only parent companies are required to bear it. This is one of the lessons of the landmark judgment in *Evonik Degussa*, where the Commission had applied the increase to the fine to both the parent company and the subsidiary. That would be corrected by the GC on appeal in the following terms:

> 'In respect of, first, the increase of the fine as a result of repeated infringements, it should be noted that, while the unity of conduct of an undertaking on the market justifies that, in the event of an infringement of the rules on competition, the distinct companies that belong to the undertaking during the period of the infringement are

ECLI:EU:T:2009:366, at 147 (not appealed to the CJEU); Judgment of 23 January 2014, *Evonik Degussa and AlzChem v Commission*, T-391/09, ECLI:EU:T:2014:22 at 143.

[349] On this aspect Andreas Scordamaglia-Toussis, *EU Cartel Enforcement – Reconciling Effective Public Enforcement with Fundamental* Rights. Wolters Kluwer, 2013, at 346.

> initially jointly and severally responsible for the payment of the amount of the fine, *an exception may be accepted with respect to the case of aggravating and attenuating and, more generally, circumstances that justify an adaptation on the level of the fine that may only be present in respect of some of them but not others*. As a result, an entity against which the aggravating factor of recidivism has not been raised cannot be held jointly and severally liable alongside another entity in respect of which that circumstance has been established, for the part of the fine that corresponds to the increase for recidivism.'[350]

This led the GC to remove the effect of recidivism (that is, the increase in the fine) on the subsidiary, while maintaining it for the parent entity.

That approach would be restated some years later in *Deutsche Telekom*, where the GC clarified that it should apply even if, at the time of the first decision, the subsidiary was already a part of the single economic entity on the basis that the subsidiary did not participate in the earlier infringement (an idea which again reflects a legal entity perspective).[351] In the end, it was held that the parent company would be liable for earlier infringements of the group, but the affiliate involved in an infringement would not bear that additional burden, unless it had been directly involved in those earlier breaches.[352]

The Commission has taken a similar approach in the reverse situation, that is, where only the subsidiary was a repeat offender. By way of example, in several decisions affecting Arkema the Commission increased the fine because of prior infringements,[353] while Elf Aquitaine, its parent company, was not considered recidivist as those earlier breaches had taken place before

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[350] Judgment of 23 January 2014, *Evonik Degussa and AlzChem v Commission*, T-391/09, ECLI:EU:T:2014:22, at 271 (own translation). This point was not discussed in the subsequent appeal (Judgment of 16 June 2016, *Evonik Degussa and AlzChem v Commission*, C-155/14 P, ECLI:EU:C:2016:446).

[351] Judgment of 13 December 2018, *Deutsche Telekom AG v Commission*, T-827/14, ECLI:EU:T:2018:930, at 505-506 and 509-513. This point was not discussed in the subsequent appeal (which resulted in the Judgment of 25 March 2021, *Deutsche Telekom AG v Commission*, C-152/19 P, ECLI:EU:C:2021:238).

[352] Again, this somehow assumes a separate centre of attribution and is arguably inconsistent with the proclamation that the principle of personality should apply to the undertaking and not teach separate legal entity.

[353] Commission Decision 2006/897/EC of 19 January 2005 (COMP/37.773), paras 310-311, 314 and fn 222; Commission Decision 2006/903/EC of 3 May 2006 (COMP/38.620), para 469, fn 409; Commission Decision 2006/793/EC of 31 May 2006 (Case COMP/38.645), paras 358, 369.

it had taken control of Arkema. This doctrine was challenged by the GC in *Versalis*, where it held that a multiplier which applied to the subsidiary because of recidivism should be applied to the parent company as well.[354] However, the position of the GC was corrected by the Court in the ensuing appeal where it held that recidivism could only be imposed on the parent entity if, at the time of the initial infringement, the two entities were part of the same economic unit.[355]

4.3.1.b. Recidivism and procedural rights

The second area where recidivism contributes to the question of the economic unit doctrine concerns the procedural rights of parent entities.

As further discussed in chapter 6 of this dissertation, the Courts take a legal entity perspective concerning procedural rights. A telling example is the CJ's decision in *ARBED*,[356] where it corrected the GC and annulled a decision of the Commission because the statement of objections had been sent to a legal entity of a group of companies but the decision imposing a sanction had been addressed at its parent company. The legal entity perspective observed in this area might interfere with the group perspective that prevails with respect to recidivism, as the parent company could argue that it should not bear an increase in the fine resulting from an earlier enforcement procedure in which it had not been heard or otherwise allowed to defend itself. This logic was followed by the GC in several judgments, where it corrected the amount of the fine imposed on the parent entity to remove the effect of the aggravating factor for recidivism precisely on the basis that it had not been heard in the initial cases.[357]

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[354] Judgment of 13 December 2012, *Versalis and Eni v Commission*, T-103/08, ECLI:EU:T:2012:686 at 276.

[355] Judgment of 5 March 2015, *Commission v Versalis and Eni and Versalis and Eni v Commission*, C-93/13 P and C-123/13 P, ECLI:EU:C:2015:150 at 91, 93, 97 and 102.

[356] Judgment of 2 October 2003, *ARBED SA v Commission*, C-176/99 P, ECLI:EU:C:2003:524. See also judgment of 10 September 2009, *Akzo Nobel*, C-97/08 P, ECLI:EU:C:2009:536, at 57 ('The infringement of Community competition law must be imputed unequivocally to a legal person on whom fines may be imposed and the statement of objections must be addressed to that person').

[357] Judgment of 13 July 2011, T-144/07, T-147/07, T-148/07, T-149/07, T-150/07 and T-154/07, *ThyssenKrupp Liften Ascenseurs NV and others v Commission*, ECLI:EU:T:2011:364, at 319-322; judgment of 13 December 2012, *Versalis and Eni v Commission*, T-103/08, ECLI:EU:T:2012:686, at 273-274 and judgment of 12 December 2014, *Eni v Commission*, Case T-558/08, ECLI:EU:T:2014:1080, at 296-299.

These decisions look convincing from a procedural rights standpoint (which, as noted, follows a legal entity approach). Recidivism should only be applied to a legal entity that could have defended itself against the initial finding of infringement. Failing that, the earlier decision should not bind that entity. However, at the same time, that logic would release parent companies from liability for repeat infringements committed by entities in their groups unless the enforcer had joined the parent to each action. And even if it had, the parent company could change over the years as a result of various forms of restructuring. These concerns led the CJEU to correct the GC's doctrine following an appeal by the Commission against the latter court's *Versalis* judgment, holding that

> 'in order to establish the aggravating circumstance of repeated infringement on the part of the parent company, it is not necessary for that company to have been the subject of previous legal proceedings giving rise to a statement of objections and a decision. For that purpose, what matters is an earlier finding of a first infringement resulting from the conduct of a subsidiary with which the parent company involved in the second infringement formed, already at the time of the first infringement, a single undertaking for the purpose of Article 81 EC.'[358]

It should be noted that, while declaring that participation in the earlier proceedings should not be required to apply the increase, the Court did impose the condition that the parent entity already controlled the subsidiary at the time of the initial infringement. By so doing, the Court appears to have assumed that in those situations the parent entity would ultimately have had the opportunity to defend itself at that time, and hence there would not be a *material* infringement of its rights.

While the logic is understandable and may be agreed with, it contrasts with the case law of the Court concerning procedural formalities, a matter that is discussed further in chapter 6 of this thesis.

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[358] Judgment of 5 March 2015, *Commission v Versalis and Eni and Versalis and Eni v Commission*, C-93/13 P and C-123/13 P, ECLI:EU:C:2015:150, at 92.

4.3.2. Deterrence

The second element of the fine where a group approach is taken is the deterrence factor. Here the logic is that in order to discipline the infringer, fines should have regard to its effective economic capacity,[359] this in the end demanding a group perspective.

The effective economic capacity of the economic entity was already taken into account in the 1998 Fining Guidelines[360] to ensure a sufficient deterrent effect. The approach was clarified and strengthened in the 2006 version of these Guidelines, where the Commission vowed to 'pay particular attention to the need to ensure that fines have a sufficiently deterrent effect; to that end, it may increase the fine to be imposed on undertakings which have a particularly large turnover beyond the sales of goods or services to which the infringement relates'.[361] That policy has been applied in numerous cases, resulting in multiplied fines being imposed on subsidiaries of large groups.

In contrast to recidivism, the Commission's practice is to apply the deterrence multiplier equally to the subsidiary and the parent company, based on the consolidated accounts of the group of entities. However, in *Slovak Telekom*[362] the Commission changed its practice and imposed a deterrence multiplier only on the parent company, Deutsche Telekom. In the subsequent appeal, the GC disagreed with that approach. In the GC's view, the imposition of a higher fine on the parent company than the subsidiary would only be possible if there were elements in the infringement that were specific to the former, which was not the case as Deutsche Telekom's liability was purely derived from its subsidiary.[363] In that same decision,

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[359] This idea has long been accepted in EU competition law, having been relied on in the judgment of 7 June 1983, *SA Musique Diffusion française and others v Commission*, 100-103/80, ECLI:EU:C:1983:158 at 106.

[360] Guidelines on the method of setting fines imposed pursuant to Article 15 (2) of Regulation No 17 and Article 65 (5) of the ECSC Treaty. [1998] OJ C 9/3.

[361] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (Fining Guidelines), [2006] OJ C 210/2, at 30.

[362] Commission Decision of 15 October 2014, Case AT.39523, *Slovak Telekom*, at 1531.

[363] Judgment of 13 December 2018, *Deutsche Telekom v Commission*, T-827/14, ECLI:EU:T:2018:930, at 520-524. Note that this was not discussed in the ensuing appeal, decided by judgment of 25 March 2021, *Deutsche Telekom AG v Commission*, C-152/19 P, ECLI:EU:C:2021:238.

however, the GC confirmed the application of the aggravating factor of recidivism only to the parent company.

The infringer's economic capacity is for the purposes of deterrence is assessed at the time that the fine is imposed and not at the time of the infringement.[364] As a result, the turnover of the group that an entity was part of at the time of the infringement may not be taken into account if the entity were sold before the infringement decision is adopted.[365]

Following the pronouncement of the Court in *Sumal*,[366] the question arises whether the deterrence factor should be calculated individually for potentially separate economic units within a group of companies.[367] It is submitted that this would be unlikely to apply, since recidivism relies heavily on the economic capacity of the infringer as reflected in its consolidated turnover, and not on considerations regarding the economic unit for other purposes.

4.3.3. The 10% limit

Perhaps the best known of all the rules that govern fines for breaches of competition law, the 10% limit or 'cap' was first established in Regulation 17/62[368] and readopted in Article 23 of Regulation 1/2003.

Under the methodology laid down in the Fining Guidelines, the 10% limit operates as a 'ceiling' rather than a 'range'. This means that the 'basic amount' of the fine is set without regard to the entity's turnover and later adjusted for mitigating and aggravating circumstances and the deterrence factor (where the size of the undertaking is factored in, as discussed in the earlier section). It is only after all these steps are taken that the resulting figure may be capped. This methodology arguably has a distortive effect especially for smaller undertakings, for

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[364] Judgment of 24 March 2011, *Pegler v Commission*, T-386/06, ECLI:EU:T:2011:115, at 133.

[365] Judgment of 7 June 2011, *Arkema France and others v Commission*, T-217/06, ECLI:EU:T:2011:251, at 272.

[366] Judgment of 6 October 2021 (Grand Chamber), *Sumal v Mercedes Benz Trucks España*, C-882/19, ECLI:EU:C:2021:800.

[367] Ibid, at 47.

[368] Arts 15, 16 of Regulation 17/62, [1962] OJ L 13/204, English special edition Series I Volume 1959-1962, p. 87.

which the reductions in the fine may not have any effect on the amount to be paid. In the past, these shortcomings led the Supreme Courts in Germany[369] and Spain[370] to consider the 'cap' system to be contrary to national constitutional principles, forcing their NCAs to follow a different system to that used by the EU Commission. It is unclear if and how the ECN+ Directive will affect these divergences.[371]

The above is relevant as it shows the purpose of this mechanism, which is not one of retribution (to be calculated from the viewpoint of damage to competition) or deterrence (which would seek to avoid future breaches), but to ensure that the fine does not put the existence of the undertaking at risk, as was confirmed at any early stage by the Court in *Musique Diffusion française.*[372] This explains that the cap is calculated with respect to the infringer's situation at the time of the decision imposing the fine, not the date of infringement.

As with the deterrence factor, the 10% rule is applied separately where an economic entity has been broken up in the period between the infringement and the decision. This was declared by the Grand Chamber judgment in *Kendrion,*[373] confirming earlier decisions of the GC in the same sense.[374] This is understandable since the 10% cap seeks to ensure that the sanction takes into account the economic capacity of the undertaking at the time the fine is imposed. If at that time the imputed entity no longer belongs to a group, the cap should be applied to it separately, and if the former parent is held liable, the separate limits of the latter would apply.

Somewhat surprisingly, that logic seems not to apply to the reverse situation, where an entity has been absorbed by an economic group after the infringement but prior to the decision. This

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[369] BGH, Judgment of 26 February 2013, *Grauzementkartell*, KRB 20/12.

[370] Spanish Supreme Court, judgment of 29 January 2015, *BCN Aduanas*, 2872/2013, ECLI:ES:TS:2015:112.

[371] ECN+ Directive, art 15.

[372] Judgment of 7 June 1983, *SA Musique Diffusion française and others v Commission*, 100-103/80, ECLI:EU:C:1983:158, at 119. For a recent restatement cf Judgment of 26 January 2017, *Mamoli Robinetteria v Commission*, C-619/13 P, ECLI:EU:C:2017:50 at 83.

[373] Judgment of 26 November 2013 (Grand Chamber), *Kendrion v Commission*, C-50/12 P, ECLI:EU:C:2013:771, at 57.

[374] Judgments of 15 June 2005, *Tokai v Commission*, T-71/03, ECLI:EU:T:2005:220 at 387; judgment of 16 June 2011, *FMC Foret, SA v Commission*, T-191/06.ECLI:EU:T:2011:277, at 324.

happened in *YKK*,[375] where YKK Stocko had been a member of the cartel and continued that behaviour after being taken over by the YKK group. In the infringement decision,[376] the Commission calculated separate fines for the two periods but corrected the amount by applying both the deterrence factor *and* the 10 percent cap having regard to the size of the YKK group at the time of the decision. That methodology was accepted by the General Court.[377] However, in the ensuing appeal, the CJ held that the 10% cap should be applied to each separate period, on the basis that the undertakings that had committed the infringement were different. That logic was, however, not applied to the increase in the fine on the basis of deterrence, which was also applied to the amount for the first period.

Independently of the criticism that may be made of the solution adopted by the Court,[378] *YKK* usefully exemplifies the multiple goals of the notion of undertaking and the group approach taken in EU competition law, which lead to different results depending on the question at hand. In that respect, the notion of undertaking lends itself to different answers to different questions. This happens not only when looking at different uses, such as calculation of fines or group liability, but even within the different objectives sought in relation to the various factors that are weighed up when calculating a fine.

4.3.4. Ability to pay

The last factor in the calculation of fines where a group perspective is relevant concerns the power of the Commission to modify the fine where the infringer is unable to pay the fine 'on the basis of objective evidence that imposition of the fine as provided for in these Guidelines would irretrievably jeopardise the economic viability of the undertaking concerned and cause its assets to lose all their value'.[379]

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[375] Judgment of 4 September 2014, *YKK Corporation and others v Commission*, C-408/12 P, ECLI:EU:C:2014:2153

[376] Decision of 19 September 2007, COMP/39.168, *Fasteners*.

[377] Judgment of 27 June 2012, *YKK Corp. and Others v Commission*, T-448/07, ECLI:EU:T:2012:322.

[378] For a critical view of this decision, see Carsten Koenig, 'The boundaries…' cit, in fn 260 at pp 26-27.

[379] Fining Guidelines, 35. On the policy of the Commission in this respect, see Information Note by Mr Almunia and Mr Lewandowski of 12 June 2010, SEC(2010) 737/2.

This mechanism relies on a similar logic to the 10% cap in that it does not initially seek retribution or deterrence; rather, the goal is to prevent the fine from causing the disappearance of an economic operator, an assessment that is best made under a group perspective. The main difference is that in this case the risk is evaluated in the light of the current and specific economic situation of the infringer, rather than as a principle applying across the board generally. This global approach explains that, as with the 10% limit, a group perspective is adopted.

At the same time, the case-specific approach that prevails in the determination of the capacity of an infringer to pay the fine may result in going beyond the confines of the undertaking itself for a determination, reaching other stakeholders. A telling example is *Global Steel Wire*,[380] where the CJEU confirmed a decision of the Commission that, besides looking at the different legal entities involved from a group perspective, had examined the possibility of the entities seeking financing from third parties, including – remarkably - the shareholders of the companies in question.[381]

4.4 The intragroup exemption

A third area where the notion of undertaking has shaped EU competition law is the principle that agreements between entities within an economic unit should be excluded from the prohibition of anticompetitive agreements contained in Article 101 TFEU, a doctrine here identified as the 'intragroup exemption'.[382]

In contrast with the uses of the notion discussed in earlier sections, where a group perspective extends the reach of the prohibition or amplifies the seriousness of the decisions adopted for their addressees, the intragroup exemption does the exact opposite, removing the applicability

[380] Judgment of 26 October 2017, *Global Steel Wire, SA and others v Commission*, C-454/16 P to C-456/16 P and C-458/16 P, ECLI:EU:C:2017:818 and the decision at first instance, judgment of 2 June 2016, *Moreda-Riviere Trefilerías, SA and others v Commission*, T-426/10 to T-429/10 and T-438/12 to T-441/12, ECLI:EU:T:2016:335, at 521-524.

[381] In a rare move, Global Steel Wire filed a claim related to their request of inability to pay. The case was later settled out of Court. See Order of the President of the Fourth Chamber of 28 January 2021, *Global Steel Wire, SA and Others v Commission*, T-545/19, ECLI:EU:T:2021:47.

[382] This part of the dissertation incorporates parts of my article 'Rethinking the Intragroup Exemption after Ecoservice', (2021) V(2) *Market and Competition Law Review* 49.

of Article 101 TFEU and thereby granting an exemption to the prohibition. This is important because it is often interpreted (especially by defendants) more generously than when other uses of the notion of undertaking are in play.

Another significant distinction between this 'privilege', as it is sometimes called,[383] and other group theories is that it is specific to competition law and, within it, only for Article 101 purposes. Parental liability, succession theories and consolidated accounting perspectives are used in other legal areas, but not the intragroup exemption. This is as much a curse as a blessing, as the doctrine is 'uncontaminated' by other viewpoints and stubbornly maintains a competition-only logic in relation to what is ultimately a seminal question: when do many become one?

The intragroup exemption was recognised in EU law at a relatively early stage in *Christiani & Nielsen.*[384] The reasoning given in that decision was brief, being limited to observing that competition between the two legal entities involved (a Danish parent company and its Dutch wholly-owned subsidiary) would not be possible. It is suggested that this approach, which would be reiterated over the years in Court rulings, misses the true point, since competition between entities within a group of companies is indeed clearly *possible*, the question being whether it may be legally *required*.[385]

The Court had its first opportunity to address this doctrine in *Béguelin.*[386] The case concerned a distribution agreement between a Japanese corporation and a Belgian company, which had a subsidiary in France to which it had assigned sub-distribution. The question raised was whether that sub-distribution agreement would be affected by Article 101 TFEU, a point the Court addressed in a single line noting that the subsidiary, 'although having separate legal

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[383] The German term 'Konzernprivileg' is frequently used and appears in the Opinion of AG Lenz of 25 April 1996, *Viho v Commission*, C-73/95 P, ECLI:EU:C:1996:164 (at 29). Also Juan Ignacio Ruiz Peris, *El privilegio del grupo*, Tirant lo Blanc, Valencia, 1999.

[384] Decision 69/195/CEE of 18 June 1969 *Christiani & Nielsen*. [1969] OJ L 165/12.

[385] Contrast with Okeoghene Odudu, David Bailey, "The single economic entity doctrine in EU competition law", *Common Market Law Review* 51 (2014) at 1728.

[386] Judgment of 25 November 1971, *Béguelin Import Co. v S.A.G.L. Import Export*, 22/71. ECLI:EU:C:1971:113.

personality, enjoys no economic independence',[387] leaving open the question of how agreements between affiliates that acted independently on the market should be treated.

A few months later, the Court referred to the exemption in *ICI.* As noted in section 4.2.1 above, that judgment concerned mainly parental liability, and the intragroup exemption was not in issue. However, when discussing the claim against the British ultimate parent, the Court observed *obiter* that

> '(w)here 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.'[388]

The reference to the intragroup exemption in that context suggests that at that time the Court assumed that it should be treated as a part of the single entity doctrine alongside parental liability,[389] a perspective that has reached to this day.[390]

Two years later, the *Centrafarm* judgments added an intriguing limitation to the intragroup exemption; in order to benefit from it, and in addition to the 'lack of autonomy' on the part of the subsidiary, the agreements should be 'concerned merely with the internal allocation of tasks as between the undertakings'.[391] This seemed to mean that not all intragroup agreements were exempted, but only those that divided the tasks between the various legal entities, there being limited clarity on what this would mean. It may be recalled that at that time US antitrust law still applied section 1 of its Sherman Act to agreements inside groups of companies under

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[387] Ibid at 8.

[388] Judgment of 14 July 1972, *Imperial Chemical Industries Ltd. v Commission*, 48/69, ECLI:EU:C:1972:70, at 134. See also the judgment of that same date in *J. R. Geigy AG v Commission*, 52/69, ECLI:EU:C:1972:73, at 44.

[389] In this decision, the Court took a flexible approach to notification formalities within a group of companies too. See *ICI* at 34-39 and Chapter 6 of this thesis.

[390] See for a recent instance the Opinion of AG Rantos of 14 July 2022, ECLI:EU:C:2022:586, at 34, discussing imputation and the intragroup exemption as being linked.

[391] Judgments of 31 October 1974, *Centrafarm v Sterling Drug*, 15/74, ECLI:EU:C:1974:114 and *Centrafarm v Winthrop*, 16/74, ECLI:EU:C:1974:115, respectively at 41 and 32. Note that the quote uses the term 'undertakings' to mean each entity in a group of companies, as was commonplace at that time.

the ‘intra-enterprise conspiracy doctrine’, a perspective which would be abandoned only in 1984,[392] which probably explained why some retained a restrictive view of the exemption.

The additional requisite in *Centrafarm* was reiterated a decade later in *Bodson*.[393] However, the later decision in *Ahmed Saeed* silenced it, limiting itself to requiring that the entities formed ‘an economic unit within which the subsidiary has no real freedom to determine its course of action on the market’. [394] Whether the additional requisite limited the exemption to agreements allocating tasks within a group of companies became the central issue in *Viho.*[395]

The case examined concerted refusals aimed at curbing parallel trade by various affiliates and distributors of Parker Pen to Viho, an independent wholesaler. In its investigation, the Commission found that the distribution agreements between Parker Pen or its affiliates and independent distributors breached Article 101 TFEU and imposed fines.[396] However, the Commission did not apply that logic to the agreements between entities within the Parker Pen group because of the intragroup exemption. That meant that these entities could collectively refuse to deal with Viho without risk of a prohibition under Article 101 TFEU. Viho appealed, and one of the arguments it raised was that the refusals to supply to it were not something that was ‘concerned merely with the internal allocation of tasks as between the undertakings’ within the meaning of *Centrafarm.*

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[392] *Copperweld v. Independence Tube*, 467 U.S. 752 (1984). See before this decision by undisclosed authors, ‘Intra-Enterprise Conspiracy under Section 1 of the Sherman Act: A Suggested Standard’ (1977) 75 (4) *Michigan Law Review*, 717. Right after the decision see the laudatory article by James M. Steinberg, ‘The Long Awaited Death Knell of the Intra-Enterprise Doctrine’ (1985) 30 *Villanova Law Review* 521. For a contrasting view, S. John Goodwin, ‘Recent Developments, The Demise of the Intra-Enterprise Conspiracy Doctrine: Flexible Antitrust Enforcement Policy Abandoned in a Maze of Economic Certainty—Copperweld Corp. v. Independence Tube Corp., 104 S. Ct. 2731 (1984)’ (1985) 60(3) *Washington Law Review* 757. For a more recent review of the doctrine, Natasha Menell, ‘The Copperweld Question: Drawing the Line between Corporate Family and Cartel’, (2016) 101 *Cornell Law Review* 467 and Florence Thépot, *The Interaction Between Competition Law and Corporate Governance. Opening the ‘black box’*. Cambridge, 2019, at 41 ff.

[393] Judgment of 4 May 1988, *Corinne Bodson v Pompes funèbres des régions libérées SA*, 30/87, ECLI:EU:C:1988:225.

[394] Judgment of 11 April 1989, *Ahmed Saeed Flugreisen and Silver Line Reisebüro v Zentrale zur Bekämpfung unlauteren Wettbewerbs*, 66/86, ECLI:EU:C:1989:140, at 35.

[395] Judgment of 12 January 1995, *Viho v. Commission*, T-102/92, ECLI:EU:T:1995:3; on appeal, judgment of 24 October 1996, *Viho v. Commission*, C-73/95 P, ECLI:EU:C:1996:405.

[396] *Viho* (GC), at 12.

In its judgment of 12 January 1995, the GC sided with the Commission and removed the additional requirement in *Centrafarm*, requiring solely 'control' and 'commercial dependence' for the exemption to apply. Remarkably, the GC also ruled that an agreement between a parent company and its affiliate could not be defined as being 'between undertakings', in an early defence of the use of that term to denote economic units.[397] In the subsequent appeal, the Court agreed with the GC that the additional requirement in *Centrafarm* should be abandoned; however, following the advice of AG Lenz,[398] it rejected the semantic argument that there was no agreement between undertakings.[399]

While it removed the additional element that the agreements be 'concerned merely with the internal allocation of tasks as between the undertakings' in order to benefit from the exemption, *Viho* maintained the other condition laid down in *ICI* that the exemption required that the subsidiaries did not enjoy real autonomy in determining their course of action in the market but carried out the instructions issued to them by the parent company controlling them.[400] On a literal reading, this left the door open to applying Article 101 TFEU to agreements within a group of companies despite the existence of control if it was established that the entities enjoyed market independence from each other.

In the years that followed, however, Article 101 TFEU has not been used in that manner, and if it has, no disputes have reached the European courts. In his seminal essay on the undertaking as subject to the competition rules, Wouter Wils argued that all agreements within a group of companies should be exempted, noting that any possible market freedom of subsidiaries enabled by the parent company would be 'just another way of exercising control'[401]. Odudu and Bailey, for their part, suggested examining situations where the various components in a single entity might have diverging interests despite the existence of

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[397] Ibid at 50. See section 2.2.3 for a discussion of this aspect of the decision.

[398] Opinion of 25 April 1996, ECLI:EU:C:1996:164, at 59.

[399] See Chapter 2 of this dissertation. It would take another ten years for the CJEU to define separate companies of a group as an undertaking in its judgment of 14 December 2006, *CEES*, C-217/05, ECLI:EU:C:2006:784, para. 40.

[400] Note also the clarification in *Bodson* at 19, 20 that the mere fact of belonging to a group of companies would not suffice for the exemption to apply.

[401] Wouter P J Wils, "The undertaking as subject of EC competition law and the imputation of infringements to natural or legal persons", *European Law Review* 25, no. 2 (2000): 103.

control.[402] That approach would permit some application of Article 101 TFEU to groups of companies in exceptional situations.[403]

The Commission, for its part, appeared to disregard the market independence element in paragraph 11 of the 2010 Horizontal Guidelines[404], suggesting that the exemption would apply provided there was decisive influence. That policy choice would seem to fit better with the control-centric focus of the EU Merger Control regulation. However, the Commission's own Notice on the Notion of Aid seemed to indicate that this may be read differently in some situations.[405]

In its recent judgment in *Ecoservice*, the Court would seem to have resolved this question by extending the exemption to any agreements within a group of companies, regardless of their independence on the market.[406] The case concerned agreements and concerted practices among affiliates of a group of companies in the context of public procurement, an area where, as noted above in chapter 3, the Court of Justice had acknowledged that sibling entities may act independently of each other for the purposes of EU procurement directives.[407] Despite recognising that independence on the market,[408] the Court declared that Article 101 TFEU would not apply to agreements between these entities provided that a parent company had a

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[402] Okeoghene Odudu, David Bailey, "The single economic entity doctrine in EU competition law", *Common Market Law Review* 51 (2014): 1729 and 1738. For a different perspective that seeks to integrate the various uses of the notion of undertaking, see Alison Jones, 'The Boundaries of an Undertaking in EU Competition Law', (2012) 8(2) *European Competition Journal*, 301, 317.

[403] Ibid, at 1730. Odudu and Bailey discuss the US decision in *American Needle, Inc. v. NFL*, 560 U.S. 183 (2010) as an example of a firm with multiple centres of decision. See also in that same article the discussion of the treatment of the unity of interests as a presumption in *Copperweld* and the more ambiguous answer under EU law at 1732.

[404] 'Article 101 only applies to agreements between independent undertakings. When a company exercises decisive influence over another company, they form a single economic entity and, hence, are part of the same undertaking. The same is true for sister companies, that is to say, companies over which decisive influence is exercised by the same parent company. They are consequently not considered to be competitors even if they are both active on the same relevant product and geographic markets'. *Horizontal Guidelines*, [2011] OJ C11/1, para. 11.

[405] See Guidelines on the Notion of Aid, [2016] OJ C 262/1, para. 11, referring vaguely to "a controlling share and other functional, economic and organic links".

[406] Judgment of 17 May 2018, *Ecoservice*, C-531/16, ECLI:EU:C:2018:324, at 28, 29.

[407] Judgments of 19 May 2009, *Assitur*, C-538/07, ECLI:EU:C:2009:317; 23 December 2009, *Serrantoni*, C-376/08, ECLI:EU:C:2009:808; 22 October 2015, *Impresa Edilux*, C-425/14,ECLI:EU:C:2015:721; 8 February 2018, *Lloyd's of London*, C-144/17, ECLI:EU:C:2018:78.

[408] The case discussed affiliates which had filed separate and independent bids acting as independent market players. Any coordination of their bids would have breached the procurement rules, as per *Assitur* and related pronouncements.

'determining influence' over them, and by implication, irrespective of whether the entities pursued independent strategies.

As I have discussed elsewhere,[409] it would be appropriate not to interpret *Ecoservice* too broadly and maintain the possibility of applying Article 101 in certain situations such as agreements between State-controlled entities, businesses in groups with separate centres of decision and industries subject to statutory requirements of independence, despite the presence of control.[410] The recent decision of the Court in *Sumal* may also lend support to limiting the exemption by treating separate businesses in conglomerate groups as separate economic units,[411] thereby arguably opening a door to the application of Article 101 TFEU to restrictive agreements among them.

Finally, with respect to the intragroup exemption, a reference should be made to the recently published 2022 Draft Horizontal Guidelines where, as already noted in section 3.1.3.c., the Commission has proposed to extend this waiver to certain agreements between the parent entities and the joint venture itself. That would change the prevailing view that these agreements should be treated as concluded between different entities[412] or possibly excluded from Article 101 as restrictions ancillary to a concentration.[413] It may be recalled that the Commission already tried this in its 2010 Draft Horizontal Guidelines, but in the end removed this reference from the definitive version.[414]

In support of this change, the 2022 Draft Horizontal Guidelines refer to the judgments in *Du Pont* and *Dow*,[415] in which the Court had accepted that the jointly controlling parents may be

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[409] Marcos Araujo Boyd, 'Rethinking the Intragroup Exemption after Ecoservice', (2021) V(2) *Market and Competition Law Review* 49.

[410] Ibid at 64-68.

[411] Judgment of 6 October 2021 (Grand Chamber) *Sumal v Mercedes Benz Trucks España*, C-882/19, ECLI:EU:C:2021:800, at 47.

[412] See Decision of 16 January 1991, *IJsselscentrale*, [1991] OJ L 28/32, at 12-13; Decision of 15 May 1991, *Gosmé/Martell*, [1991] OJ L 185/23, at 30.

[413] See Ancillary Restraints Notice [2005] OJ C 56/24 at 36 ff.

[414] Draft Horizontal Guidelines SEC(2010) 528/2, at 11.

[415] Judgments of 26 September 2013, *EI du Pont de Nemours v Commission*, C-172/12 P, ECLI:EU:C:2013:601 at 36 and of the same date, *Dow Chemical v Commission*, C-179/12 P, ECLI:EU:C:2013:605 at 42.

liable for infringements committed by their joint venture. It should be recalled that the Court specified at that time that the finding of a single economic entity was made 'only for the purposes of establishing liability for participation in the infringement', indicating that this approach may not be applied to other uses of the doctrine (arguably including the intragroup exemption). Unfortunately for the clarity of that doctrine, in *LG Electronics*[416] the Court rejected a narrow reading of *Du Pont* and accepted that same logic for the purposes of calculating the fine, agreeing that the turnover of jointly controlled undertakings should be factored in. While it is apparent that this latter approach was not meant to cover all the functions of the single entity doctrine, it seems to be now read by the Commission as confirming that the agreements between jointly controlling entities and their joint venture should benefit from the intragroup exemption.

The proposed Horizontal Guidelines suggest that the intragroup exemption would only apply within certain limits and requisites, such as demonstrating that the parent companies effectively exercise decisive influence. The Commission would also retain the right not to apply the exemption to agreements for the creation or altering the scope of the JV and may be unavailable outside the product and geographic scope of the JV's activity. The JV should also be 'involved' (a nebulous term) in the agreement. Moreover, the draft Horizontal Guidelines do not differentiate between fully functional and other JVs, which raises the question whether this doctrine may also apply to purely cooperative ventures, whether fully functional or not.

It is submitted that the Commission's position in the draft Horizontal Guidelines is misguided. As per the preceding discussion, the logic of the intragroup exemption does not rely on the mere existence of decisive influence, but rather on the finding that a parent company and its subsidiary form a single economic unit within which the subsidiaries do not enjoy real autonomy in determining their course of action on the market and carry out the instructions issued to them by the parent company that controls them, as has been held in all relevant

[416] Judgment of 14 September 2017, *LG Electronics and Koninklijke Philips Electronics*, C-588/15 P and C-622/15 P, ECLI:EU:C:2017:679, paragraphs 71 and 76.

precedents from *ICI* to *Viho*. Consequently, the exemption should be limited to full-control situations where affiliates have no separate will, something that is not the case with JVs.[417]

More importantly for the purposes of this discussion, the Commission's position provides yet another example of the tendency to mechanically apply a solution adopted when applying the notion of undertaking in a given situation to other uses, disregarding their underlying goals. In this case, imposing parental liability on joint controlling parents makes sense for the very same reasons that would apply to sole controlling parents. The extension of that approach to the calculation of fines in *LG Electronics*, where it was held that the sales of jointly controlled entities may also be factored in when calculating a fine, is also logical. But the underlying logic of these enforcement choices has little to do with the intragroup exemption.

In the end, the Commission is doing here what it had proposed to the Court back in 1972 in *ICI*:[418] to assume that the single entity doctrine needs to be applied consistently across its different uses. Whether this perspective should now be maintained will be discussed at the end of this chapter.

4.5 Theories of succession

The notion of undertaking has also been used in EU competition law in support of expansive theories of succession.

Succession is a broad doctrine that is applied in multiple areas of law. Its origins lie in the need to ensure the continuity of legal and economic relationships following the death of an individual (*mortis causa* succession) through tools that enable creditors and other rights holders to assert their claims against other persons, named as successors. This principle was eventually applied to other situations where a person was replaced by another following an agreement or the act of an authority (*inter vivos* succession).

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[417] This does not mean that every agreement establishing a JV or between it and a parent is subject to Article 101 TFEU. Many of the restrictions in that context are eligible to be treated as ancillary to a valid transaction under paragraph 36 ff of the Notice on Ancillary Restrictions (citation at fn 413 above).

[418] See Judgment of 14 July 1972, *Imperial Chemical Industries Ltd. v Commission*, 48/69, ECLI:EU:C:1972:70 at page 632 and chapter 2, section 2.2.2 of this thesis.

Succession as a concept eventually found its way into the law governing legal entities. As with the death of an individual, the disappearance of a company results in a procedure to liquidate its assets and eventually assign its relationships to other persons. Legal entities may also transmit some or all of their activities to other entities, either within their groups of companies or to independent market players.

Despite the analogy, the succession of individuals and companies presents relevant differences. In short, the identity of the individual is assumed not to change during their lives, and when deceased, only some of the liabilities are passed on, as criminal or sanctioning provisions are extinct with the passing. In contrast, the identity of firms (and their legal vehicles) changes over time in many respects as they enter new markets and leave others, buy and sell businesses and replace their management, raising a question about their continued identity. Moreover, successors are often asked to bear liabilities derived from infringements, something that would not normally be asked in the case of individuals.

The above differences are especially relevant in the context of corporate reorganisations, incidentally a notion for which no easy analogy comes to mind with respect to individuals. It is apparent that these transactions may not be used to release economic players from their obligations. As a result, legal systems have developed relatively wide theories of succession with respect to legal entities. An example of this is the Transfers of Workers Directive,[419] which seeks to protect employees in the case of the 'transfer' of a business.[420] Similar principles are relied on with respect to taxes, sanctions and other public or private liabilities. Unsurprisingly, this logic has also been applied in the field of competition law.

In the enforcement of Articles 101 and 102 TFEU the doctrine of succession was first used in *Suiker Unie.* In that case, the Commission imputed an infringement dating back to 1968 to an entity that had formally only commenced trading in 1971, after having taken over the activities of four cooperatives. The Court observed that the applicant had assumed the rights and

[419] Directive 2001/23/EC, [2001] OJ L 82/16. This replaced former Directive 77/187/EEC, [1977] OJ L 61/26.

[420] This is defined in Art 1(b) of the Directive as 'a transfer of an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.' The notion of 'undertaking' in the Directive does not necessarily correspond to that used in competition law, as confirmed in judgment of 2 December 1999, *Allen*, C-234/98, ECLI:EU:C:1999:594, at 19.

liabilities of these cooperatives and concluded that their behaviour should be imputed to it in a classical application of the economic continuity doctrine,[421] without any direct reference to the notion of undertaking.

Later decisions would however progressively intertwine the two. An early example is *CRAM and Rheinzink*,[422] where Rheinzink argued that it should not be liable for the infringements committed by its affiliate Rheinisches Zinkwalzwerk GmbH & Co., an entity that had been dissolved between the dates on which the alleged behaviour took place and the infringement decision. In that case, the Commission argued before the Court that the two legal entities under consideration were

> '(…) two successive legal forms of one and the same undertaking. The subjects of competition law are undertakings. The undertaking in question changed its name and its legal form at the moment of the transformation, but its objects, registered office and management remained unchanged. Consequently, the acts committed by the dissolved company may be imputed to Rheinzink as the sole legal successor of that company.'[423]

To which the Court replied, without expressly endorsing the terminology put forward by the Commission, that

> 'The Commission's argument must be accepted. Rheinzink has not contested that not only is it the legal successor of Rheinisches Zinkwalzwerk GmbH & Co., but it has continued the economic activities of that company. For the purposes of Article 85 of the Treaty, a change in the legal form and name of an undertaking does not create a new undertaking free of liability for the anti-competitive behaviour of its predecessor, when, from an economic point of view, the two are identical.'[424]

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[421] Judgment of 16 December 1975, *Suiker Unie v Commission*, 40/73, ECLI:EU:C:1975:174, at 77-88.

[422] Judgment of 28 March 1984, *Compagnie Royale Asturienne des Mines SA and Rheinzink GmbH v Commission*, 29 and 30/83, ECLI:EU:C:1984:130.

[423] Ibid at 8. Note the designation of the undertaking as a 'subject' of competition rules, also noted at fn 1.

[424] Ibid at 9.

This decision is remarkable in that, already in 1984, it approached the concept of 'undertaking' from the perspective of an entity that pursues an economic activity, regardless of possible changes to its name and legal form under a logic of economic continuity. It should, however, be noted that this construction was applied in restrictively defined circumstances where the 'objects, registered office and management remained unchanged'.[425]

In subsequent years, the Court would consider the impact of theories of succession taking a much wider perspective. Rather than the mere continuation of the business of a legal entity having replaced another one that had been liquidated, the question turned to how to treat a business that had changed hands either during the period of infringement or between its end and the date of the fine. Two cases deserve a mention in this respect: *Anic* and *Aalborg*.

The first case stems from the *Polypropylene* decision,[426] where Anic was held responsible for the payment of a fine despite having sold the line of business in question to a third entity. In its appeal, Anic argued that holding it liable was incorrect and pointed out that a different decision had been reached in the case of another infringer that was in the same cartel, Saga Perokjemi, where the new buyer (Statoil) had been made liable. The Court dismissed the argument based on a strict reading of the doctrine of succession, holding that a transfer of liability could only happen where the initial infringer had ceased to exist.[427] If the former infringer remained legally in existence, it should remain personally liable. That being the case of Anic, the fine was confirmed.

Some years later, however, a different conclusion was reached in *Aalborg*, one of the appeals against the *Cement* decision,[428] which challenged that the Commission had imputed the conduct to Aalborg Portland A/S, an entity that had assumed the activities of the former

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[425] Note that at this time the Court had not yet defined the notion of undertaking (this had to wait until *Höfner* in 1991) or confirmed that it may comprise various legal entities (a principle only accepted by the CJEU in *CEES* in 2006). In that respect, *CRAM* belongs to the category of isolated and contradictory rulings lacking a consistent theory but on which the Court would later build its doctrine, a category that would also include the Judgment of 25 October 1983, *Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunken AG v Commission*, 107/82, ECLI:EU:C:1983:293 and the Judgment of 12 July 1984, 170/83, *Hydrotherm*, ECLI:EU:C:1984:271.

[426] Commission Decision 86/398/EEC of 23 April 1986 (IV/31.149 — *Polypropylene*), [1986] OJ L 230/1

[427] Judgment of 8 July 1999, *Commission v Anic Partecipazioni SpA*, C-49/92 P, ECLI:EU:C:1999:356, at 145.

[428] Decision 94/815/EC of 30 November 1994 (IV/33.126 and 33.322 - *Cement*), [1994] OJ L 343/1.

infringer, Aktieselskabet Aalborg Portland-Cement Fabrik, and not of this last legal entity which was still in existence at the time the fine was imposed. In the appeal, Aalborg Portland A/S argued that the succession doctrine could not be applied in this case under the logic in *Anic*. However, the GC sided with the Commission and accepted that transfer of responsibility referring vaguely to both entities being the 'same economic entity'[429] and quoting *CRAM and Rheinzink* as authority, silencing the fact that the former infringer was still in existence. In the appeal before the CJ, despite the opposition of AG Ruiz-Jarabo Colomer,[430] the Court confirmed the GC's finding on liability, correcting the succession doctrine so that the disappearance of the former infringer would not be required if the activity had changed hands within an economic group.[431]

The solution adopted in *Aalborg*, later applied in various cases,[432] transformed the doctrine of economic continuity. In its original form, this was a limited mechanism aimed at correcting the void caused by the disappearance of a legal entity. *Anic* had made it clear that this instrument should only apply to a situation where the initial entity no longer existed, so as not to impinge on the principle of legal personality as generally understood, namely that liability for an infringement should correspond to the legal entity that committed it. Theories of succession based on an 'economic continuity' logic were an acceptable exception to that principle where the original entity had disappeared, as there would be no other choice. But *Aalborg* held for the first time that the principle of legal personality may be set aside, despite the continued existence of the original infringer, where its economic activity had been continued by other entities controlled by the same player.

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[429] Judgment of 15 March 2000, *Cimenteries CBR and Others v Commission*, T-25, 26, 30-39, 42-46, 48, 50-65, 68-71, 87, 88, 103, 104/95, ECLI:EU:T:2000:77, at 1335.

[430] Opinion of AG Ruiz-Jarabo Colomer of 11 February 2003, *Aalborg Portland A/S and others v Commission*, 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, ECLI:EU:C:2003:85, at 72.

[431] Judgment of 7 January 2004, *Aalborg Portland A/S and Others v Commission*, 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, ECLI:EU:C:2004:6, at 355-357.

[432] Judgment of 27 September 2006, *Jungbunzlauer AG v Commission*, T-43/02, ECLI:EU:T:2006:270 at 132, Judgment of 31 March 2009, *ArcelorMittal and Others v Commission*,T-405/06, ECLI:EU:T:2009:90 at 111. This later decision would be confirmed by Judgment of 29 March 2011 (Grand Chamber), *ArcelorMittal v Commission*, C-201/09 P and C-216/09 P, ECLI:EU:C:2011:190, see 104.

The impact of *Aalborg* on the principle of legal personality was confronted head on by the Grand Chamber of the CJEU three years later in *ETI*,[433] in what constitutes one of the most important decisions on the notion of undertaking. The case concerned an investigation by the Italian competition authority into the Italian tobacco monopolist, which had acted on the market successively through three entities.[434] The question was whether the current legal vehicle could be held liable for the conduct of the former organizations which the Italian government had used to run its tobacco monopoly, and especially for the actions of AAMS, which was still in existence at the time. In addressing that question, the Court relied on *Aalborg*, noting that all the entities were owned by the same public entity (the Ministry of the Economy and Finance of Italy) and therefore the requirement that the initial infringer still existed would not prevent the transfer of liability. Most importantly, the Court framed the question on the notion of undertaking and relied by analogy on its then-incipient doctrine that sanctions could be imposed on entities other than the infringer 'where those entities have been subject to control by the same person within the group and have therefore given the close economic and organisational links between them, carried out, in all material respects, the same commercial instructions'.[435] This led the Court to clarify that the principle of personal responsibility should not be read as applying to legal entities but rather to economic units, noting that

> 'It is apparent from the case-law that Community competition law refers to the activities of undertakings (…) and that the concept of an undertaking covers any entity engaged in an economic activity, irrespective of its legal status and the way in which it is financed (…).
>
> *When such an entity infringes competition rules*, it falls, according to the principle of personal responsibility, to that entity to answer for that infringement (see, to that effect,

[433] Judgment of 11 December 2007 (Grand Chamber), *ETI and Others v Autorità Garante della Concorrenza e del Mercato*, C-280/06. ECLI:EU:C:2007:775.

[434] Ibid at 9. The entities were the Amministrazione autonoma dei monopoli di Stato (AAMS), Ente tabacchi italiani and Ente tabacchi italiani – ETI SpA.

[435] Ibid at 49. Note that the judgments quoted in that paragraph are unrelated to succession.

> Case C-49/92 P *Commission v Anic Partecipazioni* [1999] ECR I-4125, paragraph 145, and Case C-279/98 P *Cascades v Commission* [2000] ECR I-9693, paragraph 78).'[436]

With these words, the Court was arguably following a real entity perspective within the meaning of the discussion on chapter 1 of this thesis, this is, identifying the economic player as a separate being from its legal incorporation, so as to avoid the shackles of a legal entity perspective of the principle of succession.

This perspective of the principle of legal personality in the field of competition law as applying to the undertaking would become a permanent feature, despite the doubts raised at the time by several Advocates General of the Court.[437]

The application of succession theories within groups of companies was further developed in *Parker Hannifin.*[438] That case examined the liability of an entity in the *Marine Hose* cartel[439] whose fine had been calculated having regard to the total duration of the infringement (over 19 years), even though its current owner had only possessed it for the last five years of that period and the entity initially involved in the conduct was still in existence. It should be noted that, in that case, the Commission had found itself unable to divide the fine between the initial and subsequent owner of the business, as it would normally have done, as the action against the initial entity and the original owners was time-barred. Since the original seller had created a subsidiary, transferred the relevant business to it and sold that entity, the Commission argued that those transactions had taken place within an economic unit and therefore it was possible to apply the doctrine on economic succession despite the continued existence of the original infringer. While the General Court disagreed with this logic and corrected the fine in that

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[436] Ibid, 38 and 39 (emphasis added). Despite the references to earlier cases as apparent earlier support of the application of the principle of legal personality to the undertaking, these precedents did not share that logic. The paragraph in *Cascades* quoted as authority reads: 'It falls, in principle, *to the legal or natural person managing the undertaking in question* when the infringement was committed to answer for that infringement, even if, when the Decision finding the infringement was adopted, another person had assumed responsibility for operating the undertaking' (emphasis added).

[437] See Chapter 2, section 2.2.4 of this thesis.

[438] Judgment of 18 December 2014, *Commission v Parker Hannifin Manufacturing and Parker-Hannifin*, C-434/13 P. ECLI:EU:C:2014:2456.

[439] Decision of 28 January 2009, Case COMP/39406 - *Marine Hoses.*

respect,[440] in the subsequent appeal the Court of Justice, heavily relying on the notion of undertaking, supported the more expansive view of the Commission.

The most relevant development in relation to the doctrine of succession in recent times is, of course, *Skanska.*[441] The case concerned a follow-on claim following a decision holding a cartel liable in the asphalt sector. Three of the cartel participants had been liquidated in the period of investigation and their businesses had been transferred to their shareholders.[442] In a public enforcement decision, the Finnish competition authority had applied the doctrine on succession as developed over the years in the field of public enforcement and sanctioned the shareholders of these three entities as their successors. However, in the subsequent follow-on damages claim, it was argued that only the legal entity that had caused the damage (i.e., the legal entity identified as infringer) could be considered liable under Finnish law, and consequently there would be no redress for cartel victims such as the municipality of Vantaa, claimant in the case.[443]

Following an appeal to the Supreme Court of Finland by the victim and one of the cartel participants,[444] a reference for a preliminary ruling was sent to the CJEU. The questions sought to confirm whether the liable entity should be determined under national or EU law, and the main consequences of each alternative, including the limitations that would arise from the principle of effectiveness, should national law apply.

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[440] Judgment of 17 May 2013, T-146/09, *Parker ITR Srl and Parker-Hannifin Corp., v Commission*, ECLI:EU:T:2013:258.

[441] Judgment of 14 March 2019, *Vantaan kaupunki v Skanska Industrial Solutions Oy and Others*, C-724/17, ECLI:EU:C:2019:204.

[442] Ibid, at 7-9.

[443] As explained by the referring court, the doctrine of piercing the corporate veil under Finnish law could not be applied as there was no fraud or concealment. Ibid, at 15.

[444] The cartel participant argued that the compensation it had been ordered to pay should be reduced in the part corresponding to the dissolved companies which participated in the cartel. See AG Wahl's Opinion of 6 February 2019, C-724/17, ECLI:EU:C:2019:100, para 18.

In its response, which was heavily reliant on AG Wahl's Opinion,[445] the Court declared that the principle of full effectiveness of Article 101 TFEU[446] required that the entity that is required to compensate the damage caused by an infringement be directly determined by EU law.[447] Furthermore, it enshrined the notion of 'undertaking' as an autonomous concept of EU law and declared that it could not have a different scope when applied by the Commission in the context of the imposition of fines and in actions for damages resulting from the infringement of the competition rules.[448] As a result, the Court tied the notion of undertaking in private enforcement cases to the criteria and standards developed over the years in the field of public enforcement, on the basis that both serve essentially the same purpose, namely strengthening the work of the EU competition rules by discouraging their infringement.[449] Consequently, the national court was instructed to apply the principle of economic continuity, as the national competition authority had done.

Leaving aside its impact on private enforcement, *Skanska* confirms the role of the doctrine of succession as a construct aimed at avoiding that corporate restructuring would frustrate the enforcement of the law, this time in the context of its private application. Again, its underlying logic is that the economic entity that committed the infringement, irrespectively of its incorporation into legal entities over time, must bear the consequences of an infringement under a defined theory of attribution. Under that perspective, succession is no longer just a safety valve to solve the anomaly of an entity that can no longer respond (as in *Suiker Unie* or *CRAM*) or an evolution of that doctrine whereby the disappearance of the legal entity identified as infringer is not relevant where the business is continued by the same economic group (as in *Aalborg* and *ETI*), but a mechanism to ensure that the actual economic activity remains liable for the damage caused regardless of ownership, whether in public or private enforcement, a logic that would exclusively rely on the principle of effectiveness.[450]

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[445] Opinion of AG Wahl of 6 February 2018, *Vantaan kaupunki v Skanska Industrial Solutions Oy and Others*, C-724/17, ECLI:EU:C:2019:100.

[446] *Skanska* at 25. It is understood that this would also apply to Article 102 TFEU.

[447] Ibid at 28.

[448] Ibid at 47.

[449] Ibid at 44.

[450] As I have explained elsewhere (Marcos Araujo Boyd, 'Should Children Pay for Their Parent's Sins? The Sumal Preliminary Reference', (2021) 12 (1) *Journal of European Competition Law & Practice* 25, at 31), it is

4.6 The notion in the field of merger control

The current notion of undertaking in its structural sense (that is, the 'economic unit' limb of the concept of undertaking) owes much to the adoption and application of the Merger Control Regulation. It is no coincidence that the seminal decision in *Höfner,*[451] which heralded a new era for that notion, was adopted just a few months after the entry into force of Regulation 4064/89,[452] whose control-centric perspective made corporate groups the standard image of the economic agents concerned by the competition rules.

Somewhat awkwardly, the Merger Regulation confusingly uses the term 'undertaking' with two distinct meanings. On the one hand, its title suggests that 'undertakings' would be the groups that hold control; on the other, its Article 5 employs the term to denote separate legal entities, a feature that, as already discussed, is the result of having in mind EU legislation on the determination of the turnover of groups of companies.[453] However, leaving aside this terminological divergence, the Regulation departs from concept of 'undertaking' based on control and whose size may be established with relative precision.

The clarity of the notion of undertaking in the Merger Regulation (again, leaving the terminological inconsistency on one side) has given rise to the assumption that the 'undertaking' defined under these rules would be the same 'undertaking' referred to in the

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important to differentiate the principle of 'full effectiveness' as applied in the above cases from the doctrine on 'equivalence and effectiveness' created by the CJEU to guide national courts in the enforcement of EU-law based rights where national procedural laws are applied. In short, 'full effectiveness' means taking a broad view of the objectives pursued by the rule in question, expanding its scope to cover elements which are insufficiently expressed in the rule itself, while 'equivalence and effectiveness' stands for the traditional rule whereby national rules used when enforcing EU-derived rights should be those employed for similar claims under national law (equivalence) and it should not make impossible or unreasonably difficult exercising those rights.

[451] Judgment of 23 April 1991, *Höfner and Elser v Macrotron*, C-41/90, ECLI:EU:C:1991:161.

[452] The original Merger Regulation (Regulation 4064/89, [1990] OJ L 157/13) came into force on 1 September 1990. It was replaced by the current Merger Regulation 139/2004.

[453] Especially Directive 83/349 of 13 June 1983, on Consolidated Accounts. [1983] OJ L 193/1, today replaced by Directive 2013/34/EU of 26 June 2013 on Annual and Consolidated Accounts, [2013] OJ L 182/19 (the Accounts Directive). As discussed in Section 3.3, despite borrowing the term 'undertaking' with this meaning, the rules on consolidation in Article 5 of the Merger Regulation do not coincide with those of the Accounts Directive. A salient difference is the inclusion of the sales of jointly controlling entities, which are not included in consolidated sales under the Directive.

case law on derived liability, the intragroup exemption, succession and fines. This of course assumed that there was 'one' notion of undertaking for all these purposes.[454]

Over the years, that initial perspective has come under scrutiny, particularly with respect to joint ventures. The following subsections discuss three elements that suggest divergences between the notion of undertaking used in the field of merger control and other areas of EU competition law: the treatment of joint ventures, the treatment of 'conglomerate' undertakings according to the approach in *Sumal* and the specific situation of SOEs.

4.6.1 The notion of undertaking and joint control

As explained in section 3.1.3 of this dissertation, the economic unit doctrine in EU competition law has essentially been built around sole control. Groups where parent companies exercise decisive influence over their subsidiaries are understood to be an economic player with a unitary will, a single centre of decision. It has however become apparent that besides 'sole control' structures, two or more independent economic operators may jointly possess the power to determine the commercial behaviour of an entity, commonly called a 'joint venture' or JV.

Following the coming into force of the merger control rules, the creation and modification of some of these joint ventures has come within their scope.[455] In that context, 'concentration' was defined to include their creation and the replacement of any of their jointly controlling parents and transactions where a jointly controlling entity takes sole control,[456] which implies that joint ventures should be treated as independent of their (jointly controlling) parents. It was also agreed in that context that the turnover of a JV would include its parents' consolidated sales. All these principles make sense in that area of law, but arguably could interfere with other uses of the notion of undertaking.

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[454] This initial perspective is apparent in Wouter P.J. Wils, 'The undertaking as subject of E.C. competition law and the imputation of infringements to natural or legal persons', 25 (2000) *European Law Review*, 99. As noted in footnote 390, this assumption remains alive today as evidenced by AG Rantos' Opinion in *Unilever Italia*.

[455] Especially those of a structural nature, the so-called 'fully functional' and permanent. On this notion see *Jurisdictional Notice* at 91ff.

[456] See Art 3.4 of the Merger Regulation.

One salient example of such an interference is the parental liability of the jointly controlling parents which, as discussed in section 3.1.3.c above, was affirmed by the Court in the two parallel judgments in *Du Pont* and *Dow Chemical*[457] under the logic that the parents and their jointly controlled affiliate were the 'same undertaking'. In response to the arguments of the parties that this perspective would conflict with the position under the Merger Regulation, the Court expressly stated that this finding was made only for the purposes of liability.[458] That clarification was blurred in the subsequent judgment in *LG Electronics,*[459] where the Court accepted that same logic of a 'same undertaking' for the purposes of turnover calculation in the context of fine-setting. As was also explained earlier in this chapter,[460] these two precedents have been quoted in support of the proposal made in the 2022 Draft Horizontal Guidelines that agreements between joint ventures and their parents should benefit from the intragroup exemption, which relies on a similar 'same undertaking' paradigm.

The above results in a rather confusing scenario where joint ventures would be treated as independent undertakings from their jointly controlling entities for merger control purposes and as part of the same economic unit with them for parental liability and, arguably, for the intragroup exemption. Besides the difficulties in determining when one or the other perspective would prevail for each use of the notion of undertaking, these developments challenge the unity of the notion of undertaking, this is, that it would have the same meaning irrespective of the context in which it is raised and, especially, that its boundaries (what is in, what is out) should coincide across all these uses.

The unity of the notion of undertaking was explored by Alison Jones several years ago.[461] Her conclusion at the time was that despite these contradictions, the concept of undertaking should

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[457] Judgments of 26 September 2013, *EI du Pont de Nemours v Commission*, C-172/12 P, ECLI:EU:C:2013:601 and of the same date, *Dow Chemical v Commission*, C-179/12 P, ECLI:EU:C:2013:605. This doctrine had been applied earlier by the GC in its judgments of of 27 September 2006, *Avebe BA v Commission*, T-314/01, ECLI:EU:T:2006:266, para 136 and of 12 July 2011, *Fuji Electric Co. Ltd v Commission*, T-132/07, ECLI:EU:T:2011:344 para 181.

[458] *Du Pont*, at 47; *Dow*, at 58.

[459] Judgment of 14 September 2017, *LG Electronics and Koninklijke Philips Electronics*, C-588/15 P and C-622/15 P, ECLI:EU:C:2017:679, paragraphs 71 and 76.

[460] See section 4.1.3 *in fine*.

[461] Alison Jones, 'The Boundaries of an Undertaking in EU Competition Law', (2012) 8(2) *European Competition Journal*, 301 at 315 ff; see also 'Drawing the Boundary Between Joint and Unilateral Conduct:

have a common meaning across its various functions. Since then, however, the tensions between the different uses of the notion would have grown, as she has later observed.[462] Given the further layers of incoherence added on that matter, it is now questionable if the unity of the notion will stand the test of time. The last section of this chapter discusses this matter further.

4.6.2 The consideration of conglomerate groups

A second area where the approach to economic units contained in the Merger Regulation might conflict with the notion of undertaking in other areas of competition law has emerged recently and concerns the intriguing *obiter* in *Sumal* concerning conglomerate groups:

> '(…) the same parent company may be part of several economic units made up, depending on the economic activity in question, of itself and of different combinations of its subsidiaries all belonging to the same group of companies. If that were not the case, a subsidiary within such a group could be held liable for infringements committed in the context of economic activities entirely unconnected to its own activity and in which they were in no way involved, even indirectly.'[463]

As discussed in section 4.2.2 above, the notion that a group of companies may contain several economic units or undertakings does not apply in the merger control field, raising another challenge to the unity of the notion across its uses. In addition to that, in the event it was decided that this logic should apply only to inverse liability scenarios and not be extended to other uses of the notion of undertaking (something which is likely, as per the discussion at section 4.4), the unity of the notion of undertaking would suffer a much stronger blow, as

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Parent–Subsidiary Relationships and Joint Ventures', in Ezrachi, Ariel (ed) *Research Handbook on International Competition Law*, Edward Elgar, 2012, at 404 ff..

[462] Alison Jones, Brenda Sufrin and Niamh Dunne, *Jones & Sufrin's EU Competition Law – Text, Cases and Materials*, 7th ed, OUP 2019, at 159 ff, where they note (with particular reference to the concept of an undertaking developed in the attribution of liability line of cases and that of the intragroup exemption) that 'caution should be exercised before concluding that a single approach, rather than a context specific approach, will be adopted to the concept of an economic unit/undertaking in the future. In particular, the underpinning objectives of the two lines of cases might suggest different interpretations of the concept in the diverse contexts.'

[463] Judgment of 6 October 2021 (Grand Chamber) *Sumal v Mercedes Benz Trucks España*, C-882/19, ECLI:EU:C:2021:800, at 47.

merger rules would not be the only or main outlier, but just another example of divergence for a different use.

4.6.3 The treatment of SOEs and the notion of undertaking

Finally, a third area where the notion of undertaking used in the merger field may diverge from that used in other fields of competition law concerns the treatment of SOEs.

As explained when discussing SOEs in chapter 3, Recital 22 of the Merger Regulation permits the identification of separate 'economic units' within the public sector where these structures present 'an independent power of decision, irrespective of the way in which their capital is held or of the rules of administrative supervision applicable to them'. While the text of Recital 22 would seem to limit this mechanism to the calculation of turnover thresholds, the Commission has read it in a manner enabling it to identify such 'independent powers of decision' as separate 'undertakings concerned', therefore requiring that combinations between them be notified to it if the relevant thresholds are met.[464]

The question may be raised if the logic in Recital 22 of the Merger Regulation should apply outside the scope of the merger rules, and if so, whether sanctions for anticompetitive conduct should be calculated within the boundaries of any 'independent powers of decision' and agreements between such separate sections of the public sector should benefit from the intragroup exemption.

There is currently no answer to this question. It is submitted that Recital 22 reflects a broader principle of EU law, namely the neutrality between public and private entities, and therefore it should apply to other situations governed by the competition rules. That said, there is an apparent disconnect between its logic and that which applies to private groups of companies, for which separate centres of decision (which may well exist) have not so far been considered relevant for the purposes of defining separate economic units.,[465] which complicates the

[464] Recital 22 of the Merger Regulation. See also Consolidated Jurisdictional Notice, [2008] OJ C 95/1 at 51-53, 153, 192 and 194.

[465] See the discussion above at section 4.4. It should be noted that the idea in para 45 of *Sumal* that conglomerate groups of companies may contain separate economic units is a similar but different question, as the logic in Recital 22 concerns power of decision, not a different market.

discussion further. In these circumstances, reserving Recital 22 to the field of merger control would seem to be the most prudent option, despite the divide it would result in the treatment of public and privately owned entities.

4.7. Conclusions on the uses of the single entity doctrine

The examination of the various uses or functions of the first limb of the *Höfner* formula (that is, the single entity or economic unit doctrine, whereby an undertaking is treated as a unit despite comprising multiple legal entities) shows how each one is meant to achieve a very different purpose and tilt the balance between the 'legal entity' and the 'economic unit' perspectives differently in each case. Transmission of liability acknowledges and seeks to resolve the difficulties of legal separation, but does so differently in upstream and downstream scenarios, leading to separate requirements for each. Parents are liable on the basis of the capacity to control or decisively influence the activities of their affiliates, a logic extends to their jointly controlled affiliates, as parents may be assumed to have the power to avoid the infringement makes them responsible. Subsidiaries may be liable for the deeds of their parents but only if they are, as separate entities, somehow involved in the infringement. Siblings seem to follow the logic of subsidiaries, but that awaits confirmation. Remarkably, either solution could have been decided without any regard to the notion of undertaking, which is confusingly presented as the underlying rationale of these distinct answers to very different questions.

The group perspective is also applied in fines, but again with multiple and arguably conflicting purposes, some seeking to increase deterrence and others looking at combined sales to limit potentially excessive enforcement, besides taking different moments into account (the dates of the infringement, the dates of the decision). Here, the notion of undertaking is used as guidance to determine a fair sanctions methodology, which is an odd purpose for a theory presented as reflecting economic reality. An examination of the practice reveals multiple inconsistencies, raising the question of whether better rulemaking on fine calculation would be more appropriate than relying on the notion of undertaking to achieve an optimal fine.

The intragroup exemption, with all its unanswered questions, essentially seeks to facilitate undertakings using affiliates in their business strategies by ensuring that they are not subject to Article 101 TFEU. The exemption has its fair share of inconsistencies, especially in the

treatment of strategically independent affiliates, a reality accepted by the Court in the field of public procurement but rejected in the application of the intragroup exemption. Once more, the absence of a prohibition is presented as a consequence of the notion of undertaking, but it is clearly not, as evidenced by the fact that other legal systems, notably the US's antitrust, recognise a similar exemption despite their rules being addressed to 'persons'.

In succession cases, the notion of undertaking has been used to deactivate the principle of legal personality as traditionally understood to facilitate enforcement irrespective of the continued existence of the original infringers. Once more, it is apparent that this result could have been achieved without the magic wand of the theory of the undertaking.

In merger control, the concept of undertaking (not the term, which the merger control rules confusingly use for other purposes) is used to control structural modifications. The special needs in that area are loudly calling for a separate notion of undertaking, a reality that is apparent especially in the treatment of joint ventures and SOEs, risking irreparable damage to the axiom of a single notion of undertaking.

Despite the various different goals of these constructions where the notion of 'undertaking' has been used, there is a long tradition in EU competition of defending a unitary notion of undertaking through its various uses. Given that they all have in common the same underlying logic (the single entity perspective, with its promise to disregard legal separations) it would be reasonable to erect a common house. This has been understood in this manner since *ICI*, where the Court presented parental liability, the intragroup exemption and the irrelevance of formalities in the service of notifications alongside, as if sharing the same logic. Over the years, that paradigm has been kept through numerous pronouncements where the Court, irrespective of whether it was considering parental liability, succession or the calculation of fines, used precedents in any of these areas interchangeably while reiterating the judgment in *Höfner* that this notion that would apply in the field, this is, read as in the *entire* field, of competition law, a perspective that reaches to the most recent pronouncements.[466]

[466] As noted in fn 390, a most recent example of this unitarian approach AG Rantos' Opinion of 14 July 2022, ECLI:EU:C:2022:586, at 34, discussing imputation and the intragroup exemption as being linked.

The consolidation of the notion of undertaking as being more developed than its predecessor, the economic unit doctrine, elevating that term to a new centre of attribution with the implied promise of overcoming the inconsistencies of the legal entity approach, may have strengthened the view that there should be 'one' notion of undertaking with defined boundaries that applies to all of its many uses. However, if that view ever existed, it was a mirage. Arguably, many of the problems for which the notion of undertaking has been used as a catch-all solution could have been resolved without having recourse to it at all.

In recent times, the Court appears prepared to acknowledge this fact and, despite paying lip service to the notion of undertaking as a political statement which means that substance must - especially in the field of competition law - take precedence over legal form, it accepts that the notion may not always have an identical meaning in its various uses. Examples are the judgment in *Groupe Gascogne* where it noted that 'attributing a subsidiary's infringement to the parent company and prohibiting a fine being imposed in excess of 10% of the turnover of the undertaking concerned are two separate issues serving different purposes.'[467] That would also appear to be the initial meaning of the finding made in the parallel judgments in *Du Pont* and *Dow Chemical* that the parents and their jointly controlled affiliate were the 'same undertaking' should be read as made only for the purposes of liability, suggesting that this may not be true for other functions of the notion.[468]

The recent decision of the Court in *Sumal* raises that question again, arguably in louder terms. Defining the concept of undertaking in a way that requires slicing conglomerate groups into separate economic units in the context of downward liability is an entirely different question to making that finding for all purposes of the notion, making agreements between these separate divisions subject to Article 101 TFEU, ending the use of consolidated sales when setting fines and increasing the distance with the concept of 'undertaking' used in the field of merger control are decisions that should not be taken lightly. On the contrary, it would seem that it is time to limit the notion of undertaking, accepting it for what it really is: a perspective, a

[467] Judgment of 26 November 2013 (Grand Chamber), *Groupe Gascogne SA v Commission*, C-58/12 P, ECLI:EU:C:2013:770 at 57.

[468] Judgments of 26 September 2013, *EI du Pont de Nemours v Commission*, C-172/12 P, ECLI:EU:C:2013:601 at 47 and of the same date, *Dow Chemical v Commission*, C-179/12 P, ECLI:EU:C:2013:605 at 58.

paradigm that calls for legal separation within groups of entities to be partially disregarded, which, however, should not be turned into a rigid straitjacket.

That said, abandoning the unity of the notion is not, from a policy standpoint, a good idea. It is to be feared that such a move could debilitate its reach and, alongside with it, its underlying mission of identifying goal of addressing legal mandates to economic players rather than to the legal entities through which they act. It is apparent that a a notion of undertaking ‘à la carte’, where the boundaries of these economic entities may diverge depending on the use at hand would provide much less strength to the notion of undertaking as a political reality.

CHAPTER 5 – THE USES OF THE NOTION (II). ECONOMIC ACTIVITY

The earlier chapter has discussed the uses of the 'structural' limb of the notion of undertaking, whereby multiple legal entities may be treated as a unit under a single entity perspective. This chapter 5 sets out to examine its second limb: the requirement that the entity pursues an 'economic activity'.

The underlying assumption of this component of the definition is that not every entity is concerned by competition rules, but only those whose activities qualify as 'economic'. In that respect, this limb serves to delimit the scope of competition rules, a tall order that has raised considerable interest by scholars.[469] The interest is well deserved since the exclusion has a particularly broad scope, beyond any of the other exceptions to the prohibitions:[470] non-economic activities are entirely excluded from any behavioural control under Articles 101 and 102 TFEU, without the necessity of a justification under of any sort. They also escape review under State aid rules and arguably merger control rules too. The exclusion is complete; that is, it does not depend on proportionality or appropriateness. In an area of law such as competition law where exceptions are handled with so much care, the requirement of an economic activity stands out as a particularly exceptional method to cast a blind eye on whole areas of the economy.

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[469] Among the most recent academic literature, mention should be made of Okeoghene Odudu, *Economic Activity as a Limit to Community Law, in The Outer Limits of European Law*, (Hart 2009); Niamh Dunne, 'Knowing When to See It: State Activities, and the Concept of Undertaking', (2010) 16 *Columbia Journal of European Law* 427; Marek Szydlo,'Leeway of Member States in Shaping the Notion of an 'Undertaking' in Competition Law', (2010) 33 (4) *World Competition* 549; Vassilis Hatzopoulos, '*Regulating Services in the European Union* (OUP 2012) and his earlier research paper *The Concept of 'Economic Activity' in the EU Treaty: From Ideological Dead-Ends to Workable Judicial Concepts*, College of Europe, Research Paper in Law 06/2011; Amir Ibrahim, 'A Re-evaluation of the Concept of Economic Activity for the Purpose of EU Competition Rules: The Need for Modernisation', (2015) 11 *European Competition Journal* 265; Eric Kloosterhuis 'Defining Non-Economic Activities in Competition Law', (2017) 12 *European Competition Journal* 117 and Johan W van de Gronden, 'Services of General Interest and the Concept of Undertaking: Does EU Competition Law Apply?' (2018) 41 *World Competition* 197.

[470] EU competition law is rife with exceptions to its prohibitions, from paragraph 3 of Article 101 TFEU to the doctrine on ancillary restrictions, from lack of effect on trade to derogations under Article 106(2), not forgetting any case law exclusions such as those in *Albany* (Judgment of 21 September 1999, *Albany*, C-67/96, ECLI:EU:C:1999:430) for workers or *Wouters* (Judgment of 19 February 2002, *Wouters*, C-309/99, ECLI:EU:C:2002:98) for unspecified public interest concerns.

In practice, the requirement of an 'economic activity' has been mainly used to exclude State-led initiatives from the scope of competition rules regardless of their economic impact, providing Member States with a binary mechanism that avoids individual examination under Article 106 of the Treaty, the rule that arguably should have been used to address the possible competitive tensions created by State-led initiatives.

More recently, and especially after *Sumal*, the requirement of an economic activity has gained new significance as a defining element of the notion of undertaking. Leaving aside its traditional function to exclude State-related activities from the scope of competition law, *Sumal* suggests that the boundaries of the undertaking may, at least for some of its functions, be traced by reference to a defined economic activity. As discussed in chapter 4, a salient consequence of this perspective is that conglomerate groups may contain several economic units, raising difficult questions on how should groups of companies with multiple activities be divided. But independently of that debate, *Sumal* casts a fresh light on the economic activity that would define the undertaking.

This chapter is structured as follows: A first section looks at the meaning of economic activity as traditionally understood. A second section discusses the case-law on the main exceptions concerning State-led activities. A third section questions the relevance of *Sumal* in this respect. A final section concludes.

5.1 The meaning of 'economic activity'

It appears easy to define what is an economic activity – in the end, it consists in offering goods or services in a market. That is the perspective of the case law. It may however be noted that the answer to the apparently simple question of whether an activity takes place in a market is affected by the time when the issue was raised and arguably by the state of the relationship between the EU and its Member States at that time.

A useful example of the above is the 1974 judgment in *Sacchi*.[471] The case concerned television broadcasting services, which the Italian State had reserved for a public entity, the

[471] Judgment of 30 April 1974, *Sacchi*, 155/73, ECLI:EU:C:1974:40.

RAI. When a preliminary reference was received at the Court, Italy and Germany argued that national television broadcasters should not be considered undertakings, as television entities provided a service of a cultural and informative nature.[472] The Court dismissed these arguments and declared that the activities were economic, while noting that as public services (which nobody denied they were) may benefit from an exception under Article 106(2) TFEU. Importantly, the Court did not arrive at that conclusion in the presence of a typical market scenario, which did not exist at the time, but considering that, as recalled by AG Reischl, broadcasting was an important branch of the economy and, notably, that private broadcasting companies conducted in a commercial manner existed in other countries.[473]

Similar issues would be raised several years later in the unusual *British Telecommunications* case.[474] From today's perspective it would seem obvious that telecommunication services in general, and the message-forwarding activities to which the case refers are economic activities that take place in a market; that may, however, not have been so in the early 1980s. Before the liberalisation of European telecommunication services,[475] there was no discernible market for those activities and, if it existed, it operated on the margins of the law. All that, however, did not stop the Court from accepting that there was an 'economic activity' and dismissing Italy's arguments based on BT's rulemaking powers ultimately based on public law, but without explaining further what an 'economic activity' could consist of.[476]

Something close to a definition, or at least a broad notion, was proffered two years later in the Italian tobacco monopoly case, where the Court declared in passing as follows:

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[472] Ibid, at 13.

[473] Opinion of AG Reischl of 20 March 1974, *Sacchi*, 155/73, ECLI:EU:C:1974:22, at page 441.

[474] Judgment of 20 March 1985, *Italy v Commission*, 41/83, ECLI:EU:C:1985:120 (*British Telecommunications*). The 'unusual' tag was used by AG Darmon in the opening remarks of his Opinion of 16 January 1985 in that matter, ECLI:EU:C:1985:12.

[475] That process was launched by the Commission through a Green Book published in 1987 ('Towards a Dynamic European Economy. Green Paper on the Development of the Common Market for Telecommunications Services and Equipment'. COM (87) 290 final).

[476] *British Telecommunications*, paras. 16-20.

> 'It is not contested that the Amministrazione Autonoma dei Monopoli di Stato (hereinafter referred to as the 'AAMS') exercises an economic activity inasmuch as *it offers goods and services on the market* in the manufactured tobacco sector.'[477]

Later judgments would build on that understanding and adapt it to the case at hand. *Höfner*,[478] for example, examined German legislation reserving to a public law entity the placement of workers, which had the effect, among others of making headhunting services illegal. Instead of looking at the overall area of the placement of workers, whose characterisation as an 'economic activity' may have been disputed, the Court focused on the impact of that monopoly in the specific market for headhunting services, concluding that 'employment procurement has not always been, and is not necessarily, carried out by public entities'.[479] That decision was greatly assisted by the inconsistencies of the German model,[480] which had even led the Bundesanstalt to acknowledge the inadequacy of the situation.[481] The case is indeed somewhat reminiscent of the BT case mentioned above, where a broadly defined monopoly condemned 'markets' close to it to a grey area under the law.

Another useful precedent is *CNSD,*[482] which examined Italian customs agents. The profession was heavily regulated by public law and Italy understandably argued, as in *BT*, that the activity was subject to public law. That attempt was mainly dismissed following a close examination of the specifically 'economic' traits of the activity. The specific elements taken into consideration for that finding were the following:

> 'The activity of customs agents has an economic character. They *offer, for payment, services* consisting in the carrying out of customs formalities, relating in particular to

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[477] Judgment of 16 June 1987, *Commission v Italy*, 118/85, ECLI:EU:C:1987:283 at 3 (emphasis added).

[478] Judgment of 23 April 1991, *Höfner and Elser v Macrotron*, C-41/90, ECLI:EU:C:1991:161.

[479] Ibid at 22.

[480] In his Opinion, AG Jacobs noted that "executive recruitment agencies are in a thoroughly anomalous situation: their activities are openly tolerated by the authorities, so they are in no danger of incurring criminal or administrative penalties; but their activities are none the less unlawful, so they cannot enforce their contracts in the courts." See Opinion cit. in note 480, para. 17 *in fine*.

[481] The Bundesanstalt had tolerated the emergence of private companies providing headhunting services. See *Höfner* at 9.

[482]Judgment of 18 June 1998, *Commission v* Italy (CNSD), C-35/96, ECLI:EU:C:1998:303.

> the importation, exportation and transit of goods, as well as other complementary services such as services in monetary, commercial and fiscal areas. Furthermore, *they assume the financial risks involved in the exercise of that activity* (Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others v Commission* [1975] ECR 1663, paragraph 541). If there is an imbalance between expenditure and receipts, the customs agent is required to bear the deficit himself.'[483]

The potential relevance of a payment and financial risk would be noted shortly afterwards in *Pavlov* in respect of medical professionals, in which the Court observed that

> 'the medical specialists who are members of the LSV *provide, in their capacity as self-employed economic operators, services on a market*, namely the market in specialist medical services. *They are paid by their patients* for the services they provide and *assume the financial risks* attached to the pursuit of their activity.'[484]

A similar reasoning was followed shortly after in *Ambulanz Glöckner*, which declared in respect of ambulance services that 'medical aid organisations provide services, *for remuneration from users*, on the market for emergency transport services and patient transport services', adding that these activities 'have not always been, and are not necessarily, carried on by such organisations or by public authorities'.[485]

Ultimately, an activity will be considered economic when it consists in offering goods or services in a market. If the activities are in fact provided by private entities in a recognisable market, that determination will be relatively straightforward. However, if the activity is carried out by public entities, the Court will examine whether comparable private undertakings do provide similar services - even if in other countries - on market terms. As AG Jacobs remarked in *Albany*,

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[483] Ibid. at 37 (emphasis added). The reference to *Suiker Unie* stresses the independent nature of these professionals, dismissing suggestions that they should be considered to form part of the structure of their principals as may be argued as regards other types of agents.

[484] Judgment of 12 September 2000, *Pavlov*, C-180/98, ECLI:EU:C:2000:428, para 76 (emphasis added).

[485] Judgment of 25 October 2001, *Ambulanz Glöckner*, C-475/99, ECLI:EU:C:2001:577, at 20 (emphasis added).

> '(t)he basic test is therefore whether the entity in question is engaged in an activity which could, at least in principle, be carried on by a private undertaking in order to make profits.'[486]

Given the reference in the definition of economic activities to *offering* goods or services, the question may be made whether an activity on the demand side of the market as a purchaser would be regarded as an activity that was 'economic'. In a report published in 1972, the German BKartA concluded that purchasing activities by public entities should be considered as a business activity and trigger the application of the German competition rules.[487] However, in *FENIN*,[488] the GC and the Court determined that the purchasing activity should not be examined independently of the subsequent use of the products in question, which were not of an economic nature in that case.[489]

As a preliminary conclusion, the presence of an economic activity serves to distinguish economic operators, generally defined by their provision of goods or services in a market. Rather than the fact of supplying goods or supplying services, the defining feature is that they operate on a market. This is the case when, for example, an operator receives a payment, incurs risks and is recognised as engaging in an economic activity in other economies.

With respect to the definition of an undertaking, the above is relevant in that an entity, whatever its structure and legal form and regardless of whether it is composed of multiple legal entities or lacks legal personality, will not be considered to be an undertaking unless it can be specifically linked to an economic activity as defined above. It will not be its legal personality or lack thereof, its mode of financing or exercise of a decisive influence, but its presence in a market that justifies it being identified as being an operator subject to

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[486] Opinion of AG Jacobs of 28 January 1999, *Albany*, C-67/96, ECLI:EU:C:1999:28, para. 311.

[487] *Bericht des Bundeskartellamtes über seine Tätigkeit im Jahre 1971 sowie über die Lage und Entwicklung auf seinem Aufgabengebiet*, 1972, at 23 (available at www.bundeskartellamt.de and www.pdok.bundestag.de). The case that prompted this doctrine had arguably more to do with procurement rules.

[488] Judgment of 4 March 2003, *FENIN v Commission*, T-319/99, ECLI:EU:T:2003:50. On appeal, Judgment of 11 July 2006 (Grand Chamber), *FENIN v Commission*, C-205/03P, ECLI:EU:C:2006:453. See Wulf Henning Roth, *Case C-205/03 P, Federación Española de Empresas de Tecnología Sanitaria (FENIN) v. Commission, Judgment of the Grand Chamber of 11 July 2006*, (2007) 44 Common Market Law Review 1131.

[489] This was as a result of the 'solidarity' exception, which is considered below.

competition rules. This makes it necessary to take a closer look at the various exceptions that the case law has laid down as regards the notion of economic activity. The following sub-section does that.

5.2 The exceptions to 'economic activity'

The case law of the EU Courts on the notion of economic activity is best understood by looking at its exceptions. As so often, initial positive definitions (such as 'economic activity means providing goods and services on a market') are open-ended, and the exceptions tend to be precise, providing valuable insights into what is meant by the general principle.

As noted above, the notion of undertaking, and specifically the 'economic activity' limb of that notion, has developed into a particularly useful tool to limit the application of EU competition rules. In contrast with other exceptions to the prohibitions (such as those under paragraph 3 of Article 101 or Article 106 of the Treaty), which look at the specific situation, dismissing the 'economic' nature of an activity places it entirely outside the realm of these rules and thus free of all competition law constraints.

The power to exclude the application of the competition rules has been used mainly to carve out activities which take place in a twilight zone between market and State, as the following subsections make clear.

5.2.1 State regulatory initiatives

An obvious exception to an economic or market initiative consists in acts derived from the exercise of public powers. That is however as intuitive as it is confusing, given the increased recourse to public initiatives that have certain market features.

The notion that the exercise of public authority equates with the absence of an economic activity is well understood. As much as we like to refer to competition between political parties and even between different authorities, acts of public power are not in a market and may not be purchased. Police regulations, labelling requirements, environmental standards or

taxes have undoubtedly a powerful impact on markets and competition, but are not in themselves economic activities within the meaning and for the purposes of competition law.

That exception however may not have the effect of carving out all State activities from any competition law discipline, given the principle of neutrality between public and private entities in EU law, discussed in section 3.1.4 above and other provisions of the Treaties such as Article 106 TFEU, which requires that business activities by States and private entities are treated similarly. This makes it necessary to separate State acts of authority and the conduct by States of market-oriented activities, a process which bears significant analogy with the distinction between actions of States *iure imperii* which generally enjoy sovereign immunity under public international law[490] and initiatives *iure negotii* or *iure gestionis*, whereby said immunity may not apply to commercial transactions carried out by States.[491]

The distinction between these two forms of State action and their impact on the notion of undertaking came first before the Court in *Eurocontrol*,[492] a preliminary reference resulting from a claim before the Brussels commercial courts between that entity and SAT, a German airline, for payment of route charges. The airline argued in its defence that the fees were abusive and contrary to the competition rules. Whether Eurocontrol was an 'undertaking', which hinged on whether its activities were economic, became the central issue. In the end, the Court accepted that its activities were not 'economic' within the meaning of competition law. Despite the fact that they may be claimed as a credit before civil courts, the fees in question

[490] These privileges are currently codified in the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property, Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 49 (A/59/49).

[491] See Article 10 of the convention in the earlier footnote. On this distinction see Charlene Sun, Aloysius Llamzon, 'Acta iure gestionis and acta iure imperii' in Oxford Constitutions (http://oxcon.ouplaw.com), OUP, 2022. Despite the analogy it would be noted that the aim of the immunity of State actions under public international law is to shield sovereign acts of judicial control, a principle that applies differently in the realm of EU law, where State actions, regardless of their regulatory nature, are regularly examined by courts under multiple provisions of EU law. In addition, jurisdictional immunity would prevent any discussion on the matter, while the notion of 'economic activity' would be compatible with some discussion on the activity. That said, there is some commonality between these two distinctions.

[492] Judgment of 19 January 1994, *SAT Fluggesellschaft v Eurocontrol*, C-364/92, ECLI:EU:C:1994:7.

should not be treated as purely commercial, since they may not be separated from the organization's other activities, which these dues financed.[493]

The subsequent *Diego Calì*[494] case gave the Court another chance to look at the payment of monopoly fees, in this case incurred by an operator entrusted by port authorities to carry out cleaning operations. The defendant, an operator of petrochemical transport vessels, also considered the fees charged by that entity to be abusive,[495] but the CJEU, relying on *Eurocontrol*, accepted that the payment was an 'integral part' of the surveillance activities, besides having been approved by the public authorities.[496]

Later cases gave the GC and the CJ an opportunity to clarify the subjective or objective nature of the exclusion for absence of an economic activity. As already noted, the requirement as initially formulated would appear subjective, that is, it would result in confirming that the *entity* would not be an undertaking and thereby its actions may not be subject to the competition rules. However, and irrespective of the way it was worded, the exclusion should rather refer to any non-economic *activities*, independently of who carried them out (as the 'any entity' reference in *Höfner* would suggest). That latter approach would avoid the risk of excluding from the scope of competition law possible economic activities carried out by entities whose main activities were non-economic.

That issue came squarely before the GC in *Aéroports de Paris.*[497] The case concerned ground services including handling activities in airports, which the Commission was seeking to open to competition at that time. In its appeal against the decision against the airport operator,[498] Aéroports de Paris claimed that since its activities were essentially non-economic, it should as

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[493] Ibid at 28.

[494] Judgment of 18 March 1997, *Diego Calì & Figli*, C-343/95, ECLI:EU:C:1997:160.

[495] It should be noted that the dispute concerned the port of Genoa, whose authorities had been severely criticised by the Court in its earlier judgment of 10 December 1991, *Merci convenzionali porto di Genova SpA v Siderurgica Gabrielli SpA*, C-179/90, ECLI:EU:C:1991:464.

[496] *Diego Calì* at 24. This judgment acknowledges the need to distinguish 'between a situation where the State acts in the exercise of official authority and that where it carries on economic activities of an industrial or commercial nature by offering goods or services on the market' at para 16.

[497] Judgment of 12 December 2000, *Aéroports de Paris v Commission*, T-128/98, ECLI:EU:T:2000:290.

[498] Decision of 11 June 1998, IV/35.613 - *Alpha Flight Services/Aéroports de Paris*. [1998] OJ L 230/10.

an entity be considered excluded from competition rules. The GC rejected this argument, observing that 'the Treaty provisions on competition are applicable to the activities of an entity which can be severed from those in which it engages as a public authority',[499] before going on to identify the specific activities which should be considered to be economic as the Commission had done in its decision, dismissing the appeal.

The approach followed by the Court assumed a 'severability' logic, this is, a perspective whereby the economic initiatives would be examined separately from the entity itself. That viewpoint would return to the GC some years later in the *SELEX* case with respect to Eurocontrol, whose activities had been defined as non-economic in the *SAT Fluggesellschaft v Eurocontrol* judgment discussed above.[500] In that case, SELEX, a supplier of air traffic management services, filed a complaint claiming that Eurocontrol was treating it unfairly through its activities as a developer of technical standards for ATM equipment and the provision of assistance to national administrations in that field. Remarkably, the Commission rejected the complaint on the basis that Eurocontrol was not an undertaking, arguing that its main activities were not commercial. In the ensuing appeal, the GC disagreed with the Commission's approach and, relying on *Aéroports de Paris*, looked at each activity separately, concluding that the provision of assistance to national authorities was not connected with the exercise of public authority and was economic,[501] despite dismissing the appeal as it found no evidence of abuse. In the subsequent appeal, the CJ corrected the GC with respect to the 'connection' between the assistance to national administrations and the exercise of public powers, confirming that in carrying out that activity, Eurocontrol was not an undertaking within the meaning of Article 102 TFEU.[502] However, its reasoning confirmed that the exclusion should be based on the activity in question, and not, as the Commission had proposed, as a subjective exception, and alongside it, the 'severability' logic.

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[499] *Aéroports de Paris*, at 108.

[500] *SAT Fluggesellschaft v Eurocontrol*, fn 492 above.

[501] Judgment of 12 December 2006, *SELEX Sistemi Integrati SpA v Commission*, T-155/04, ECLI:EU:T:2006:387, at 54.

[502] Judgment of 26 March 2009, *SELEX Sistemi Integrati v Commission*, C 113/07 P, ECLI:EU:C:2009:191, at 82.

Subsequent judgments of the Court have shown how difficult, or rather, discretionary, the determination of a sufficiently close 'link' with the exercise of public authority and its 'severability' may be at times. The Grand Chamber decision in *MOTOE* applied the severability logic to condemn Greek rules granting a regulatory entity that organised and commercially exploited motorcycling events the power to intervene in the granting of authorisations to its rivals without that power being made subject to restrictions, obligations and review, rejecting the arguments based in the 'closeness' of the powers as a public authority and the activities in a related market.[503] However, later cases have confirmed the treatment of various activities as 'non-economic' given their 'closeness' to the exercise of public powers. By way of example, in *EasyPay*,[504] the exclusive right to pay retirement pensions by money order was not considered to be an economic activity as it was 'linked' to a reserved competence of the Member States. Similarly, *Compass-Datenbank*[505] endorsed the definition of 'non-economic' of restrictions linked to the management of the commercial registry in Austria. A similar solution was reached in the hotly debated *TenderNed*,[506] which involved setting up an internet procurement platform to implement EU directives in the field, where that activity was reserved to one entity despite the existence of commercial platforms that provided similar functions.

These examples suggest that the Commission and the EU Courts enjoy a significant margin of discretion with respect to the 'proximity' or 'closeness' of an economic activity and the exercise of public power. That margin may be narrower with respect to certain activities if there is a clear underlying policy, as in the case of liberalising handling activities in airports or introducing competition in sports, but does not necessarily lead to an expansive reading of the competition rules to any area where market principles may be invoked.

More to the point of this dissertation, the above discussion usefully showcases several components that may be relevant in defining an economic entity, and especially the concept

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[503] Judgment of 1 July 2008 (Grand Chamber), *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio*, C-49/07, ECLI:EU:C:2008:376.

[504] Judgment of 22 October 2015, *EasyPay*, C-185/14, ECLI:EU:C:2015:716.

[505] Judgment of 12 July 2012, *Compass-Datenbank*, C-138/11, ECLI:EU:C:2012:449.

[506] Judgment of 28 September 2017, *TenderNed*, T-138/15, ECLI:EU:T:2017:675, on appeal Judgment of 7 November 2019, *Aanbestedingskalender and others v Commission*, C-687/17 P, ECLI:EU:C:2019:932.

that different activities, economic or otherwise, may be looked at separately, coupled with the correction or caveat that those different initiatives may be linked in a manner that justifies their joint treatment. These two ideas will be revisited when examining the contribution of 'economic activity' to the notion of undertaking.

5.2.2 The 'solidarity' exemption

A second category of exclusion from the notion of undertaking by lack of an economic activity concerns the provision of social services.

Poucet et Pistre[507] was the first case that examined national social security institutions from this viewpoint. These activities (essentially the management of pension schemes and the provision of medical assistance under a compulsory scheme managed by the State) might be considered as similar to those offered by private market players; therefore, an application of the notion of 'economic activities' might have resulted in considering them, at least in part,[508] to be economic, opening the door to oversight under Articles 106 and 107 TFEU. In *Poucet et Pistre* however the Court, relying solely on *Duphar*, a case decided in 1984 which had recognised that 'Community law does not detract from the powers of Member States to organise their social security systems',[509] observed that these entities 'pursue a social objective and embody the principle of solidarity'.[510] It then concluded that

> 'Sickness funds, and the organizations involved in the management of the public social security system, fulfil an exclusively social function. That activity is based on the principle of national solidarity and is entirely non-profit-making. The benefits paid are statutory benefits bearing no relation to the amount of the contributions'.[511]

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[507] Judgment of 17 February 1993, *Poucet and Pistre*, C-159/91 and C-160/91, ECLI:EU:C:1993:63.

[508] Note the possibility of partial determination mentioned above in note 497.

[509] Judgment of 7 February 1984, *Duphar v Netherlands*, 238/82, ECLI:EU:C:1984:45, at 16. This case concerned Dutch legislation limiting medicines subject to reimbursement and did not use the term 'solidarity'.

[510] *Poucet et Pistre*, at 8.

[511] Ibid. at 18.

In later cases, the Court was careful to avoid expanding this exception. Thus, in *FFSA*[512] it refused to apply the exclusion to a non-profit-making organization which managed an insurance scheme for retired workers intended to supplement a basic compulsory scheme, established by law as optional and operating according to the principle of capitalization, confirming the irrelevance of the entity being non-profit. Similarly, in *Albany* the Court avoided excepting a system run by a non-profit entity, but whose participation had been made compulsory by the public authorities, although in this case the scheme was cleared under Article 106 TFEU.[513] However, *Cisal* added a new requisite, namely that, in addition to being based on solidarity principles, the entity should be subject to significant State supervision, an approach that enabled Member States to influence the determination.[514] That logic would be applied in *AOK*[515] and *Kattner Stahlbau*[516] with respect to German sickness funds, which were excluded from the competition rules despite possessing market-oriented features.[517] In contrast, in *AG2R*[518] the entity running the supplementary insurance scheme was considered to be an 'undertaking', although in the end the scheme in question was accepted under Article 106 TFEU.

The last step in this process concerns the reform made in 1994 in the Slovak health insurance system, which changed from a unitary system, with just one State-owned health insurance company, to a pluralistic model in which public and private bodies coexist. That scheme provides for significant room for competition between the entities that provide these services. That fact, together with reports of public assistance to one of the players, a public entity, resulted in the Commission reluctantly opening an investigation into the possible granting of state aid. However, following a protracted investigation, the Commission ultimately decided that the assistance in question was not subject to Articles 107 and 108 TFEU, since the entities

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[512] Judgment of 16 November 1995, *FFSA*, C-244/94, ECLI:EU:C:1995:392.

[513] Judgment of 21 September 1999, *Albany*, C-67/96,ECLI:EU:C:1999:430, at 84.

[514] Judgment of 22 January 2002, *Cisal v INAIL*, C-218/00, ECLI:EU:C:2002:36, at 43.

[515] Judgment of 6 March 2004, *AOK Bundesverband* C-264/01, ECLI:EU:C:2004:150, para 51. Note that the Court accepted the exception despite the latitude available to the entity in setting the contribution rate and its freedom to engage in a degree of competition with other sickness funds in order to attract members (see para 56).

[516] Judgment of 5 March 2009, *Kattner Stahlbau*, C-350/07, ECLI:EU:C:2009:127.

[517] *AOK* at 56 and *Kattner Stahlbau* at 44 *et seq*.

[518] Judgment of 3 March 2011, *AG2R Prévoyance*, C-437/09, ECLI:EU:C:2011:112.

concerned were not undertakings. In *Dôvera*,[519] the GC disagreed with the Commission and considered that these entities were engaged in an economic activity. However, following an appeal by the Commission and the Slovak Republic, the Grand Chamber followed the advice of AG Pikamäe[520] and confirmed that, despite the competitive traits of the Slovak system, the activity should be considered non-economic, mainly because of the solidarity element and the State's role in overseeing the system.[521]

As with the cases discussed in the earlier subsection, these precedents indicate that the Commission and the Courts administer with care the scope of the exemption available to entities pursuing social security and related activities, protecting the choices made in these sensitive areas by Member States through case-specific solutions.

5.2.3 The educational exemption

In addition to the exclusions related to the exercise of public powers and solidarity, the recent judgment in *Escuelas Pías Betania*[522] has held that compulsory education financed and supervised by Member States may also benefit from the exceptions available to non-economic activities. In this case, the preliminary reference sought to determine the applicability of State aid rules to certain tax benefits in favour of the Catholic church in Spain, which, it was argued, distorted competition in relation to primary and secondary education. The Court, relying on earlier case law issued in the context of free movement of persons,[523] which had examined the regulation of these services, declared that the entity at stake was not an undertaking in respect

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[519] Judgment of 5 February 2018, T-216/15 *Dôvera zdravotná poist'ovňa, a.s. v Commission*, ECLI:EU:T:2018:64.

[520] Opinion of 19 December 2019, *Dôvera zdravotná poist'ovňa, a.s. v Commission*, C-262/18 P, ECLI:EU:C:2019:1144.

[521] Judgment of 11 June 2020, C-262/18 P and C-271/18 P, *Commission and Slovak Republic v Dôvera zdravotná poist'ovňa, a.s.*, ECLI:EU:C:2020:450. See Elena Aldescu and Inês Neves, 'Non-Economic Activities with Economic Features: the Speciality of 'Hybrid' Social Security systems. Case Comment to the Judgment of the EU Court of Justice of 11 June 2020 European Commission and Slovak Republic v Dôvera zdravotná poist'ovňa (Joined cases C-262/18P and C-271/18P)', (2021) 14(23) *Yearbook of Antitrust and Regulatory Studies* 141 and Juan Jorge Piernas López, 'When is a company not an undertaking under EU Competition law? The contribution of the Dôvera judgment', (2021) 58 *Common Market Law Review* 529.

[522] Judgment of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania*, C-74/16, ECLI:EU:C:2017:496.

[523] Judgments of 7 December 1993, *Wirthl*, C-109/92, ECLI:EU:C:1993:916 and 27 September 1998, *Humbel*, 263/86, ECLI:EU:C:1998:451.

of mandatory educational activities, but it could be so defined in relation to other services provided to families, a logic that reminds the severability issues discussed above with respect to the exercise of public powers.[524] Arguably, the logic of the exclusion, as the case of the exercise of public powers and the 'solidarity' exemption, concerns respecting some autonomy of Member States in the management of a characteristic State responsibility, where principles other than competition would take precedence.

5.3 The delimitating function of economic activity following *Sumal*

As the discussion in the preceding section shows, the 'economic activity' limb has been mainly used to shield State-led initiatives from competition law interference. Consequently, the academic thinking in relation to this component has to date been centred on its use in defining the scope of competition law, rather than examining what in the notion, if anything, would serve to better understand what is meant by 'undertaking', let alone establish its boundaries.

The above is apparent even from a cursory review of the literature. The 'single unit' limb of the notion has been examined on numerous occasions, mostly in connection with parental liability and other of its functions. Although probably with less intensity, the economic activity requirement is also regularly reviewed, as new case law keeps re-establishing the boundaries between State-led exemptions and open markets. The two areas of scholarship are however entirely separate.

The recent decision of the Court in *Sumal* is a good opportunity to review this estrangement. As discussed in chapter 4, that judgment accepted that damages claims may be addressed at a subsidiary of the legal entity identified in a public enforcement decision, but in that context defined the undertaking by reference to its economic activity with the following words:

> 'However, it is also appropriate to observe that the organisation of groups of companies that may constitute an economic unit may be very different from one group

[524] For a commentary on that decision see Johan W van de Gronden, 'Services of General Interest and the Concept of Undertaking: Does EU Competition Law Apply?' (2018) 41 *World Competition* 197.

> to another. There are, in particular, some groups of companies that are 'conglomerates', which are active in several economic fields having no connection between them.
>
> Therefore, the possibility for the victim of an anticompetitive practice of invoking, in the context of an action for damages, the liability of a subsidiary company rather than that of the parent company cannot automatically be available against every subsidiary of a parent company targeted in a decision of the Commission punishing conduct that amounts to an infringement. As the Advocate General observes, in essence, in point 58 of his Opinion, the concept of an 'undertaking' used in Article 101 TFEU is a functional concept, in that the economic unit of which it is constituted must be identified having regard to the subject matter of the agreement at issue (see, to that effect, judgments of 12 July 1984, *Hydrotherm Gerätebau*, 170/83, EU:C:1984:271, paragraph 11, and of 26 September 2013, *The Dow Chemical Company v Commission*, C-179/12 P, EU:C:2013:605, paragraph 57).
>
> Therefore, the same parent company may be part of several economic units made up, depending on the economic activity in question, of itself and of different combinations of its subsidiaries all belonging to the same group of companies. If that were not the case, a subsidiary within such a group could be held liable for infringements committed in the context of economic activities entirely unconnected to its own activity and in which they were in no way involved, even indirectly.'[525]

With the above words, the Court was distancing the notion of undertaking (at least for the purposes of downward liability) from that of a group of companies linked by control, which was the prevailing perspective until then under the control-centric perspective of the Merger Regulation and which is also followed in the other uses of the notion, from turnover calculation for fining purposes to recidivism. Following *Sumal*, the 'economic activity' could

[525] Judgment of 6 October 2021 (Grand Chamber) *Sumal v Mercedes Benz Trucks España*, C-882/19, ECLI:EU:C:2021:800, at 45-47.

be relevant to the task of defining the boundaries of an economic unit and, consequently, of an undertaking.

Another element that indicates the increased relevance of the economic activity component in *Sumal* is the reference, when recalling the doctrine on the notion of undertaking, to paragraphs 84 and 86 of *Knauf Gips*,[526] where the Court had described it as a "unitary organisation of personal, tangible and intangible elements, which pursues a *specific economic aim* on a long-term basis'.[527]

Unfortunately, *Sumal* provides limited and confusing guidance on how this specific aim would guide the division of groups of companies into separate undertakings, referring to 'economic fields having no connection between them' (para 45) as a possible logic for separation alongside the 'subject matter of the agreement at issue' (para 46), the 'economic activity in question' (para 47) and even hint at 'a specific link between the economic activity of that subsidiary and the subject matter of the infringement' (para 51), which reads as further limiting the scope of the activity. Moreover, at the end of its analysis *Sumal* seems to sum up the logic of these concepts into a requirement that 'the anticompetitive agreement concluded by the parent company, for which it has been punished, concerns the *same products* as those marketed by the subsidiary' (para 52, emphasis added), clearly a much narrower standard.

The above references suggest that the Court may have wanted to progress the law on this matter, giving more weight to the 'economic activity' limb of the notion of undertaking, but felt necessary to leave open how that element would play out in defining the boundaries of economic entities and in what contexts (communication of liability, calculation of fines, intragroup exemption) it may be used.

A related question with respect to this process is whether the identification of several economic units within a group of companies may follow the logic of the case-law discussed in previous sections concerning 'severability', this is, the intuition that an entity may be engaged

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[526] Ibid at 41.

[527] Judgment of 1 July 2010, *Knauf Gips* v *Commission*, C-407/08 P, ECLI:EU:C:2010:389 (emphasis added). This was noted by Niklas Brueggemann, 'The unsung harmony of *Sumal* and the *Akzo* line of case law', (2022) 1 *Concurrences On-Topic I Private enforcement in Europe after Sumal* 31 at 33.

in various activities which could be treated independently. Reference was made of *Aéroports de Paris*, where the GC had noted that this entity carried out both economic and non-economic activities, a doctrine that would also be followed in *SELEX* or *Escuelas Pías Betania* with respect to State aid. As then discussed, however, these precedents seem influenced by a determination by the Courts to acknowledge a margin of freedom to Member States in the administration of activities in fields connected to the exercise of public power (eventually extended to solidarity-based structures and mandatory education) which is arguably a different logic to the one that should be followed to define economic units within groups of companies.

In any event, it is suggested that *Sumal* has ushered in a new era where the functional component in *Höfner*, that is, the economic activity limb, will be instrumental for setting the boundaries of the undertaking, a concept that will distance itself from that of a group of companies linked by control.

5.4 Conclusions on economic activity

Since the seminal decision in *Höfner* it has been clear that the notion of undertaking consists of two elements or 'limbs': On the one hand, a structural component which would define the undertaking as an 'entity' despite often encompassing containing multiple legal vehicles, built over a 'single economic entity' logic. On the other hand, the requirement that this entity would be involved in an 'economic activity'.

In the years that have followed, the second limb or functional component of the notion, this is, the requirement of an economic activity, has been used to carve out an exception for certain initiatives where the involvement of Member States disallowed a mainly economic viewpoint. This exception added a layer of protection to State activities from scrutiny under EU competition law that came on top of that already provided by Article 106 TFEU. The restrictive interpretation of what may be considered 'economic' and a generous reading of 'links' between public power and State measures and the role of State supervision has arguably extended the exemption even further.

Other than to provide a safe haven to State initiatives, the functional limb has played no role in defining the undertaking. Under the prevailing control-centric perspective of the Merger

Regulation, groups of companies defined by control have been considered an ‘undertaking’ provided their activities in question were broadly economic in nature.

Sumal hints at a change of paradigm in this respect. The proclamation that conglomerate groups may contain several economic units or undertakings will require a closer look at the activities of those structures. How their partitioning is to be made, how distant the economic activities need to be from one another and, especially, for what purposes or ‘uses’ of the notion of undertaking this exercise is to be done are a question mark at the time of writing.

When responding to these questions, the Court may find limited assistance in the case-law that has looked at the notion of economic activity as a limit of EU competition law with respect to State-led initiatives. The logic of the links of different activities and eventually the process of severability of different activities may occasionally provide a benchmark, but these are largely uncharted waters, for which there are no answers at the time of writing.

CHAPTER 6 – UNDERTAKINGS AND LEGAL ENTITIES AS ADDRESSEES OF ARTICLES 101 AND 102 TFEU

The current doctrine on the enforcement of Articles 101 and 102 TFEU proclaims that economic players or undertakings, and not legal entities, are the natural addressees of these rules, an idea expressed by the following words in *Schindler*,

> 'The authors of the Treaties chose to use the concept of an undertaking to designate the perpetrator of an infringement of competition law, who is liable to be punished pursuant to Articles 81 EC and 82 EC, now Articles 101 TFEU and 102 TFEU, and not the concept of a company or firm or of a legal person, used in Article 48 EC, currently Article 54 TFEU.'[528]

Despite this grandiose declaration, the enforcement of these provisions takes place against specific legal persons, be it individuals or entities, which are understood to be 'linked' to the undertaking. As a result, the 'economic entity' perspective inevitably coexists with a 'legal entity' viewpoint, resulting in a model of parallel attribution where Articles 101 and 102 TFEU are simultaneously applied to the undertaking and specific legal entities. Under this enforcement perspective, the 'undertaking' would be first identified as the 'perpetrator' of the breach and, in a second step, one or more legal entities would be imputed with all or a part of that breach.[529]

This chapter discusses the case law concerning the role of the undertaking and the legal entity as addressees of Articles 101 and 102 TFEU. The analysis is divided into three main sections followed by a conclusion. The first section looks at the case law concerning the role of the legal entity in the public enforcement of Articles 101 and 102 TFEU. Since this is the area

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[528] Judgment of 18 July 2013, *Schindler and Others v Commission*, C-501/11 P, ECLI:EU:C:2013:522, at 102.

[529] This two-step process has historically not been clearly explained in Commission decisions or, for that matter, in Court judgments, which often referred to legal entities as undertakings and vice versa. In recent times, however, the practice of the Commission has evolved and now its decisions discuss the intervention of the undertaking and the identification of the legal entities that are imputed with a breach separately. For a recent example of this approach, see Decision of 14 July 2020, Case *AT.40410-Ethylene*, at sections 2.3 and 7.

where this matter has most often been examined, this is the most detailed section. I then turn to the roles of the undertaking and legal entity in private enforcement actions, where several developments have taken place in recent times. A third section briefly considers the emerging area of the exclusion of bidders in public procurement procedures for suspected or confirmed breach of the competition rules, where the distinction between economic and legal entities is affected by the interplay between EU competition law and the public procurement rules, adding a degree of confusion to matters. Finally, some concluding remarks are made.

6.1 Undertakings and legal entities in the public enforcement of Articles 101 and 102 TFEU

While the European competition rules are addressed to undertakings, their enforcement by the Commission requires identifying one or more natural or legal persons that may be heard and to whom, ultimately, any decisions made at the end of the procedure may be addressed.[530]

It has been said that this is the result of a requisite imposed by the Treaties, since the Commission enforces Articles 101 and 102 TFEU through decisions within the meaning of Article 288 TFEU,[531] which require an addressee. Article 299 TFEU also seems to impose that these instruments are addressed to a 'person', in particular where a pecuniary obligation, such as a fine, is imposed.[532] All of this is true, but there is a much more straightforward reason for identifying legal entities for enforcement purposes: put simply, there is a clear risk that, if this is not done, decisions would require for their enforcement a specification stage, something that would create difficulties.

The parallel attribution of infringements to undertakings and to specific legal entities under a dual enforcement model as noted is liable to cause inconsistencies, stemming from the lack of principles of attribution common to these two enforcement avenues. There are in that respect

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[530] Judgment of 10 September 2009, *Akzo Nobel and Others v Commission*, C-97/08 P, ECLI:EU:C:2009:536 para 57. Cfr however the Opinion of AG Fennelly of 29 October 1998, C-395/96 P and C-396/96 P, *CMB and Dafra-Lines v Commission*, ECLI:EU:C:1998:518 at 179.

[531] 'A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.'

[532] 'Acts of the Council, the Commission or the European Central Bank which impose a pecuniary obligation on persons other than States, shall be enforceable.'

aspects for which a strict economic entity perspective is followed, but others where that viewpoint is interlaced with legal entity considerations. The 10% limit on fines, for instance, is, leaving aside the difficulties discussed in chapter 3 and in section 4.3, calculated on the total turnover of the undertaking. The intragroup exemption, again regardless of its grey areas, also appears to assume a group perspective. The definition of concentration for the purposes of the Merger Regulation, putting to the side the issues listed in section 4.6, also presupposes an economic entity viewpoint. However, other enforcement measures adopt a legal entity perspective, often pursued in parallel with the former economic entity viewpoint: by way of example, parental liability is, at least in part, expressed as a presumption of control of a legal entity over another legal entity. Downward liability after *Sumal* may exist in some situations and not in others independently of the existence of control, betraying a legal entity logic. Recidivism concurs only if the legal entity against it is claimed has participated in the earlier breach, and as a result may be applied to some affiliates and not others. As further discussed below in section 6.1.2 in this same chapter, time limits also largely follow a legal entity perspective and therefore the Commission may not claim a fine from a specific vehicle if their liability has expired, even though the 'undertaking' as such may still be liable. In sum, there is not a 'one catch all' perspective of enforcement taking either a 'pure' economic entity or a legal entity viewpoint.

The absence of a unique enforcement model strictly erected under the notion of undertaking has the effect that the choice of one or other legal entity, which is further a discretionary step for enforcement agencies, will alter the consequences of an infringement. Parent companies not called to a procedure may not be held liable. Selecting intermediate parent entities instead of ultimate will cap fines differently. Picking intermediate companies not linked to prior infringements will also excuse recidivism. Choosing entities whose participation is beyond enforcement time limits instead of others that have another situation will limit the amount of the fines. All this will challenge the assumed notion that the legal form of the undertaking should be irrelevant.

With the above in mind, the following subsections examine three points: first, the need to identify legal entities for public enforcement purposes; second, the effect that such an identification has on the obligations that may result for the entity in question, third, the

discretion that authorities appear to have in making those choices in public enforcement decisions.

6.1.1 The need to identify a legal entity for enforcement purposes

As already noted, the enforcement of the competition rules against undertakings requires the identification of one or more specific legal entities which may be formally heard, appoint a representative and provide an address for service.

One way of looking at this is to consider these legal entities as a formal interface between the authority and the undertaking, performing an essential 'letterbox' function. As the case law of the Court shows, that is needed alongside the enforcement procedure up until the moment when a decision is issued and, thereafter, in relation to the latter's enforcement. In that respect, the public enforcement of Articles 101 and 102 TFEU follows a 'legal entity' perspective, where legal entities are the contact points used by the authority, while taking into consideration the economic unit involved.

In the initial years of competition law enforcement, the Commission and the Courts seemed to have a more flexible attitude to the role of legal entities in enforcement procedures. An early example of this is the notification of the Commission decision in *ICI* to the German subsidiary of Imperial Chemical Industries plc, which was probably done to avoid notifications outside the territory of the Communities at the time. On appeal, the Court seemed to concede that this was a procedural irregularity, but in the end dismissed the claim noting that the parent company (to which the decision as such was addressed) had ultimately been able to access it.[533] A similar approach was followed shortly after in *Continental Can.*[534]

Many years later in *Orkem* the question was raised with respect to requests for information served on an affiliate; again, the Court dismissed the relevance of this apparent mishap under a single entity approach, whereby irregular notifications made to affiliates of the formal

[533] Judgment of 14 July 1972, *Imperial Chemical Industries Ltd. v Commission*, 48/69, ECLI:EU:C:1972:70 at 34-44.

[534] Judgment of 21 February 1973, 6/72, *Europemballage Corporation and Continental Can Company Inc. v Commission*, ECLI:EU:C:1973:22, at 3.

addressee could be accepted unless the rights of defence of the various entities had been *materially* disregarded.[535]

Not long after *Orkem*, the Court changed tack on the relevance of legal form in *Compagnie Maritime Belge* (*CMB*). The case concerned an uncommon accusation of joint abuse of a dominant position committed within a maritime conference, the Associated Central West Africa Lines or Cewal. Probably as a result of the nature of the accusation, the statement of objections ('SO') identified the maritime conference itself (Cewal) as the entity that had committed the breach, despite the fact that it had no legal personality. However, precisely because of that fact, some of its members were fined in the decision adopted in the end.[536]

In the appeal that followed, the GC saw nothing wrong with imposing fines on Cewal's members, observing that the SO had been notified to them[537] and, therefore, that they had all had the opportunity to defend themselves. After all, the GC was following the logic of *ICI*, *Continental Can* and *Orkem* which, as mentioned above, had taken a material, rather than formal, approach to procedural irregularities. However, in the subsequent appeal, the CJ examined these formalities much more strictly.[538] Quoting earlier authority on the essential procedural safeguards that the SO must respect, it declared that 'the Commission is required to specify unequivocally, in the statement of objections, the *persons* on whom fines may be imposed'.[539] Since the SO had only identified as the perpetrator of the infringement the collective entity constituted by Cewal, the companies had not been made sufficiently aware of the fact that fines could be imposed on them. This was sufficient for the Commission's

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[535] Judgment of 18 October 1989, *Orkem v Commission*, 374/87, ECLI:EU:C:1989:387 at 6.

[536] Decision 93/82/EEC of 23 December 1992 (IV/32.448 and IV/32.450: *Cewal, Cowac and Ukwal*) and 86 (IV/32.448 and IV/32.450: *Cewal*), [1993] OJ L 34/20.

[537] Paragraph 217 of the judgment by the GC appears to mention that the SO may not have been served on the applicants, but para 232 notes that the members of Cewal had been notified the SO, the problem being that this document only warned of sanctions against Cewal. Judgment of 8 October 1996, *CMB and others v Commission*, T-24/93, T-25/93, T-26/93 and T-28/93, ECLI:EU:T:1996:139.

[538] Judgment of 16 March 2000, *CMB Transports SA and others v Commission*, C-395/96 P and C-396/96 P, ECLI:EU:C:2000:132.

[539] Ibid at 143 (emphasis added). Note that the judgment did not specify al 'legal person', but merely a 'person', which in that context meant each member of the shipping conference, not necessarily specific legal entities.

decision to be quashed, despite all the other arguments raised by the appellant having been dismissed.[540]

The new doctrine concerning the need to identify legal entities in the SO was applied some months later to legal entities within a group of companies in *ARBED*, one of various appeals against the Commission decision in *Steel Beams*.[541] The case concerned market-sharing initiatives which, within the ARBED group, had been carried out by TradeARBED. Given that the parent company had not directly intervened in the conduct, the SO was notified to the affiliate. However, the decision adopted at the end of the procedure was addressed to the parent, not TradeARBED.[542] As in its judgment in *CMB*, the GC saw nothing wrong with the procedural aspects of the decision, observing that ARBED and TradeARBED were one and the same undertaking for the purposes of the competition rules.[543] It also noted that both legal entities had replied in the same way to requests for information and participated in the administrative procedure and that ARBED had assumed that the SO was addressed to the two legal entities, as evidenced by the fact that it instructed a lawyer who had represented both legal entities, concluding that the procedural irregularities were not of a nature to cause the nullity of the decision.[544]

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[540] Interestingly, the CJEU judgment examined (and dismissed) all the other arguments of the appellant, leaving the question of the failure of the SO to state on whom fines could be imposed to the very end of the judgment, instead of the usual approach of dealing with procedural issues first (especially where they are successful). This suggests that the Court wanted to address the merits of the case given the absence of case law at that time on maritime conferences, which probably facilitated the re-adoption by the Commission of the infringement decision against Compagnie Maritime Belge with a lower fine (Decision 2005/480/EC of 30 April 2004 relating to a proceeding pursuant to Article 82 EC (Cases COMP/D/32.448 and 32.450 – *Compagnie Maritime Belge*), summarised in [2005] OJ L 171/28), which was also appealed, this time unsuccessfully (judgment of 1 July 2008, T-276/04, *Compagnie Maritime Belge v Commission*, ECLI:EU:T:2008:237).

[541] Decision of 16 February 1994, 94/215/ECSC, *Steel Beams* [1994] OJ L 116/1. While the case was based on the ECSC, the discussion is valid also for the TFEU.

[542] The Decision (at 322) explains that this was done to ensure equality of treatment with other participants, suggesting that otherwise it would have calculated the fine having regard to the turnover of TradeARBED, which would have resulted in much lower fines.

[543] Judgment of 11 March 1999, *ARBED SA v Commission*, T-137/94. ECLI:EU:T:1999:46, para 90. Note that this judgment predated the CJ's judgment in *CMB*.

[544] Ibid, 95-102.

As may be expected after *CMB*, the CJ disagreed with this reasoning. Following the Opinion of AG Stix-Hackl, albeit under a different logic,[545] the Court reiterated the principles in *CMB* that 'the statement of objections must specify unequivocally the legal person on whom fines may be imposed and be addressed to that person.'[546] As the SO had not stated that fines may be imposed on ARBED, which was not the formal addressee of that document, no sanctions could be imposed on that legal entity. It was irrelevant that ARBED may have been aware of the SO, or that it may have participated in the procedure and caused ambiguity itself; such an ambiguity could only have been corrected by the Commission properly issuing a fresh statement of objections.[547]

This stricter approach to the need for the SO to state clearly what a legal entity is accused of was taken further some years later in *Bolloré*, where the CJ again corrected the more lenient views of the GC and annulled a decision because the SO had not clearly specified the capacity in which the parent company was being accused.[548] Shortly thereafter, these ideas would be revisited in *Akzo I*,[549] which added something that was probably obvious from the beginning, but that had not been declared by the CJ until that moment: the enforcement decision at the end of the procedure should also be addressed to a specific legal entity, which had to be the same one that had been heard in the procedure.[550]

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[545] The Opinion had based its opposition to the GC's judgment on a material violation of the rights of the defence, as ARBED may not have been aware of the need to put forward specific arguments in respect of the attribution of liability for the acts of its affiliate. See Opinion of 26 September 2002, *ARBED SA v Commission*, C-176/99 P, ECLI:EU:C:2002:532, at 75.

[546] Judgment of 2 October 2003, *ARBED SA v Commission*, C-176/99 P, ECLI:EU:C:2003:524, para 21.

[547] Ibid, at 23. This statement exemplifies the different approach compared to the Opinion of AG Stix-Hackl (and the earlier precedents).

[548] More specifically, whether as a result of its direct actions or as parent of an affiliate. Judgment of 26 April 2007, *Bolloré SA and Others v Commission*, T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02 and T-136/02, ECLI:EU:T:2007:115 at 66-81. On appeal, Judgment of 3 September 2009, *Papierfabrik August Koehler AG, Bolloré SA and Distribuidora Vizcaína de Papeles SL v Commission*, C-322/07 P, C-327/07 P and C-338/07 P, ECLI:EU:C:2009:500, 23-48.

[549] Judgment of 10 September 2009, *Akzo Nobel and Others v Commission*, C-97/08 P, ECLI:EU:C:2009:536 para 57.

[550] The reference to the CJ is made here in the strict sense. The GC had already made that point in several cases, starting with its judgment of 20 April 1999, *Limburgse Vinyl Maatschappij NV and others v Commission*, joined cases T-305/94, T-306/94, T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94, ECLI:EU:T:1999:80, para 978.

The position adopted by the Court in *CMB* and especially *ARBED*, where it distanced itself from earlier case law that had required material damage to the rights of defence in favour of a formal perspective, should be understood in the context of greater attention to procedural rights at a time when the Commission was substantially increasing the level of fines. At the same time, however, it is remarkable that this qualification would be adopted precisely in the years where the Courts were defining the notion of undertaking, with the promise of disregarding legal form. In any event, it consolidated the primacy of a legal entity based approach, as opposed to an economic entity perspective, with respect to procedural rights.

In the Court's most recent judgments, this legal entity approach appears to have softened. Thus, in *Siemens Österreich* the Court corrected the GC, which had declared that each company should be able to discern from a decision imposing a fine on it to be paid jointly and severally with one or more other companies the amount which it must pay in relation to the other joint and several debtors,[551] describing the requisite that legal entities should be identified as one 'of a purely practical nature'.[552] More to the point, in *Versalis* the Court overruled the GC, which had declared that at a parent company that had not participated in the procedure in which the earlier sanction had been imposed should not bear the burden of an increased penalty for recidivism,[553] weakening the logic of separate procedural rights for each legal entity. These more recent pronouncements suggest that the legal entity approach is likely to remain confined to formal elements of the procedure, such as the identification of an entity in the SO and in the decision.

In conclusion, separate legal personality is essential to the enforcement of any law, and the competition rules are no exception. Admitting binding acts that did not identify legal entities would have downgraded decisions to acts that should be complemented at the implementation phase, a door that the Court chose not to leave open. That logic has been expanded by the

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[551] Judgment of 10 April 2014, *Commission v Siemens AG Österreich and Others*, C-231/11 P to C-233/11 P, ECLI:EU:C:2014:256, at 66.

[552] Ibid at 55.

[553] Judgment of 5 March 2015, *Commission v Versalis and Eni and Versalis and Eni v Commission*, C-93/13 P and C-123/13 P, ECLI:EU:C:2015:150, at 91. See above at section 4.3.1.b.

Court to include the SO, making legal entities the 'legal letterbox' of the undertaking or, to use a different metaphor, one of the many doors that gives access to it.

Besides this 'letterbox' function, separate legal personality within economic units may affect the content of undertakings' legal obligations, as the following section examines.

6.1.2 The relevance of the legal entity beyond procedural rights

Despite the advances in making the economic entity the addressee of the competition rules, the legal structure of undertakings impacts their obligations under Articles 101 and 102 TFEU. This is because, as noted in the discussion of the various uses of the notion of undertaking in chapter 4 of this dissertation, the Commission and the Courts take parallel legal and economic entity approaches to the public enforcement of Articles 101 and 102 TFEU, which are simultaneously applied to the undertaking and one or more legal entities. Under this dual enforcement approach, the legal structure of undertakings may alter the consequences of an infringement of competition law, thereby contradicting the declared irrelevance of legal form.

As earlier explained in this same chapter at 6.1, this dual perspective may be observed in multiple enforcement areas, from the treatment of parental or subsidiary liability, to recidivism. This section will discuss one such area, namely the treatment of limitation periods, an area where Courts, Advocate Generals, the Commission and, inevitably, the affected parties have clashed, providing useful material for the examination of the roles of the legal entity and the undertaking.

Limitation periods were regulated un EU competition law already in 1974,[554] and are currently contained in Articles 25 and 26 of Regulation 1/2003. Their logic was summarised by AG Bot in his Opinion in *ThysenKrupp Nirosta* as follows:

> 'The limitation period in respect of criminal proceedings is a universal and fundamental principle of our law. It may be defined as a ground on which a

[554] Regulation 2988/74 concerning limitation periods. [1974] OJ L 319/1. In the ambit of the ECSC Decision 715/78/ECSC, [1978] OJ L94/22.

> prosecution lapses because a certain period of time has elapsed since the date on which the offence was committed. (…)
>
> Limitation tends to establish social peace and responds to a common concern for legal certainty. (…) Classically, a number of reasons are given to support limitation. First, with the passage of time punishment loses its raison d'etre owing to the gradual disappearance of the disruption of public order caused by the offence. Next, in a spirit that is more protective of the interests of the persons and undertakings in question, evidence of the offence is more difficult to preserve or to establish after a certain period. Last and above all, limitation makes it possible to penalise the inertia, inactivity or even negligence of the prosecuting authorities and favours infringers being tried within a reasonable time.'[555]

In the early years of competition law, before the notion of undertaking acquired its current traits, limitation periods were applied under a legal entity perspective. However, the progressive expansion of the doctrine on the notion of undertaking soon raised the question of whether an economic entity viewpoint should also be adopted in relation to limitation periods. This was the crux of the matter in the judgment of 2009 in *ArcelorMittal*, part of the *Steel Beams* saga.

As will be recalled from the preceding section in this same chapter, in its 2003 judgment in *ARBED* the Court had annulled a fine imposed on a parent company because the SO had been addressed to its affiliate.[556] Following that ruling, the Commission recommenced proceedings against three entities in that group (ARBED itself and two of its subsidiaries, TradeARBED and ProfilARBED), seeking to correct the procedural flaws and to reissue the fines by adopting a second decision.[557]

In their appeals against that second decision, the two affiliates argued that the new Commission decision was time-barred. In their view, the five-year limitation period in Article

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[555] Opinion of AG Bot of 26 October 2010, *ThyssenKrupp Nirosta v Commission*, C-352/09 P, ECLI:EU:C:2010:635, at 187-188.

[556] Judgment of 2 October 2003, *ARBED SA v Commission*, C-176/99 P, ECLI:EU:C:2003:524.

[557] Decision of 8 November 2006 (Case COMP/F/38.907 – Steel beams), [2008] OJ C 235/4.

25 of Regulation 1/2003 had been running in relation to them during the appeal that had ended with the 2003 judgment. While that period may have been suspended under paragraph 6 of that provision with respect to their parent ARBED, this did not affect them, since they were separate legal entities and not a party to those proceedings.[558] The Commission understandably opposed this submission, noting that, if accepted, it could become impossible to re-adopt decisions in cases where the legal entity had been incorrectly identified. However, the GC sided with the applicants and took a strict legal entity approach, something that was understandable given the reliance of the discussion with the precedent in *ARBED*, where a strict legal entity perspective had been followed.[559] However, despite accepting that the affiliates could not be liable anymore, the GC confirmed their parent's liability, on the basis that the limitation period in relation to it had been suspended during the appeal.

Both ARBED (by then renamed ArcelorMittal Luxembourg SA[560]) and the Commission appealed, noting the inconsistency of the GC's decision. The former argued that the limitation periods should also apply to itself while the latter argued that the suspension should also have applied to ARBED's affiliates. Although AG Bot sided with the Commission,[561] the Grand Chamber confirmed the GC's judgment rather than the arguments of its AG: the suspension of limitation periods affected each legal person separately (in the Court's jargon, it had *inter partes* and not *erga omnes* effect). The remarkable consequence of this was that in that specific case the actual infringing entity (the subsidiaries) could benefit from time limits, but not their parent company, despite the latter not having directly participated in the conduct.[562]

That approach had two potential components which are relevant to the issue of the tension between the group and legal entity perspectives. On the one hand, it assumed that limitation periods should be evaluated from a legal entity perspective and not from a group viewpoint; on the other, it raised the question of whether parental liability could survive despite the

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[558] Judgment of 31 March 2009, *ArcelorMittal Luxembourg SA, ArcelorMittal Belval & Differdange SA and ArcelorMittal International SA v Commission*, T-405/06, ECLI:EU:T:2009:90 at 124.

[559] Ibid at 158.

[560] Ibid at 16.

[561] Opinion of AG Bot of 26 October 2010 in *ArcelorMittal Luxembourg v Commission*, C-201/09 P and C-216/09 P, ECLI:EU:C:2010:634, at 71-81.

[562] Judgment of 29 March 2011 (Grand Chamber), *ArcelorMittal v Commission*, C-201/09 P and C-216/09 P, ECLI:EU:C:2011:190. See esp. 149-150.

original infringer no longer being liable, a debate which would be labelled as the potentially 'derivative' or 'principal' nature of parental liability.[563]

In subsequent years, two conflicting lines of case law coexisted in this area. One line considered that parental liability could only be derived, and was first declared by the CJ in *Tomkins*, which concerned the Commission's decision in the *Copper Fittings* cartel.[564] In that case, following an appeal filed by Tomkins' affiliate,[565] the GC had shortened the duration of the infringement for the subsidiary that had participated in the cartel. That led the GC, in a parallel appeal filed by the parent, to reduce the latter's liability on the basis that the parent's liability could not exceed that of the subsidiary's.[566] The Commission took the matter to the CJ arguing, among other things, that parent and affiliate were independent entities and therefore the correction of the fine as regards one of them should not affect the other. The Court, sitting in Grand Chamber, rejected the Commission's appeal and declared that in such a situation, the liability of the parent company was exclusively *derived* from that of its subsidiary and may not be greater than that of the latter.[567] That doctrine would be restated in the subsequent judgments in *Siemens Österreich*[568] and *Areva.*[569]

There were however other judgments that appeared to take a different approach. One was of course *ArcelorMittal* itself, also a Grand Chamber ruling that, as noted above, had upheld the fine imposed on the parent despite the claims regarding affiliates being time-barred. Given that *ArcelorMittal* predated *Tomkins* it could be questioned if its doctrine had been corrected or at least if it would remain limited to the specific case of limitation periods running for some

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[563] The discussion that follows refers to cases where the parent was not involved in the breach, other than as a result of their dominance over the affiliate, as opposed to situations where the parent may have been directly involved.

[564] Decision of 20 September 2006 (COMP/F-1/38.121 – *Fittings*), summary published in [2007] OJ L 283/63.

[565] Judgment of 24 March 2011 *Pegler v Commission*, T-386/06, ECLI:EU:T:2011:115.

[566] Note that the parent entity was only liable as a result of its control over the subsidiary, not by other actions. Judgment of 24 March 2011, *Tomkins plc v Commission*, T-382/06, ECLI:EU:T:2011:112 at 38.

[567] Judgment of 22 January 2013, Grand Chamber, *Commission v Tomkins,* C-286/11 P, ECLI:EU:C:2013:29 at 49.

[568] Judgment of 10 April 2014, *Commission v Siemens AG Österreich and Others*, C-231/11 P to C-233/11 P, ECLI:EU:C:2014:256 at 47.

[569] Judgment of 10 April 2014, *Areva and Others v Commission*, C-247/11 P and C-253/11 P, ECLI:EU:C:2014:257 at 137.

entities but not others under Article 25(6) of Regulation 1/2003. However, just a few months after *Tomkins,* another judgment of the Grand Chamber in *Kendrion* agreed with the GC that a parent entity may bear a larger fine than that of its affiliate as a result of the 10% ceiling being applied separately to each legal entity, dealing another blow to the derivative nature of parental liability.[570]

Another arguably inconsistent decision on the derivative nature of parents' fines was *Parker Hannifin.* In *Marine Hoses,*[571] the Commission had sanctioned the owner for the entire duration of the infringement despite having possessed the entity that had participated in the conduct only for a part of that period on the basis that the claim against the initial infringer was time-barred. In the ensuing appeal, the GC corrected that approach, noting that the liability of the current owner may not predate the moment that it had taken over the activity.[572] However, following the appeal by the Commission, the Court of Justice overruled the GC and supported a broad definition of the liability of the undertaking on the basis that separate legal liability should not interfere with the effective application of the competition rules. As a result, the new owner could be liable despite the action against the original infringer having expired.[573]

The solution adopted in *Parker Hannifin* might be considered tainted by the specificities of the doctrine of succession. That was however not the case in *Bolloré II,*[574] where a parent company was held liable for an infringement committed by an affiliate that could not be sanctioned because the limitation period had expired. In the words of the General Court,

> '… the fact that the subsidiary may no longer be capable of being penalised for the infringement found, whether because the subsidiary has ceased to exist or — as the

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[570] Judgment of 26 November 2013 (Grand Chamber) *Kendrion NV v Commission*, C-50/12 P, ECLI:EU:C:2013:771, at 57.

[571] Decision of 28 January 2009, COMP/39.406 - *Marine Hoses.*

[572] Judgment of 17 May 2013, T-146/09, *Parker ITR Srl and Parker-Hannifin Corp., v Commission,* ECLI:EU:T:2013:258.

[573] Judgment of 18 December 2014*, Commission v Parker Hannifin Manufacturing and Parker-Hannifin,* C-434/13P. ECLI:EU:C:2014:2456, at 40.

[574] Judgment of 27 June 2012, *Bolloré v Commission*, T-372/10, ECLI:EU:T:2012:325, at 186-195. Note that this decision followed the annulment of an earlier decision by the judgments cited in footnote 548 above.

> applicant claims in the present case — because the limitation period has expired in favour of that subsidiary, has no effect on the question whether the parent company, which is itself deemed to have committed the infringement owing to the economic unity with its subsidiary, may be penalised. Admittedly, there would be no liability of the parent company if it were shown that there had been no infringement, but that liability cannot cease to exist because the penalty against the subsidiary is time-barred.'[575]

In the subsequent appeal, the CJ did not address this point.[576] At that time, however, the appeals against the *Heat Stabilisers* decision,[577] where Akzo Nobel was being held liable for two cartels stretching back to 1987 and 1991 in which its subsidiaries had taken part. As in the case of *Bolloré II*, the older part of the infringement was, under a legal entity perspective, time-barred, since these subsidiaries had been replaced by other entities also controlled by Akzo. In its decision, the Commission ignored that and declared their liability alongside that of their parent for the entire period, stressing the latter's control over them.[578] The appeal against that decision was resolved by the judgments of the GC and CJ in *Akzo II*.[579]

In the first instance judgment, the GC corrected the decision of the Commission and declared that the affiliates could not be liable by reason of the time-limits having expired. Despite that, and, quoting its own decision in *Bolloré II* as sole authority,[580] it held that the fact that the claim against the affiliates was time-barred would not affect the liability of their parent.[581]

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[575] Ibid at 194.

[576] Judgment of 8 May 2014, *Bolloré v Commission*, C-414/12 P, ECLI:EU:C:2014:301, at 109.

[577] Decision of 11 November 2009, COMP/38.589 — *Heat Stabilisers.*

[578] Ibid, paras 512-514 and 671.

[579] In this dissertation, *Akzo I* stands for the judgments of the GC of 12 December 2007, *Akzo*, T-112/05, ECLI:EU:T:2007:38 and of the CJ of 10 September 2009, *Akzo Nobel and Others v Commission*, C-97/08 P, ECLI:EU:C:2009:536 that formulated the presumption of exercise of dominant influence, and *Akzo II* denotes the GC judgment of 15 July 2015, *Akzo Nobel NV and Others v Commission*, T-47/10, ECLI:EU:T:2015:506 and the judgment of the CJ of 27 April 2017, *Akzo Nobel NV and Others v Commission*, C-516/15 P, ECLI:EU:C:2017:314, on appeal against the *Heat Stabilisers* decision.

[580] Judgment of 15 July 2015, *Akzo Nobel NV and Others v Commission*, T-47/10, ECLI:EU:T:2015:506 at 117-129.

[581] It is noteworthy that during the written phase before the GC, the CJ issued its judgments in *Siemens Österreich* and *Areva*, both seemingly endorsing *Tomkins* and arguably its 'derived liability' paradigm. Despite

Akzo appealed, claiming, in essence, that the GC had infringed the rules concerning the liability of parent companies for the unlawful conduct of their subsidiaries,[582] relying on the derived nature of parental liability.

In his Opinion, AG Wahl agreed with the appellants. In his view, the derivative nature of Akzo's liability in this case meant that it could not be liable when the affiliates in question could not be charged.[583] The CJ however decided differently. Despite quoting *Tomkins*, the Court noted that neither Article 23 of Regulation 1/2003 nor the case law specifies the legal or natural person that may be held responsible for an infringement or be punished by a fine[584] (which would mean that this is part of the Commission's discretion) and observed that the parent company 'is held individually liable for an infringement of the EU competition rules *which it is itself deemed to have infringed*, because of the decisive influence which it exercised over the subsidiary'.[585] Having presented parental liability as direct, the Court rewrote its doctrine on derivative liability as meaning that 'the parent company's liability necessarily depends on the facts constituting the infringement committed by its subsidiary and to which its liability is inextricably linked'[586] and quoted *ArcelorMittal* as a case where the parent had been sanctioned despite the fine against the affiliate being time barred,[587] concluding that the GC was fully entitled to find that the fact that the Commission's power to impose penalties on the affiliates had expired did not preclude Akzo Nobel from being held liable in respect of that infringement period.[588]

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inviting the parties to submit their views on the relevance of those judgments in their procedures, the GC dismissed the relevance of those decisions. Ibid, at 83 and 90.

[582] Judgment of 27 April 2017, *Akzo Nobel NV and Others v European Commission*, C-516/15 P, ECLI:EU:C:2017:314, at 28.

[583] Opinion of AG Wahl of 21 December 2016, *Akzo Nobel*, C-516 P, ECLI:EU:C:2016:1004, at 81-91.

[584] CJ judgment in *Akzo II* at 51.

[585] CJ judgment in *Akzo II* at 56 (emphasis added).

[586] Ibid at 61.

[587] Ibid at 63.

[588] For a comment on this decision by Judge Da Cruz Vilaça, rapporteur in that case, see José Luís da Cruz Vilaça, Mariana Martins Pereira, 'Parental liability under the ECN+ Directive and its extension to accessory sanctions', [2020] XI (42-43) *Revista de Concorrência e Regulação* 75, at 78.

Akzo II may be hailed as strengthening the doctrine on the undertaking by recognising the irrelevance of limitation periods for the liability of parent entities. In its decision, the Court has ensured that parent companies are unable to claim an expiry unless any entity under their control and themselves had ceased the conduct during the requisite period. That avoids for instance that a carrousel of subsidiaries replacing each other in a cartel would impact the liability of the group and is, in that respect, consistent with the approach followed in succession of undertakings where, as discussed in section 4.5 above, corporate reorganisations within a group of companies had been found incapable of reducing the liability of the undertaking.

At the same time, it is noteworthy that the solution adopted by the Court is based on a legal entity logic. Whether time limits have expired is a question that depends on the legal structure of the undertaking and may have a different answer for one or another legal entity. As with the case of parental liability, the solution adopted by the Court ensures a more direct enforcement against economic players and especially parent entities, but at the cost of acknowledging the relevance of separate legal entities.

In conclusion, the treatment of limitation periods illustrates the difficulties involved in using both legal entity and economic entity approaches in the application of Articles 101 and 102 TFEU. This adds to the inconsistencies detected in chapter 4 of this thesis, where several instances of parallel legal and economic entity perspectives were examined. In the end, as things now stand, legal entities are not exclusively an ‘entry point’ or ‘letterbox’ of the undertaking, a function that would seem necessary if not unavoidable, but a factor that changes the obligations of undertakings, in conflict with the principle of the irrelevance of legal form declared in *Höfner*.

6.1.3 The discretion in the identification of the legal entity

One important element in the discussion of the dual centre of attribution of anticompetitive conduct concerns the discretionary power enjoyed by enforcement agencies to select the legal entity, a decision that, as discussed, is not merely procedural (the ‘letterbox’ function) but may also affect the obligations imposed at the end of an enforcement procedure in issues such as

the 10% cap, eventual sanctions for recidivism, potential time limits issues or other considerations.

The discretion in the selection of the legal entity that is imputed is only one of the choices that enforcement agencies make, a matter that has been discussed by academics, practitioners and other stakeholders.[589] As noted by several authors, it is appropriate to distinguish various types of discretion. While the terms employed by the Courts are notably inconsistent,[590] one may discern the categories of 'enforcement discretion', 'technical discretion' and 'discretion proper'. The first category would refer to the power not to intervene in cases, which the Commission has recognised for a long time, but is of limited interest for our purposes.[591] The second category would include the choices resulting from the complexity in the assessment of scenarios of fact, where various decisions seem plausible, and be shared between the Commission and the Courts through the 'manifest error' standard, which implies a margin of discretion.[592] Finally, 'discretion proper' would exist where the law expressly or impliedly

[589] The literature on this matter is vast. Among the most recent and interesting contributions (not least because of the position enjoyed by their authors), see Fernando Castillo de la Torre and Eric Gippini Fournier, Evidence, *Proof and Judicial Review in EU Competition Law,* Edward Elgar, 2017; Marc Jaeger, 'The Standard of review in competition cases involving complex economic assessments: Towards the marginalisation of the marginal review?', (2011) 2 *Journal of European Competition Law & Practice* 309; Wouter Wils, 'Discretion and prioritization in public antitrust enforcement, in particular EU antitrust Enforcement', (2011) 34(3) *World Competition* 353 and Miro Prek and Silvère Lefèvre, '"Administrative discretion", "power of appraisal" and "margin of appraisal" in judicial review proceedings before the General Court', (2019) 56 *Common Market Law Review* 339.

[590] Prek and Lefèvre, cited in the previous footnote, quote Schwarze, *European Administrative Law*, revised 1st edition (Thomson/Sweet & Maxwell, 2006), at p. 297 as having observed that no "consistency can be discerned in the Court's use of terms".

[591] This discretion was famously recognised to the Commission in this field by the GC in its judgment of 18 September 1992, *Automec v Commission*, T-24/90, ECLI:EU:T:1992:97, para 71 ff. Note that the GC decided this case in full and with the infrequent recourse to one of its members (in casu, Judge Edward) as AG. See Opinion of AG Edward of 10 March 1992, *Automec v Commission*, T-24/90, ECLI:EU:T:1992:39, which coincided with the decision adopted in the case. Later developments in this prosecutorial discretion may be found in Judgment of 4 March 1999 Case, *Ufex and Others v Commission*, C-119/97 P, ECLI:EU:C:1999:116, para 88; Judgment of 17 May 2001, *IECC v. Commission*, C-449/98, ECLI:EU:C:2001:275, at para 36; Judgment of 26 January 2005, *Piau v Commission*, T-193/02, ECLI:EU:T:2005:22, at para 80; Judgment of 23 April 2009, *AEPI v Commission*, C-425/07, ECLI:EU:C:2009:25 at para 31; Judgment of 15 December 2010, *CEAHR v Commission*, T-427/08, ECLI:EU:T:2010:517, at para 26 and Judgment of 23 October 2017, *CEAHR v Commission*, T-712/14, ECLI:EU:T:2017:748, para 34.

[592] The fact that this discretion is limited was expressed by the full Court in *Tetra Laval* in the following terms: "…whilst in areas giving rise to complex economic assessments, the Commission has a margin of discretion with regard to economic matters, that does not mean that the Courts of the European Union must refrain from reviewing the Commission's interpretation of information of an economic nature. Not only must those Courts establish, among other things, whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it". Judgment of 15 February

(but in a clear manner) provides for a margin of discretion, for example the Commission's powers to quantify fines under Article 23 of Regulation 1/2003.

The discretion applied in the process of imputation may be considered to be partly a case of technical discretion and partly of discretion proper. The complexity of the facts, especially in cases involving the succession of undertakings, may justify a certain room for manoeuvre when deciding which entity is liable.[593] On the other hand, having regard to its practical implications in the quantification of fines, the choice could be considered part of the Commission's discretion when determining the fine, a power also possessed by the Courts when so requested.[594]

The discussion of the discretion in deciding which legal person is liable under the competition rules emerged in parallel to the doctrine on the undertaking as an economic unit. In his seminal paper on this issue, Wouter Wils noted the difficulty in determining whether an entity controls another (linking the discussion to technical discretion in the sense noted above)[595] relying on paragraph 154 of the GC's judgment in *British Gypsum*, where it had been noted that the Commission could have chosen between the parent company and the subsidiary, impliedly accepting this power.[596]

2005 (Grand Chamber) *Commission v Tetra Laval*, C-12/03 P, ECLI:EU:C:2005:87, para 39. On this issue see Andriani Kalintiri 'What's in a name? The marginal standard of review of 'complex economic assessments' in EU competition enforcement', (2016) 53 *Common Market Law Review* 1283.

[593] As an example of this discretion in the light of the complexity of the facts involved, see the Judgment of 24 September 2009, *Erste Group Bank AG, Raiffeisen Zentralbank Österreich AG, Bank Austria Creditanstalt AG and Österreichische Volksbanken AG v Commission*, C-125/07 P, C-133/07 P, C-135/07 P and C-137/07 P, ECLI:EU:C:2009:576, para 82.

[594] The formula used by the CJEU stresses the power of the Court in that respect 'to substitute their own appraisal for the Commission's and, consequently, to cancel, reduce or increase the fine or penalty payment imposed'. See Judgment of 8 February 2007, *Danone v Commission*, C-3/06 P, ECLI:EU:C:2007:88, at paras. 61 and 62; Judgment of 8 December 2011, *Chalkor v Commission*, C-386/10 P, ECLI:EU:C:2011:815, at 63.

[595] '(T)he optimal legal rule is to leave the Commission a discretion as to whether it imposes the fine on the parent company, on the subsidiary, or jointly and severally on both, at least in those cases where the available evidence shows that the infringement has been initiated and/or executed, in whole or in substantial part, at the level of the subsidiary' Wouter Wils,'The undertaking as subject of E.C. competition law and the imputation of infringements to natural or legal persons', (2000) 25(2) *European Law Review* 99, 112-113.

[596] Judgment of 1 April 1993, *BPB Industries Plc and British Gypsum Ltd v Commission,* T-65/89, ECLI:EU:T:1993:31.Unfortunately, that point of the GC judgment was not discussed in the subsequent appeal either by AG Léger (Opinion of 13 December 1994, *BPB Industries plc and British Gypsum Ltd v Commission*, C-310/93 P, ECLI:EU:C:1994:408, paras. 20-31) or in the judgment itself, despite BPB having raised in its

The Courts looked at this more closely in the *Spanish Raw Tobacco* saga.[597] The case concerned six entities which had agreed the maximum average price for each variety of raw tobacco between 1996 and 2001. Since all the parties had cooperated under the then-applicable leniency rules,[598] the appeals focused on how the fines had been calculated and especially when and why the Commission had joined the parent companies to the action.[599] In its decision, the Commission identified the liable entities as follows:

- World Wide Tobacco España SA ('WWTE') was controlled by the US multinational Standard Commercial Corporation through Standard Commercial Tobacco Co., Inc. and Trans-Continental Leaf Tobacco Corporation ('TCLT'). The Commission held all three jointly liable with WWTE.

- Deltafina and Taes were owned by Universal Corporation, the latter through the intermediate company Universal Leaf Tobacco Company Inc. However, the Commission considered that it had insufficient evidence of either parent having

appeal (Judgment of 6 April 1995, *BPB Industries plc and British Gypsum Ltd v Commission*, C-310/93 P, ECLI:EU:C:1995:101, at 11)

[597] Decision 2007/236/EC of 20 October 2004 (Case COMP/C.38.238/B.2) — *Raw tobacco — Spain* [2007] OJ L 102/14.

[598] The 1998 Fining Guidelines (Guidelines on the method of setting fines imposed pursuant to Article 15 (2) of Regulation No 17 and Article 65 (5) of the ECSC Treaty, [1998] OJ C 9/3) in force at the time did not ban joint appeals, which were filed by all parties.

[599] Of the six cartel participants, five lodged appeals (all but Taes). Alliance One International, formerly Standard Commercial Corporation ('SCC'), appears as an appellant in several of these due to a string of acquisitions, both during the proceedings and following the decision. For clarity, the references below identify the initial appellant in each case: World Wide Tobacco España SA ('WWTE'): Judgment of 27 October 2010, *Alliance One International and others v Commission*, T-24/05, ECLI:EU:T:2010:453. On appeal: Judgment of 19 July 2012 (Grand Chamber), *Alliance One International and others v Commission*, C-628/10 P and C-14/11 P, ECLI:EU:C:2012:479. Dimon: Judgment of the GC of 12 October 2011, *Alliance One International v Commission*, T-41/05, ECLI:EU:T:2011:586. On appeal: Judgment of 26 September 2013, *Alliance One International v Commission*, C-679/11 P, ECLI:EU:C:2013:606. Agroexpansión: Judgment of 12 October 2011, *Agroexpansión v Commission*, T-38/05, ECLI:EU:T:2011:585. On appeal: Judgment of 26 September 2013, *Alliance One International v Commission*, C-668/11 P, ECLI:EU:C:2013:614. Cetarsa: Judgment of 3 February 2011, *Cetarsa v Commission*, T-33/05, ECLI:EU:T:2011:24. On appeal: Judgment of 12 July 2012, *Cetarsa v Commission*, C-181/11 P, ECLI:EU:C:2012:455. Deltafina: Judgment 8 September 2010, *Deltafina SpA v Commission*, T-29/05, ECLI:EU:T:2010:355. Appeal withdrawn, see Order of the CJEU of 12 July 2011, C-537/10 P, ECLI:EU:C:2011:475.

exercised decisive influence over Deltafina or Taes, and therefore did not impute liability to the parent entity or the intermediate company.[600]

- In respect of Agroexpansión, which was a wholly-owned subsidiary of Intabex, in turn a wholly-owned subsidiary of Dimon Inc., the Commission imputed liability to the ultimate parent company (Dimon), but not the intermediate (Intabex).

- Finally, as regards Cetarsa, the Commission just imputed liability to that company, but not its parent company, SEPI, or its ultimate owner, the Spanish State.

Unsurprisingly, these different approaches were raised in the various appeals as a potential infringement of the principle of equal treatment, especially by WWTE, which, in particular, had seen both its ultimate and intermediate parent companies imputed.

In its judgment at first instance in the WWTE appeal,[601] the General Court referred to the notion of the undertaking and the doctrine on parental liability and the presumption of decisive influence over an affiliate and consequent parental liability, relying on *Stora*,[602] rather than *Akzo I*.[603] Despite having declared the possibility of imputing the parent company under a presumption of effective control, the GC examined the tests that the Commission had used[604] and declared that it had to employ the same method for determining parental liability (either the *Akzo* presumption or specific evidence of decisive influence) to all the undertakings that were parties.[605] Since in the case of one of the intermediate companies (TCLT), the evidence

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[600] It may be noted that the decision identified Taes and Deltafina as separate undertakings, and even granted Taes a reduction of the fine as it had assisted in providing incriminating evidence in respect of Deltafina, which shows the terminological and conceptual confusion over the notion of undertaking at that time.

[601] Judgment of 27 October 2010, *Alliance One International and others v Commission*, T-24/05, ECLI:EU:T:2010:453.

[602] Judgment of 16 November 2000, *Stora Kopparbergs Bergslags AB v Commission*, C-286/98 P, ECLI:EU:C:2000:630.

[603] Note that the oral hearing in this case had taken place on 17 June 2009, several weeks before *Akzo* was adopted, which is probably the reason for the judgment not to include it as authority. See Judgment of 27 October 2010, *Alliance One International and others v Commission*, T-24/05, ECLI:EU:T:2010:453, para 49.

[604] Judgment of 27 October 2010, *Alliance One International and others v Commission*, T-24/05, ECLI:EU:T:2010:453, 133-147.

[605] Ibid paras 156-160.

did not support the conclusion that it had exercised decisive influence, and liability could not be asserted on the basis of the presumption (because that method had not been employed for all parties), the General Court annulled the decision of the Commission in respect of that specific intermediate company, confirming the liability of the other parent companies involved.

In the appeal raised by the Commission, AG Kokott drew a distinction between 'the question of whether the parent and subsidiary companies belong to a single undertaking and their consequential liability for a cartel offence', which was to be answered with legal criteria alone (as the Commission had argued), and the fines that may be imposed for that cartel offence, a matter which was in essence discretionary, noting as follows:

> 'In the context of its discretion under Article 23(2)(a) of Regulation No 1/2003 the Commission can decide in each individual case whether it will impose a fine at all for the cartel offence of an undertaking, but also on which legal person (or persons) standing behind the undertaking concerned it will impose such a fine.'[606]

In other words, AG Kokott took the position that the choice of the legal person or persons to be fined was a matter for the Commission to decide at its discretion, as that ultimately would impact on the calculation of the fine.[607] That approach was accepted by the Court, on the understanding that this matter was linked to the Commission's powers to quantify fines.[608]

Since then, the Courts have maintained the approach first suggested by AG Kokott: on the one hand, which legal entities may be imputed is a legal matter, there being no discretion in that

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[606] Opinion of AG Kokott of 12 January 2012, *Alliance One*, C-628/10 P and C-14/11 P, ECLI:EU:C:2012:11 at 46-47. Cfr para 55, where it is said that 'need not necessarily impose fines on all the parent companies of participants in a cartel'.

[607] In support of discretion, AG Kokott quoted para 82 of the judgment of 24 September 2009, *Erste Group Bank AG and others v Commission*, C-125/07 P, C-133/07 P, C-135/07 P and C-137/07 P, ECLI:EU:C:2009:576) and para 121 of the judgment of 29 September 2011, *Elf Aquitaine SA v European Commission*, C-521/09 P, ECLI:EU:C:2011:620.

[608] Judgment of 19 July 2012 (Grand Chamber) *Alliance One International and others v Commission*, C-628/10 P and C-14/11 P, ECLI:EU:C:2012:479, at 44 and 59.

respect;[609] on the other, however, the Commission would have discretion to hold liable a specific legal person which is part of an undertaking.[610]

The last step in this process is, of course, *Sumal*. [611] While this is a judgment adopted in the context of private enforcement, it is submitted that at least a part of the discussion it contains applies equally to public enforcement since, as the judgment itself notes,

> 'the concept of 'undertaking', within the meaning of Article 101 TFEU, which constitutes an autonomous concept of EU law, cannot have a different scope with regard to the imposition of fines by the Commission under Article 23(2) of Regulation No 1/2003 as compared to actions for damages for infringement of the EU competition rules.'[612]

In that respect, *Sumal* relies on earlier case law on the joint and several liability of all the legal entities within an undertaking[613] and therefore leaves the door open to a free choice as regards the selection of any of them for both public and private enforcement purposes,[614] while adding two qualifications: first, as explained elsewhere in this thesis, that the notion of undertaking should not be read as encompassing the entire group of companies, in particular where they are 'conglomerates', but rather it should be divided according to 'economic activities', and therefore the joint and several liability would apply within that part of the group; and second, that in the specific case of a claim against the subsidiary of an entity against which an

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[609] A consequence of that is the joint liability of affiliates, which operates by law, as confirmed in Judgment of 10 April 2014, *Commission v Siemens AG Österreich and Others*, C-231/11 P to C-233/11 P, ECLI:EU:C:2014:256 at 57; Judgment of 10 April 2014, *Areva and Others v Commission*, C-247/11 P and C-253/11 P, ECLI:EU:C:2014:257 at 122; Judgment of 26 January 2017, *Villeroy & Boch* v *Commission*, C-625/13 P, ECLI:EU:C:2017:52 at 150; Judgment of 25 November 2020, *Commission v GEA Group*, C-823/18 P, ECLI:EU:C:2020:955 at 61.

[610] Judgment of 24 September 2009, *Erste Group Bank AG, Raiffeisen Zentralbank Österreich AG, Bank Austria Creditanstalt AG and Österreichische Volksbanken AG v Commission*, C-125/07 P, C-133/07 P, C-135/07 P y C-137/07 P at 82; judgment of 11 July 2013, *Team Relocations and Others* v *Commission*, C-444/11 P, ECLI:EU:C:2013:464 at 159, *Akzo II* at 51. Cfr judgment in *Sumal* at 63.

[611] Judgment of 6 October 2021 (Grand Chamber) *Sumal v Mercedes Benz Trucks España*, C-882/19, ECLI:EU:C:2021:800.

[612] Ibid at 38. Note also that the reasoning of the judgment in this respect relies heavily on earlier decisions adopted in a public enforcement context.

[613] Ibid at 44. The judgment also recalls the discretion of public enforcement agencies at para 63.

[614] Ibid at 48 and 50.

infringement has been established, a ‘specific link’ may be applied; namely, ‘that the anticompetitive agreement concluded by the parent company, for which it has been punished, concerns the same products as those marketed by the subsidiary’.[615]

At the time of writing, the Court has not yet provided additional clarifications on the above two limitations. Leaving aside the first of these (which does not question the discretion regarding the choice of a legal entity within an undertaking, but limits its boundaries), a word needs to be said about the indication contained in the second limitation, which operates as a limit on the discretion, at least for specific situations (in this case, when a subsidiary of an entity identified in a public enforcement decision may be asked to bear a follow-on claim).

In that respect, *Sumal* seems to have changed the logic underpinning the discretion discussed above. The freedom to select a given entity to hold liable, which had been recognised by the Courts, appeared to reflect the notion that any of the legal entities within an undertaking could be used to penetrate it, an approach recalled in paragraphs 48 and 50 of *Sumal* itself. However, at the same time, the Court has limited that discretion for the specific case at hand (a follow-on claim against a subsidiary of the original entity). While that may well be understood given the specific situation under examination, in view of the Court’s declared unwillingness to permit claims against unrelated subsidiaries, the underlying ‘legal entity perspective’ challenges the logic of the theory pursuant to which any legal entities could have been chosen for enforcement purposes.

In addition, *Sumal* provides an excellent starting point for examining the process of identifying liable entities in relation to private enforcement of Articles 101 and 102 TFEU, something which is examined in the next section.

6.2 Undertakings and legal entities in the private enforcement of Articles 101 and 102 TFEU

The roles of the undertaking and legal entity as centres of attribution in the application of Articles 101 and 102 TFEU may, in addition to public enforcement, be seen from the

[615] *Sumal* at 52.

perspective of private enforcement as an awakening giant transforming the role of competition law in various ways, including as regards the notion of undertaking.

Attribution has a different purpose and consequences in private and public enforcement. Rather than an imputation based on personal responsibility aimed at punishment and deterrence of a person or an organisation, civil claims potentially involve the payment of damages, the modification or termination of contracts and other legal relationships or obligations to do or refrain from doing, among other potential remedies. Some of those claims may only be made against a specific legal entity against which the claimant can assert an individual right or that is in possession of the means to comply with the request being made, limitations that do not necessarily coincide with those facing a public enforcement action.

The private enforcement of Articles 101 and 102 TFEU, first declared in *BRT/SABAM*,[616] has ensured a constant flow of references that have examined the notion of undertaking. Mention could be made of *Hydrotherm*,[617] *Höfner*,[618] *Poucet and Pistre*,[619] *Diego Cali*[620] or *Pavlov*,[621] all of which originated in private claims. A common element in all these cases should be noted: they all impliedly assumed that the notion of 'undertaking' in a public and private enforcement setting was identical, quoting indistinctly public and private decisions.

In 2001, *Crehan* opened a new era in the private enforcement of Articles 101 and 102 TFEU, one founded on the 'full effectiveness' of these provisions. From this new perspective, Articles 101 and 102 should be read in a way that went beyond their literal confines to ensure that their implied aims were attained. In other words, their enforcement required not only that certain practices be prohibited but also that other remedies be ordered. As a result, damages claims should be allowed as a matter of EU law since the full effectiveness of these provisions

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[616] Judgment of 30 January 1974, BRT *v SABAM*, 127/73, ECLI:EU:C:1974:6, paras 15-16. By contrast, the (now expired) parallel provisions of the ECSC Treaty do not have direct effect, as confirmed by Judgment of 13 April 1994, Case C-182/92, *H. J. Banks & Co. Ltd v British Coal Corporation*, ECLI:EU:C:1994:13.

[617] Judgment of 12 July 1984, *Hydrotherm*, 170/83, ECLI:EU:C:1984:271.

[618] Judgment of 23 April 1991, *Höfner and Elser v Macrotron*, C-41/90, ECLI:EU:C:1991:161.

[619] Judgment of 17 February 1993, *Poucet and Pistre*, C 159/91 and C 160/91, ECLI:EU:C:1993:63.

[620] Judgment of 18 March 1997, *Diego Calì & Figli*, C-343/95, ECLI:EU:C:1997:160.

[621] Judgment of 12 September 2000, *Pavlov*, C-180/98, ECLI:EU:C:2000:428.

'would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition'.[622] In that respect, the importance of *Crehan* does not lie in its confirmation of the possibility of claiming damages, something already available and quite common in many EU countries at that time, but the determination that this right, and eventually others, would stem directly from EU law under the 'full effectiveness' paradigm.

That vein would be carefully mined in subsequent decisions. *Manfredi* confirmed that damages may be sought by any individual, even if not a party to an agreement, provided that there was a causal relationship for that harm.[623] *Kone*[624] relied on that logic to strengthen the rights of claimants by enabling them to pursue umbrella damages. *Pfleiderer*[625] and *Donau Chemie*[626] argued that the principle of effectiveness of Article 101 TFEU would limit measures by enforcement authorities to protect leniency applicants from disclosure if that hampered damages claims. And eventually that same paradigm would lead to the Court's judgment in *Skanska*,[627] where 'full effectiveness' was instrumental in establishing that the notion of 'undertaking' should be understood as an EU law concept in a context of succession.

The facts of *Skanska* were described when the case-law doctrine on succession was analysed.[628] It is sufficient here to recall that the case concerned a follow-on claim where a

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[622] Judgment of 20 September 2001, *Courage v Crehan*, C-453/99, ECLI:EU:C:2001:465 at 26.

[623] Judgment of 13 July 2006, *Vincenzo Manfredi et al v Lloyd Adriatico et al*, C-295-298/04, ECLI:EU:C:2006:461, para 62.

[624] Judgment of 5 June 2014, *Kone et al v ÖBB Infrastruktur*, C-557/12, ECLI:EU:C:2014:1317, 24-26

[625] Judgment of 14 June 2011 (Grand Chamber), *Pfleiderer*, C-360/09, ECLI:EU:C:2011:389, 24.

[626] Judgment of 6 June 2013, *Donau Chemie*, C-536/11, ECLI:EU:C:2013:366 at 27.

[627] Judgment of 14 March 2019, *Skanska*, C-724/17, ECLI:EU:C:2019:204. See generally on this decision Christian Kersting, 'Kartellrechtliche Haftung des Unternehmens nach Art. 101 AEUV – Folgerungen aus EuGH, Urt. v. 14.03.2019, C-724/17 – Skanska –', (2019) *Wirtschaft und Wettbewerb* 290. Revised and updated translation 'Private law liability of the undertaking pursuant to Art 101 TFEU' available at SSRN: https://ssrn.com/abstract=3439973; Tatiana Siakka, 'Case C-724/17 Vantaan kaupunki v Skanska Industrial Solutions: Transposition of the Concept of an 'Undertaking' into Civil Damages Actions' (2019) *Journal of European Competition Law & Practice* 1; Czsongor István Nagy, 'Has the time come to federalize private competition law? The autonomous concept of undertaking in the CJEU's ruling in Case C-724/17 Vantaa v. Skanska' (2019) 26 (5) *Maastricht Journal of European and Comparative Law* 720; Hans-Markus Wagener, 'Follow-up to Skanska – The 'Implementation' by National Courts So Far', (2019) 10 *Neue Zeitschrift für Kartellrecht*. Available at SSRN: https://ssrn.com/abstract=3455993 or http://dx.doi.org/10.2139/ssrn.3455993.

[628] Section 4.5.

divergence had emerged between the solution given in the public enforcement procedure, in which the national competition agency had applied the EU doctrine on economic continuity, and the subsequent private enforcement claim, where under local law only the legal entity that had caused the damage (and had been liquidated during the procedure) could be held liable.[629]

At first instance, the District Court took the view that Finnish liability law made obtaining compensation resulting from the infringement of EU law practically impossible or unreasonably difficult for the party who had suffered damage, and therefore applied the economic continuity test to the determination of liability for damage in the same way as for the imposition of fines on an effectiveness basis.[630] The Finnish Court of Appeal disagreed, holding that the economic continuity test could not be applied to actions for damages in the absence of detailed rules or more specific provisions under national law.[631] Following an appeal to the Supreme Court, a preliminary reference was sent to the CJEU. The questions sought to confirm whether the issue of the liable legal entity was to be determined under national or EU law, and the main consequences of each alternative, including the limitations that the principle of effectiveness would require if the matter were governed by national law.[632]

As will immediately be appreciated, if the Court wished to protect the claimants' rights, there were two options: either to accept that private enforcement was a matter for national law, corrected with the principles of equivalence and effectiveness (as the District Court had done at first instance), or to declare that the choice of the legal entity was a matter of EU law under the full effectiveness doctrine and therefore Articles 101 and 102 TFEU required the doctrine

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[629] As explained by the referring Court, in the case of legal persons it may have been possible to derogate from this rule by lifting the corporate veil, but it could not be applied to that case as there was no fraud or concealment.

[630] *Skanska*, at 12.

[631] Ibid, at 13. According to the facts as explained in AG Wahl's Opinion, the Court of Appeal declared the joint and several liability of the remaining companies. Given that the claimants were being fully compensated, the argument based on the principle of effectiveness looks rather severe. See Opinion of AG Wahl of 6 February 2019, C-724/17, *Vantaan Kaupunki v Skanska Industrial Solutions Oy and Others*, ECLI:EU:C:2019:100, paras 17-18.

[632] The Damages Directive (Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union OJ L 349/1) was not applicable to the case; in any event, as the Court noted, it does not provide a definition of the entities who may provide compensation. *Skanska*, para 34.

on succession - which had been created having in mind public enforcement purposes - to be followed in private enforcement situations. As proposed by AG Wahl, the Court opted for the latter, holding that the determination of the entity that is required to provide compensation for damage of an infringement of Article 101 TFEU is directly governed by EU law.[633] In that context it enshrined the notion of 'undertaking' as an 'autonomous concept of EU law' the scope of which was the same, regardless of whether the Commission applied it when imposing fines or in actions for damages resulting from an infringement of the competition rules.[634] The Court therefore linked the notion of undertaking in private enforcement cases to the criteria and standards developed over the years in the field of public enforcement, on the understanding that both serve essentially the same purpose: to strengthen the EU competition rules by discouraging their infringement.[635]

The above principles would be developed in *Sumal*.[636] This judgment has already been discussed in earlier chapters as well as in the immediately preceding section and therefore will only be looked at briefly here in terms of its contribution to the issue of private enforcement.

In this respect, *Sumal* is largely an offspring of *Skanska*. In the past, affiliate liability had been assumed to be a matter for national law, as *Provimi* and other cases decided by national courts show.[637] But following the declaration in *Skanska* that the determination of the legal entity that should make good cartel damages should be governed by EU law, that avenue had been closed.[638] Consequently, the Grand Chamber confirmed the solution in *Skanska* declaring that the choice of the legal entity should be determined by EU law only[639] and follow the same

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[633] *Skanska*, 28.

[634] *Skanska*, 47.

[635] *Skanska*, 44.

[636] Judgment of 6 October 2021 (Grand Chamber) *Sumal v Mercedes Benz Trucks España*, C-882/19, ECLI:EU:C:2021:800.

[637] See the discussion above on Provimi in section 4.2.2 above and the UK cases cited there. See also the cases cited by Carsten Koenig, 'Comparing Parent Company Liability in EU an US Competition Law' (2018) 41(1) *World Competition* 69 at fn. 26. See also Aqueel Kadri and Scott Campbell, 'Subsidiary liability—the Provimi point answered?', (2021) 12 *European Competition Law Review* 686.

[638] Oddly enough, AG Pitruzzella's opinion for the case suggested that the question before the Court may not be 'why downward liability exists in law' but rather 'whether there are logical reasons to discard it', presenting downward liability as a (national law based?) tool that EU law would tolerate under certain conditions, rather than an obligation. Opinion of AG Pitruzzella of 15 April 2021, *Sumal*, C-882/19, ECLI:EU:C:2021:293 at 52.

[639] *Sumal* at 34, 38 and especially 75, where the Court confirms that a different solution would contradict EU law.

logic as in public enforcement, including proclaiming the liability of the undertaking but not that of any legal entities which it may contain,[640] the 'automatic' nature of the joint and several liability of any entities that comprise the economic unit[641] and the communication of liability between the various entities in an economic unit.[642] At the same time, it upheld the legal entity-centric approach to procedural rights, acknowledging the rights of subsidiaries (not undertakings) to challenge rulings based on their forming part of an economic unit.[643] This latter recognition came, however, with the same limits as in public enforcement situations, such as those that prevent affiliates from disputing the facts found to exist in a decision that the affiliates themselves would have been unable to challenge (by analogy with *Versalis*[644]).

The identical nature of the notion of undertaking in public and private enforcement, and the consequence of this, namely that the identification of the legal entity that should respond in both situations should be based on EU law only and coincide for both areas, as per *Skanska* and *Sumal* [645] could be challenged. As discussed in the preceding section, the freedom to choose one or other legal entity in public enforcement is related to the discretionary powers of the Commission under Article 23 of Regulation 1/2003.[646] That logic is however absent from the choice of the entity that would respond in actions before the national courts. Actually, *Sumal* itself seems not to follow that approach by limiting that discretion to the specific case at hand, requiring the subsidiary that may face a claim following a public enforcement decision against its parent entity to sell the same products as its parent. It is too early to confirm whether this limitation is related to the different logic of private enforcement (and if so,

[640] Ibid at 42.

[641] Ibid at 44.

[642] Ibid at 48.

[643] Ibid at 53.

[644] Ibid at 49 and 59.

[645] *Skanska*, at 47, *Sumal* at 38.

[646] As *Sumal* itself notes, 'the Commission may freely choose to hold liable for an infringement, and to punish by the imposing [sic] a fine, any legal entity belonging to an undertaking that participated in an infringement of Article 101 TFEU.'

whether other limitations will emerge as case-law develops in this area) or derives from the nature of follow-on claims against subsidiaries.

6.3 The notion of undertaking and the exclusion from public tenders for breach of the competition rules

In recent times, a 'new kid on the block' has emerged in the catalogue of remedies for competition law breaches aimed at boosting deterrence: the exclusion from public tenders, a potential sanction which would be added to 'classic' public enforcement and private claims. While a detailed examination of this recent development is beyond the scope of this dissertation, the roles of the undertaking and legal entity deserve a mention here, complementing the outlook provided in earlier sections.

Briefly, the Procurement Directive[647] provides two competition law-related mechanisms which may result in a bidder being excluded from a procurement process. Its Article 57.4 (c) empowers the contracting authority, either of its own volition or when so required by the Member State in question, to exclude bidders 'where the contracting authority can demonstrate by appropriate means that the economic operator is guilty of grave professional misconduct, which renders its integrity questionable', a mechanism that, as Recital 101 of the Directive acknowledges and the Court has confirmed,[648] applies to findings of breach of the competition rules. Besides, paragraph (d) of that same provision empowers the authority to exclude a bidder 'where the contracting authority has sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition,' which seemingly targets activity that may be uncovered within a procurement process. These mechanisms have been recently explained in a Commission Notice 'on tools to fight collusion in public procurement and on guidance on how to apply the related exclusion ground' adopted on 18 March 2021[649] (hereinafter, the

[647] Directive 2014/24/EU of 26 February 2014 on public procurement, [2014] OJ L 94/65.

[648] Judgment of 18 December 2014, *Generali-Providencia Biztosító*, C-470/13, ECLI:EU:C:2014:2469 and Order of the Court of 4 June 2019, *CNS v Gruppo Torinese Trasporti*, C-425/18, ECLI:EU:C:2019:476.

[649] [2021] OJ C 91/1. For a criticism of the Notice, Albert Sánchez-Graells, 'First Thoughts on the Commission's Bid Rigging Exclusion Guidance -- What Difference Will It Make?', *Howtocrackanut*, blogpost of 22 March 2021.

'Procurement Notice') which has led to two references for a preliminary ruling, one of which has been responded already.[650]

The power to exclude bidders under these provisions (which, as the Court has explained, is exclusively the contracting authority's, which is not bound by the position taken by others[651]) is governed by the procurement rules. Importantly, these identify the entities to which these rules apply under the term 'economic operator', which is defined in Article 2.1 (10) of the Procurement Directive as follows:

> ' "economic operator" means any natural or legal person or public entity or group of such persons and/or entities, including any temporary association of undertakings, which offers the execution of works and/or a work, the supply of products or the provision of services on the market.'

As it will immediately be noticed, the provisions in question follow the legacy legal entity perspective, despite the fact that these remedies would apply to an infringement of competition rules. Since the 'economic operator' defined in procurement law does not correspond to the undertaking as understood under competition rules, the exclusion could apply to a particular affiliate of a group but not others, which makes no sense under competition law.

To make matters worse, the Procurement Notice treats these two notions as equivalent, confusingly and repeatedly declaring that Article 101 prohibits anticompetitive agreements between 'economic operators', while at the same time proclaiming that collusion between affiliated entities would be prohibited (which is true under procurement rules but initially not under Article 101 following *Ecoservice*,[652] as section 5.5 of the Procurement Notice itself recalls).

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[650] Judgment of 15 September 2022, *Omnibusunternehmen*, C-416/21, ECLI:EU:C:2022:689, confirming that the exclusion may cover practices other than Article 101 TFEU. The other reference is *Futrifer*, case C-66/22, pending at the time of writing.

[651] Judgment of 19 June 2019, *Meca Srl v Comune di Napoli*, C-41/18, ECLI:EU:C:2019:507 at 28 and Judgment of 3 October 2019, *Delta*, C-267/18, ECLI:EU:C:2019:826 at 27.

[652] Judgment of 17 May 2018, *Ecoservice*, C-531/16, ECLI:EU:C:2018:324. See the discussion in Section 4.1.3.

Leaving aside the careless drafting of the Notice, the regulation of exclusion sits uncomfortably between the competition and procurement rules, making it difficult to determine the principles that should be applied to resolve a given situation. That is particularly the case with respect to the entity that may bear the exclusion. While the breach of the competition rules will be attributable to an undertaking, the exclusion may only apply to the 'economic operator' concerned (that is, the legal entity submitting a bid), as candidly acknowledged in the last paragraph of the Notice.[653]

While this result is understandable from a public procurement standpoint, it is not hard to think of situations where that solution would be contrary to the purpose and goals of the competition rules. By way of example, it may be difficult to justify the differentiated treatment of two undertakings which have colluded by the mere fact that one of them happens to own a subsidiary that can file a separate or subsequent bid. That situation could be argued to run counter to the principle of the effectiveness of Articles 101 and 102 TFEU defined by the Court and summarised earlier in this chapter, which ultimately is aimed at preventing measures that shield infringers from liability.

6.4 Conclusions on the undertaking and the legal entity in the application of Articles 101 and 102

Despite the huge advances made in making the undertaking the only subject of the competition rules, the legal structure used by economic entities is legally relevant in several ways, with the Court seemingly unable to find a safe passage between the Scylla of the economic unit (the six headed sea monster Odysseus was advised to pass by) and the Charybdis of the legal entity paradigm (a mythical whirlpool allowing no escape in the quest to put substance over form). Several points may be made in this respect:

First, at the risk of stating the obvious, legal entities (and not 'undertakings') are relevant for public enforcement purposes. In the end, a 'person' must pay the fine or damages for the loss

[653] 'Lastly, exclusion decisions on grounds of collusion refer only to the economic operator found to have colluded and not to other economic operators in some way affiliated to that operator (such as mother companies, other companies belonging to the same group or subsidiaries of the excluded companies) and which were not involved in the given award procedures.'

caused. It could be argued that the need for there to be legal entities should only exist at the enforcement stage, and that a decision could be validly adopted against an undertaking, without specifying a legal entity. Leaving aside the formal point of Articles 288 and 289 of the Treaty, in the end that is not the position that the Court has reached, and for good reasons. The lack of identification would have to be sorted at the enforcement stage anyway. However, that choice arguably questions the perspective that undertakings are the 'true and only' subject of the competition rules and the entities to which the principle of personality refers to.[654]

Second, legal entities are relevant for procedural reasons, where they carry out the function referred to above as a 'letterbox'. As the Court has repeatedly declared, the identification of a legal entity is not only a requirement for the valid adoption of a decision, but also for certain procedural acts and especially the notification of the SO.

It is hard to argue against the logic of that perspective: if a decision is to be enforced and the law grants a right to be heard in favour of the entity against which enforcement is to be made, those which the law identifies as bearing its burden (the legal entities) should possess that right. Since enforcement falls on legal entities, it is those entities that must possess the procedural rights. That is the main lesson in *ARBED*. That said, this logic allows some flexibility, as cases such as *Versalis* (where the Court rejected that the legal entity suffering the consequences of recidivism must have participated in the enforcement procedure leading to the decision) show. That additional flexibility should not be expected to go so far as to disconnect legal entities from enforcement procedures: decisions will likely still be addressed to legal persons and not to loosely defined economic entities, with the result that the prevailing legal entity perspective in the area of procedural rights is likely to be maintained.

A third point to be made is more disturbing: the legal structure of the undertaking affects the contents of the obligations of legal entities, betraying the logic underlying *Höfner* and its progeny. The selection of one or other entity may affect the level of the fines, the

[654] In the words of Carsten Koenig, '(t)he case law fluctuates between the Courts' efforts to maintain their strong focus on the economic unit as the actual perpetrator, while at the same time doing justice to the individual addressees of the decision imposing the fines' (Carsten Koenig, 'The Boundaries of the Firm and the Reach of Competition Law: Corporate Group Liability and Sanctioning in the EU and the US', in Marco Corradi and Julian Nowag (eds), *The Intersections between Competition Law and Corporate Law and Finance*, Cambridge University Press, 2021, at 15).

communication of liability and other effects including those of limitation periods, where a legal entity perspective seems to hold sway. While the most recent case law - especially *Akzo II* – has moved away from the legal entity perspective by dismissing the 'derivative' nature of parental liability, the economic entity paradigm still looks as being hostage to the legal entity-centric perspective.

Fourth, the recent decisions in *Skanska* and *Sumal* have clarified that the notion of undertaking is defined by EU law only and, especially, that its meaning in private and public enforcement is the same. It is, however, unclear what this means, since a discretionary choice of the legal entities that would bear the brunt of any liability makes sense in public enforcement but arguably not in private enforcement. *Sumal* itself seems to have squared the legal entity perspective and the notion of undertaking through mandating a series of 'links' that ultimately limit that discretionary choice. Since it is a recent decision, its consequences for future cases will require due reflection.

Lastly, new enforcement mechanisms for competition law breaches in the procurement law area confusingly depart from the notion of undertaking. It is to be expected that the Court will eventually clarify whether, and for what purpose, the notion of undertaking may play a role in these situations too, perhaps when addressing the upcoming preliminary ruling in *Futrifer*.[655] In any event, and as also discussed in section 4.4. of this thesis, procurement rules appear to follow a marked legal entity approach in which the Court has recognised the independence of offers by affiliates, a logic that markedly diverges with that followed in the field of competition, consolidating the exceptionality of competition rules in their treatment of economic players as addressees of legal mandates.

[655] See reference above at fn 650.

PART 7 – CONCLUSIONS

Under the prevailing enforcement model, rights and obligations are attributed to persons, a concept that identifies individuals and legal entities. This perspective is exceptionally challenged through theoretical constructions such as piercing the corporate veil, economic unit or enterprise doctrine where the legal entity paradigm may cause severe distortions but remains the dominant perspective.

The notion of undertaking in the field of EU competition law seeks to place economic players or firms, here understood as 'a social phenomenon outside of the law',[656] as the true addressees of its mandates. As with the constructions recalled above, its goal is to overcome the anomalies resulting from the interposition of legal entities between the firms and their actions, ensuring that economic players are treated regardless of their legal clothing. This presupposes not only the intuition that a real entity exists behind the legal vehicle, but that there is a divergence between economic actors and legal entities that needs to be corrected.

Legal entities should be understood as tools placed at the disposal of economic players to conduct business. That concession includes three essential features: legal impersonation, the capacity to shield assets from liability, and the possibility for a person to control multiple vehicles. The first tool provides a centre of attribution separate from the true entity, the second limits enforcement to that vehicle and the third provides a power to own multiple such legal entities. Since enforcement is directed against these legal vehicles, it is affected by the above features. That is, in essence, the source of the anomaly against which the notion of undertaking reacts.

EU competition law is well placed to implement a potent challenge against the legacy imputation model labelled in this dissertation as the 'legal entity' perspective, correcting these anomalies. That is being attempted through the erection of an alternative attribution paradigm aimed at identifying economic players as 'undertakings' and placing them as addressees of these norms.

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[656] Eva Micheler, *Company Law: A Real Entity Theory*. Cambridge, 2021, at 1.

That process is facilitated by the nature of competition law, an area prone to looking through legal entities to examine economic realities and naturally inclined to pursue an economic entity perspective. In the case of EU law, this is coupled by its power to create EU law notions, which stand above national legal categories given the principle of primacy. This provides EU competition law with the tools needed to support an alternative model of attribution that looks directly at firms rather than legal entities.

This function of the notion of undertaking was not born out of the ECSC Treaty in 1951 or even the EEC Treaty in 1957. The term used in these texts was read by the Court as meaning an economic player with separate legal personality, choosing a legal entity perspective at a time where certainty and predictability were key. Leaving aside some isolated pronouncements (such as *CRAM*[657] or *Hydrotherm*[658]), it would only be after *Höfner*[659] that the Court really undertook the task to erect an EU notion of the undertaking in the field of competition law, which was built over a broad single economic entity paradigm.

Several factors, especially the enactment of the Merger Regulation and the fight against international cartels, led the Court in the 1990s to progressively replace the above paradigm with an incipient doctrine of the undertaking. That truly historic process required multiple steps after the initial formulation in *Höfner*. To name just some that are especially salient, *Dansk Rørindustri*[660] abandoned the link between the undertaking and a specific legal entity. *CEES*[661] hammered down its application to groups of companies. *ETI* [662] declared that the

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[657] Judgment of 28 March 1984, *Compagnie Royale Asturienne des Mines SA and Rheinzink GmbH v Commission*, 29 and 30/83, ECLI:EU:C:1984:130 at 8 (summarising the position of the Commission rather than the Courts' own).

[658] Judgment of 12 July 1984, *Hydrotherm*, 170/83, ECLI:EU:C:1984:271 at 11.

[659] Judgment of 23 April 1991, *Höfner and Elser v Macrotron*, C-41/90, ECLI:EU:C:1991:161, para. 21. This definition would eventually find its way into legislative texts such as Art. 1 of Protocol 22 of the EEA Agreement and Article 2.1 (10) of Directive (EU) 2019/1 empowering national competition authorities (ECN+ Directive) [2019] OJ L 11/3.

[660] See Judgment of 28 June 2005 (Grand Chamber), *Dansk Rørindustri v Commission*, C-189/02, ECLI:EU:C:2005:408, at 101-113. The necessity of legal personality for public undertakings had been dismissed earlier in the *Italian Tobacco* case. See Judgment of 16 June 1987, *Commission v Italy*, 118/85, ECLI:EU:C:1987:283, at 11.

[661] Judgment of 14 December 2006, *Confederación Española de Empresarios de Estaciones de Servicio v Compañía Española de Petróleos SA*, C-217/05, ECLI:EU:C:2006:784, at 40.

[662] Judgment of 11 December 2007 (Grand Chamber), *ETI and Others v Autorità Garante della Concorrenza e del Mercato*, C-280/06. ECCLI:EU:C:2007:775.

principle of personality applied to the undertaking and not to legal entities. *Akzo I*[663] articulated the very famous presumption of exercise of control and confirmed the relevance of legal entities as addressees of the statement of objections and the decision. *Akzo II*[664] clarified that parental liability would not derive from that of the subsidiaries. More recently, *Sumal*[665] has recently opened the door for subsidiary liability and inaugurated an era where the specific activity pursued by each entity becomes very relevant, opening the door to identifying several economic units in a group of companies.

The enumeration of these cases serves as a reminder of the fact that the meaning of the notion is a historic product that has been changing and is still debated, making it difficult to affirm the existence of a definitive concept. It also helps to realise some of the difficulties that placing economic entities as addressees of competition rules must confront.

This dissertation does not question the rationale for a single entity doctrine in competition law, a process that is assumed as partly a necessity and partly a policy choice taken by the CJEU. Its goal is rather to understand its challenges and implications, following a detailed analysis of the pronouncements of the Court, testing its consistency and capacity to achieve its underlying aim which is to hold firms accountable in this specific area of law.

The investigation has exposed that the notion of undertaking has been used in support of a panoply of goals, including parental liability, the exclusion of agreements within economic units from the prohibition in Article 101, calculating fines under a consolidated perspective, and ensuring that corporate restructuring did not allow escaping enforcement, to name the most relevant ones. While arguably all these goals could have been pursued without a common theory of the undertaking, a unified notion would have provided a structured framework and provide answers for novel questions, especially if it coincided with the concept used in merger control. That has resulted in the assumption that all these uses could be based on a single notion of undertaking.

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[663] Judgment of 10 September 2009, Akzo Nobel and Others v Commission, C-97/08 P, ECLI:EU:C:2009:536.

[664] Judgment of 27 April 2017, *Akzo Nobel NV and Others v Commission*, C-516/15 P, ECLI:EU:C:2017:314.

[665] Judgment of 6 October 2021 (Grand Chamber) *Sumal v Mercedes Benz Trucks España*, C-882/19, ECLI:EU:C:2021:800. See discussion at section 4.2.2.

One of the conclusions from the examination is that the unity of the notion through its varied uses, present in early in case-law since *ICI*[666] all the way through the recent Opinion of AG Rantos in *Unilever*[667] and expressed with the words 'in the context of competition law' in *Höfner*, is under challenge. Examples of that are the treatment of joint ventures in the Merger Regulation and the approach on parental liability in *Du Pont* and *Dow*,[668] the configuration of SOEs, and the treatment of conglomerate groups in the context of affiliate liability. These exceptions are telling of the difficulty of meeting the multiple goals pursued by each use of the notion under the common roof of an all-encompassing notion and place the Court at a crossroads: Should it bow to the divergent logic of each use and sacrifice the dream of a unitary concept, or stop the bleeding and bet on a consistent notion, correcting the divergences? And if the latter, should it be erected on the mere existence of control or, as suggested by *Sumal* and its 'procrustean' perspective, should conglomerate groups should be sliced into several entities, one for each economic activity, despite unity of control?

There is no question that a common notion of undertaking presents clear advantages – the historic process of replacing legal entities with firms as addressees of the law is complicated enough to add the need to wrestle with multiple concepts of undertaking depending on their use. That process would gain additional consistency if the EU law legislature joined forces and aligned the meaning of the various inconsistent realities labelled as 'undertakings' in instruments such as the Accounts Directive,[669] the Directive on Transfers of Undertakings[670] or the Directive on Workers' Councils.[671] Consideration should also be given to better coordinating the rules on public procurement and especially addressing the terminology divergence between undertakings and 'economic operators', as discussed in section 6.3 of this

[666] Judgment of 14 July 1972, *Imperial Chemical Industries Ltd. v Commission*, 48/69, ECLI:EU:C:1972:70, paras. 132-137.

[667] Opinion of AG Rantos of 14 July 2022, ECLI:EU:C:2022:586, at 34, discussing imputation and the intragroup exemption as being linked.

[668] Judgments of 26 September 2013, *EI du Pont de Nemours v Commission*, C-172/12 P, ECLI:EU:C:2013:601 at 47 and of the same date, *Dow Chemical v Commission*, C-179/12 P, ECLI:EU:C:2013:605 at 58.

[669] Directive 2013/34/EU on Annual Accounts, [2013] OJ L 182/19.

[670] Directive 2001/23/EC on Transfers of Undertakings [2001] OJ L 82/6.

[671] Directive 2009/38/EC on European Works Councils [2009] OJ L 122/28.

thesis, given the proximity of the matter. That would, besides further consistency, provide additional legitimacy to the process.

It is tempting to consider what should the Court do to progress the law in this area. Some would argue that it should go back to a traditional legal entity paradigm, restore the principle of personality as initially understood by it as applying to persons and not to economic groups, without prejudice to recurring to single entity constructions in specific cases. Parental liability could then be structured under a traditional paradigm and be excluded if the controlling entity proved no fault. The intragroup exemption could be formulated as it has under US antitrust law, which never required a notion of undertaking.

That would in my view be both incorrect and unlikely. Competition rules need to look at economic realities and not be taken hostage by legal form. EU competition law has the capacity and incentives to push the law of firms further. And it is in any event late to ask for the clock to be turned back. In the foreseeable future this trend is set to continue, probably alongside a broader tendency of other laws and courts seeking to place reality before formality.

That said, and for the benefit of the theory of the undertaking, it is worth considering returning to a unitary definition of the notion, if possible common to Articles 101 and 102 and merger control, eventually correcting the course on defining multiple firms in a group of companies. Improving rulemaking on the calculation of fines and the above suggested harmonisation with similar concepts in other areas of law would also greatly help.

Leaving aside the unity of the notion across its many uses, the examination has also shown that the doctrine of the single economic unit has not resulted in a complete disregard of legal entities as centres of attribution, but in a dual enforcement model which looks both at the undertaking and the legal entity. In short, an economic entity is identified when examining a conduct or a transaction, but enforcement is made against one or several specific legal entity or entities. While hardly surprising, this reveals an unwelcome divergence between the language used by the Courts and the realities of law in action, a confusion that should be somehow addressed by the Courts.

The fact that enforcement should finally made against a legal entity suggests that these vehicles carry out a ‘letterbox’ function. However, as it has also been shown, the identification of legal entities may affect the content of an enforcement decision. By way of example, enforcement does not appear possible against a legal entity for which time limits have expired. It does not either appear possible to use for the calculation of the fine a turnover of a parent entity unless it has been called to the procedure. Recidivism is also applied on separate legal entities distinctly. The recent decision in *Sumal* is also telling of the different consequences of enforcement being addressed at disparate affiliates of a group of companies. Furthermore, since the Commission, as the Courts have acknowledged on multiple occasions, has a wide discretion in the choice of the legal entity for enforcement purposes, the impact of a decision in several respects (not least the level of the fine that may be levied) could vary because of that choice. All this questions the pledge in *Höfner* that the legal structures should not impact the contents of obligations based on competition law.

In the end, replacing the legacy and prevailing legal entity perspective with an alternative attribution model that would look directly at economic players was always bound to be a very tall order, and the ‘economic entity’ perspective represented by the theory of the undertaking as applied in EU competition law will not replace the ‘legal entity’ approach anytime soon. It is however to be expected that enforcement agencies, with the support of the Court, will continue applying the notion in parallel to legal entities, seeking a balance between looking at economic players comprehensively when applying competition law, ignoring the contradictions that come along with it and respecting the legal separation stemming from company law.

As the sorely missed AG Ruiz-Jarabo Colomer once noted, with reference to the CJEU’s incline in certain areas,

> ‘According to a Latin American jurist, there are three kinds of judge: the artisan, a veritable automaton who, using only his hands, produces mass judgments in industrial quantities, without lowering himself to consider the human aspects or the social order; the craftsman, who uses his hands and his brain, using traditional interpretative methods, which inevitably lead him merely to represent the legislature’s intention; and

> the artist, who, using his hands, his head and his heart, broadens the horizon for citizens, without losing sight of reality or of specific circumstances.
>
> Although they are all needed in the fulfilment of the judicial function, the Court of Justice, in the exercise of its proper role, has always identified itself with the last kind, especially now that the constant evolution of the ideas which inspired the creation of the Community has slowed down.'[672]

The notion of undertaking in competition law represents one of those areas where the Court may not only be progressing the law with their hands and its brain, but also with its heart, broadening the horizon in an area where new solutions are needed in what is, in the end, an extraordinarily significant process of law in formation: ensuring that EU competition rules are applied to economic players, regardless of legal form.

[672] Opinion of 20 March 2007, *Rhiannon Morgan*, C-11-12/06, ECLI:EU:C:2007:174, 1-2 (with reference to freedom of movement).

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