Reports of Cases

OPINION OF ADVOCATE GENERAL
PITRUZZELLA
delivered on 15 April 2021 [1]

Case C-882/19

Sumal, S.L.
v
Mercedes Benz Trucks España, S.L.

(Request for a preliminary ruling from the Audiencia Provincial de Barcelona (Provincial Court, Barcelona, Spain))

(Reference for a preliminary ruling – Competition – Undertaking – Concept – Economic unit – Action for compensation brought against the subsidiary of a company sanctioned by the Commission for an infringement of Article 101 TFEU – Admissibility – Conditions)

1. In the request for a preliminary ruling which is the subject of the present Opinion, the Court is asked to clarify whether civil liability for the harm caused by an anticompetitive practice can be claimed, by the person alleged to have suffered it, against the subsidiary of the company which engaged in that practice and which was, for that reason, penalised by the Commission by a decision that does not include the subsidiary, in the case where those companies form an 'economic unit'.

2. The economic unit theory is well established in the case-law of the Court of Justice and the General Court, in which it has been used to penalise the parent company for the anticompetitive conduct of its subsidiaries by means of a 'bottom-up' process from the subsidiaries to the parent company. In the case brought before the Court of Justice by the referring court, the question is whether that concept of 'economic unit' can justify a 'top-down' process for imputing liability, as a result of which the subsidiary is liable for the harm caused by the anticompetitive conduct of the parent company.

3. The request for a preliminary ruling has been made in the context of a dispute between Sumal SL and Mercedes Benz Trucks España SL ('MBTE') relating to compensation for damage allegedly suffered by Sumal as a result of MBTE's parent company, Daimler AG, being part of a cartel in breach of Article 101 TFEU.

[1] Original language: Italian.

I. The facts of the dispute in the main proceedings, the questions referred for a preliminary ruling and the procedure before the Court

4. Between 1997 and 1999, Sumal, the appellant in the main proceedings, leased two Daimler trucks from MBTE, the respondent in the main proceedings, through the dealership Stern Motor SL.

5. On 19 July 2016, the European Commission adopted Decision C(2016)4673 final relating to a proceeding under Article 101 TFEU and Article 53 of the EEA Agreement [2] ('the 2016 Decision'), in which it found that there had been a single and continuous infringement of Article 101 TFEU and of Article 53 of the EEA Agreement consisting, inter alia, of collusive arrangements among leading truck manufacturers, including Daimler, on pricing and gross price increases in the EEA for trucks, which took place, in the case of Daimler, between 17 January 1997 and 18 January 2011.

6. Sumal brought an action for damages against MBTE before the Juzgado de lo Mercantil n.º 7 de Barcelona (Commercial Court No 7, Barcelona, Spain), seeking payment of the sum of EUR 22 204.35 for the damage resulting from the infringement of competition rules established by the 2016 Decision, for which it holds MBTE liable as a subsidiary of Daimler. MBTE opposed the application on the ground, inter alia, that it lacked capacity to be made a defendant since only Daimler – which had a separate legal personality – could be considered liable for the unlawful act.

7. By judgment of 23 January 2019, the Juzgado de lo Mercantil n.º 7 de Barcelona (Commercial Court No 7, Barcelona) dismissed the action, finding that MBTE lacked capacity to be a defendant by virtue of the fact that Daimler was the only legal entity affected by the administrative proceedings initiated by the Commission and resulting in the imposition of a penalty with regard to the cartel on which Sumal's claims for damages were based.

8. Sumal appealed against the judgment of the Juzgado de lo Mercantil n.º 7 de Barcelona (Commercial Court No 7, Barcelona) to the Audiencia Provincial de Barcelona (Provincial Court, Barcelona, Spain), the referring court. That court notes that the Court of Justice has not yet ruled on the question of whether an action for damages on the basis of a decision finding an infringement of competition rules, adopted by the Commission or by a national competition authority, can be brought against a company not involved in that decision but wholly owned by the company which, in that decision, is identified as the perpetrator of the infringement. It points out that national case-law diverges on this point. Some Spanish courts recognise this possibility in accordance with the 'economic unit theory', while others reject it on the basis that that theory, although it allows civil liability for the anticompetitive conduct of a subsidiary to be attributed to the parent company, does not allow that process to be reversed given the absence of control by the subsidiary over its parent company.

9. In those circumstances, the Audiencia Provincial de Barcelona (Provincial Court, Barcelona) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'Does the doctrine of the single economic unit developed by the Court of Justice provide grounds for extending liability from the parent company to the subsidiary, or does the doctrine apply solely in order to extend liability from subsidiaries to the parent company?

[2] Case AT.39824 – Trucks. A summary of that decision is published in the *Official Journal of the European Union* (OJ 2017 C 108, p. 6).

In the context of *intra*-group relationships, should the concept of single economic unit be extended solely on the basis of issues of control, or can it also be extended on the basis of other criteria, including the possibility that the subsidiary may have benefited from the infringing acts?

If it is possible to extend liability from the parent company to the subsidiary, what would be required in order for it to be possible?

If the answers to the earlier questions support the extension of subsidiaries' liability to cover acts of the parent company, would a provision of national law such as Article [71(2) of the Ley 15/2007 de Defensa de la Competencia (Law 15/2007 on the Protection of Competition; "the LDC") [3]] which provides only for the liability incurred by the subsidiary to be extended to the parent company, and then only where the parent company exercises control over the subsidiary, be compatible with that position of the Court of Justice?'

10. MBTE, the Italian and Spanish Governments and the Commission submitted written observations in these proceeding pursuant to Article 23 of the Statute of the Court of Justice. As a measure of organisation of procedure within the meaning of Article 61(1) of the Rules of Procedure of the Court of Justice, the Court invited the parties to the main proceedings and the interested parties within the meaning of Article 23 of the Statute of the Court of Justice to reply in writing to specific questions. Sumal, MBTE, the Spanish Government and the Commission followed up on that measure. The Court also decided to waive the hearing originally scheduled for 1 December 2020 and to put further questions to the parties and to the interested parties for a written reply. Sumal, MBTE, the Spanish and Italian Governments and the Commission replied to those questions.

II. Analysis

A. Admissibility of the request for a preliminary ruling

11. MBTE argues that the request for a preliminary ruling is inadmissible on two grounds.

12. In the first place, it submits, the order for reference does not meet the requirements of Article 94 of the Rules of Procedure of the Court of Justice, since it contains neither a summary of the relevant findings of fact as determined by the referring court, nor an account of the facts on which the questions referred for a preliminary ruling are based, but merely reproduces the facts as alleged by the parties to the main proceedings. Lastly, the order for reference provides a vague, partial and inaccurate picture of the relevant national case-law. [4]

13. The Court has consistently held that the need to provide an interpretation of EU law which will be of use to the national court makes it necessary that the national court define the factual and legal context of the questions it is asking or, at the very least, explain the factual circumstances on which those questions are based. Those requirements are of particular importance in the area of competition, in which the factual and legal situations are often

[3] Law of 3 July 2007 (BOE No 159 of 4 July 2007, p. 28848).

[4] According to MBTE, contrary to what is stated in the request for a preliminary ruling, there is no diverging case-law in Spain on the question of a subsidiary's liability for anticompetitive offences committed by its parent company. Further, the lack of capacity of a Daimler subsidiary not mentioned in the 2016 Decision to be a defendant in an action for damages based on that decision was recognised only by the Juzgado de lo Mercantil n.º 3 de Valencia (Commercial Court No 3,Valencia, Spain), by decisions which were, moreover, set aside on appeal.

complex.[5] In the present case, contrary to MBTE's contention, the description given in the order for reference of the factual background to the dispute in the main proceedings is sufficient to explain the reasons that led the referring court to formulate the first three questions referred for a preliminary ruling and to enable the Court to understand their scope. Moreover, that description allowed the parties and the interested parties under Article 23 of the Statute of the Court of Justice to submit written observations on those questions.

14. Conversely, the argument as to the fourth question referred for a preliminary ruling is a different matter. First, as MBTE stated in the first ground of inadmissibility of the request for a preliminary ruling, the content of Article 71(2) of the LDC – which is, moreover, extrapolated from its systemic context – is reproduced briefly only when the fourth question referred for a preliminary ruling is formulated.[6] The order for reference gives no indication either of the referring court's interpretation of that provision or of the reasons why it considers that provision to be incompatible with an interpretation of EU law that allows an action for damages to be brought against the subsidiary for the anticompetitive conduct of the parent company.[7]

15. In those circumstances, the plea of inadmissibility raised by MBTE on the ground of failure to comply with the requirements of Article 94 of the Rules of Procedure of the Court of Justice must, in my view, be rejected in respect of the first three questions referred for a preliminary ruling and upheld in respect of the fourth question referred.

16. In the second place, MBTE submits that the questions referred for a preliminary ruling by the Audiencia Provincial de Barcelona (Provincial Court, Barcelona) are purely hypothetical. It argues that the first three questions have no bearing on the facts of the main proceedings, since Sumal has neither relied on nor proved circumstances that justify the extension to MBTE of liability for the offences committed by Daimler, but bases its action solely on the 2016 Decision.

17. In that regard, it should be recalled that it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions put by national courts concern the interpretation of a provision of EU law, the Court is, in principle, bound to give a ruling. It follows that questions relating to EU law enjoy a presumption of relevance. The Court may refuse to give a ruling on a question referred by a national court only where it seems quite

5 See, inter alia, judgment of 5 March 2019, *Eesti Pagar* (C-349/17, EU:C:2019:172, paragraph 49).

6 The text of Article 71(1) and (2) of the LDC, introduced into that legislation for the purpose of transposing 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 2014 L 349, p. 1), is reproduced in the observations of the Spanish Government. Paragraph 1 of that article provides that 'anyone infringing competition law shall be liable for the damage and losses caused'. Paragraph 2(a) specifies that 'infringement of competition law shall mean any infringement of Articles 101 or 102 TFEU or Articles 1 or 2 of this law', while subparagraph (b) provides that 'the shares of a company may also be allocated to the companies or persons controlling it, except where its financial conduct is not influenced by any of them'.

7 The referring court also fails to point out that, in its current version, Article 71(2) of the LDC is the result of an amendment introduced by Real Decreto-ley 9/2017 of 26 May 2017 (BOE No 126 of 27 May 2017, p. 42820). To the extent that that provision is clearly substantive and not merely procedural, one might wonder whether, as MBTE states in the second ground of inadmissibility of the request for a preliminary ruling, in accordance with Article 22(1) of Directive 2014/104, according to which national measures transposing substantive provisions of that directive should not apply retroactively, it applies to an action such as the one pending in the main proceedings, which, although it was brought after the entry into force of that directive, nevertheless relates to facts dating back to the period before its adoption and entry into force. In that regard, I note that a question referred for a preliminary ruling concerning, inter alia, the interpretation of the term 'retroactively' in Article 22(1) of Directive 2014/104 with regard to the provisions transposing that directive into Spanish law is currently before the Court in the pending Case C-267/20. On the scope of the temporal application of Directive 2014/104, see, in general, judgment of 28 March 2019, *Cogeco Communications* (C-637/17, EU:C:2019:263, paragraphs 24 to 34), and Opinion of Advocate General Kokott in that case (C-637/17, EU:C:2019:32, points 60 to 64).

obvious that the interpretation of a rule of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to provide a useful answer to the questions submitted to it. [8]

18. In the present case, it should be noted that the first three questions referred for a preliminary ruling concern the admissibility, under EU law, of an action for damages such as that brought by Sumal against MBTE and directed, not against the company penalised by the Commission for infringing EU competition rules, but against the subsidiary which was not the subject of the decision finding that infringement. The fact that, as MBTE submits, Sumal merely relied on the 2016 Decision in order to allege that MBTE was liable for damages resulting from the anticompetitive conduct of its parent company is immaterial, since it is a question of assessing the admissibility of the questions referred for a preliminary ruling, precisely because they seek clarification from the Court as to whether such liability exists, and if so, then in what circumstances. [9] The plea of inadmissibility of the first three questions referred for a preliminary ruling based on their alleged hypothetical nature must therefore, in my view, be rejected.

B. The first, second and third questions referred for a preliminary ruling

19. By its first three questions referred for a preliminary ruling, which should be examined jointly, the referring court essentially asks the Court whether a subsidiary can be held liable for an infringement of the EU antitrust rules committed by its parent company in application of the concept of 'economic unit' and, if so, in what circumstances such liability may be recognised.

20. As we have seen, those questions are raised in the context of a 'follow-on' action for damages – that is, an action seeking compensation for the harm caused by an infringement of antitrust rules previously established by a national or European competition authority. In this case, that determination is contained in the 2016 Decision. The applicant in the main proceedings brought an action against MBTE, the customer of the other party to its contract, in connection with the sale of trucks which took place during the period of operation of the cartel sanctioned by the 2016 Decision, on the grounds that it had been harmed by the price increase caused by the cartel, which resulted in MBTE charging a 20% premium on that sale. The action brought by Sumal appears to be based solely on the assumption that MBTE's parent company was involved in the cartel, as found by the Commission in the 2016 Decision.

21. MBTE principally argues that, taking into account the nature of the action brought against it by Sumal, to interpret the economic unit theory in such a way as to extend Daimler's liability to it would be contrary to Article 16(1) of Regulation No 1/2003. [10] In the alternative, it submits that the economic unit theory does not permit an extension of top-down liability, as suggested by the referring court. By contrast, Sumal and the Italian and Spanish Governments propose that the Court should adopt a broad interpretation of the economic unit theory, recognising, in certain circumstances, the subsidiary's liability for the damage resulting from the infringement of EU competition rules by the parent company. The Commission initially argued that, in the context of the public enforcement of antitrust rules, in principle it is not possible, as the case-law currently

[8] See, inter alia, judgment of 3 September 2020, *Vivendi* (C-719/18, EU:C:2020:627, paragraphs 32 and 33 and the case-law cited).

[9] All the other conditions for Sumal's action cited by MBTE, particularly concerning the existence of the alleged damage and its extent, must be determined by the national court.

[10] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1).

stands, to extend to the subsidiary liability for infringements committed by the parent company, since the subsidiary has no decisive influence over the parent company's conduct on the market. However, it recognises that the victim of anticompetitive practices carried out by the parent company may bring an action for damages against one of the subsidiaries, in the event of succession between undertakings or restructuring, where there is economic continuity between the two parties, or, in the conditions envisaged by the applicable national law, where the parent company responsible does not have sufficient assets to meet the applicant's claims for damages. In its replies to the questions asked by the Court, the Commission altered its position somewhat, suggesting that the answer to the first three questions referred for a preliminary ruling should be that Article 101 TFEU does not preclude the unlawful conduct of the parent company from being imputed to the subsidiary in the case where the two companies are part of the same undertaking and the national court finds that the conduct of the subsidiary is linked to a constituent element of the infringement or, in any event, where the two companies are part of the same undertaking and it is impossible or excessively difficult for the injured parties to obtain full compensation directly from the parent company for the harm suffered.

22. Notwithstanding the unprecedented nature of the questions referred for a preliminary ruling by the Audiencia Provincial de Barcelona (Provincial Court, Barcelona), I believe that they can be resolved by following the guidance contained in the case-law on the concept of 'economic unit'. We must therefore begin with an examination of that case-law.

1. The concept of undertaking in EU competition law and the 'economic unit theory'

23. In EU law, the concept of 'undertaking' has a meaning and scope defined by the legislative framework and the various objectives pursued by that legislation. In competition law, there are two aspects to the functional nature of the concept of 'undertaking'.

24. In the first place, as pointed out by Advocate General Jacobs in his Opinion in Joined Cases *AOK Bundesverband and Others*, that concept 'focuses on the type of activity performed rather than on the characteristics of the actors which perform it'.[11] Competition consists of and is influenced by economic activities. Therefore, the right to protect it can be fully effective only if its rules and prohibitions apply to economic entities. For this reason, Articles 101 and 102 TFEU refer in general terms to 'undertakings', omitting any mention of their legal structure. Provided that an activity is of an economic character, those engaged in it will be subject to the provisions of those articles, regardless of the legal status of the entity and the way in which it is financed in a given Member State.[12]

25. In the second place, the classification of an activity as economic – and therefore of an entity as an undertaking – for the purposes of the application of competition law depends on the context examined.[13] Similarly, the identification of the entities within the scope of the undertaking depends on the subject matter of the contested infringement.[14]

[11] C-264/01, C-306/01, C-354/01 and C-355/01, EU:C:2003:304, point 25.

[12] See, inter alia, judgments of 23 April 1991, *Höfner and Elser* (C-41/90, EU:C:1991:161, paragraph 21); of 17 February 1993, *Poucet and Pistre* (C-159/91 and C-160/91, EU:C:1993:63, paragraph 17); of 22 January 2002, *Cisal* (C-218/00, EU:C:2002:36, paragraph 22); and of 1 July 2008, *MOTOE* (C-49/07, EU:C:2008:376, paragraph 21).

[13] See, for example, judgment of 1 July 2008, *MOTOE* (C-49/07, EU:C:2008:376, paragraph 25).

[14] See, for example, judgment of 6 March 1974, *Istituto Chemioterapico Italiano and Commercial Solvents* v *Commission* (6/73 and 7/73, EU:C:1974:18, paragraph 41), in which the concept of undertaking, for the purposes of the application of Article 102 TFEU, was applied only to the action that the two accused companies had brought jointly against a third company which they supplied; see also judgment of 12 July 1984, *Hydrotherm Gerätebau* (170/83, EU:C:1984:271, paragraph 11), in which the Court held that, in competition law, the concept of undertaking 'must be understood as designating an economic unit for the purpose of the subject matter of the agreement'.

26. Given the functional nature of the concept of 'undertaking' adopted by the case-law and the irrelevance of the legal status of the entity engaging in the economic activity, several legally independent entities may be considered part of a single undertaking if they act as a single 'economic unit' in the market.

27. The 'economic unit' theory was developed in the 1970s and used by the Court both to exclude intra-group agreements from the scope of the prohibition laid down in the current Article 101 TFEU, [15] and to impute, within a group of companies, the anticompetitive conduct of a subsidiary to the parent company, initially in situations where the Commission's jurisdiction to sanction the parent company was contested, since it had not acted directly within the European Union.

28. In its judgment of 14 July 1972, *Imperial Chemical Industries* v *Commission* [16] ('*ICI*'), the Court upheld the decision by which the Commission had penalised the holding company of the ICI group established outside the European Union which, by making use of its power to control its subsidiaries established within the European Union, was able to ensure that the price increases decided on in the context of a concerted practice, in which it alone had participated, were implemented. [17] To ICI's objection that the infringement should be imputed only to its subsidiaries, the Court replied that the fact that the subsidiary 'has separate legal personality is not sufficient to exclude the possibility of imputing its conduct to the parent company … where the subsidiary, although having separate legal personality, does not decide independently upon its own conduct but carries out, in all material respects, the instructions given to it by its parent company'. [18] In those cases, according to the Court, the subsidiary's actions may be imputed to the parent company in view of the unity of the group thus formed by those separate entities. [19]

29. Since it was first formulated, the economic unit theory has been constantly reaffirmed by the Court of Justice. Over time, the Court has explained and clarified both the scope of this theory – even outside the context of corporate groups [20] – and the conditions for establishing whether an economic unit exists, specifying that this must be established in view of the economic,

[15] In its judgment of 31 October 1974, *Centrafarm and de Peijper* (15/74, EU:C:1974:114, paragraph 41), the Court held that the prohibition does not cover agreements or concerted practices 'between undertakings belonging to the same concern and having the status of parent company and subsidiary, if the undertakings form an economic unit within which the subsidiary has no real freedom to determine its course of action on the market'; also see judgments of 11 April 1989, *Saeed Flugreisen and Silver Line Reisebüro* (66/86, EU:C:1989:140, paragraph 35); of 4 May 1988, *Bodson* (30/87, EU:C:1988:225, paragraph 19); and of 24 October 1996, *Viho* v *Commission* (C-73/95 P, EU:C:1996:405, paragraphs 15 to 17). Although not referring to the concept of 'economic unit', similar positions were adopted both by the Court of Justice, in its judgment of 25 November 1971, *Béguelin Import* (22/71, EU:C:1971:113, paragraphs 7 to 9), on the grounds of lack of economic independence of the subsidiary, and the Commission, in its Decision 69/195/EEC of 18 June 1969 on an application for negative clearance (Case IV/22548 – *Christiani & Nielsen*) (OJ 1969 L 165, p. 12), based on the absence of competition between intra-group entities. On relations between the principal and agent, see also judgment of 16 December 1975, *Suiker Unie and Others* v *Commission* (40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73, EU:C:1975:174, paragraph 480), and, for the purpose of applying a block exemption to an agreement in which one of the contracting parties was made up of several legally independent undertakings, judgment of 12 July 1984, *Hydrotherm Gerätebau* (170/83, EU:C:1984:271, paragraph 11).

[16] 48/69, EU:C:1972:70.

[17] See *ICI*, paragraphs 129 to 141. See, to the same effect, judgments of 14 July 1972, *Geigy* v *Commission* (52/69, EU:C:1972:73, paragraphs 42 to 45); of 14 July 1972, *Sandoz* v *Commission* (53/69, EU:C:1972:74, paragraphs 42 to 45); of 25 October 1983, *AEG-Telefunken* v *Commission* (107/82, EU:C:1983:293, paragraph 49); and, within the scope of Article 86 TEC (now Article 102 TFEU), of 6 March 1974, *Istituto Chemioterapico Italiano and Commercial Solvents* v *Commission* (6/73 and 7/73, EU:C:1974:18, paragraphs 36 to 41).

[18] See *ICI*, paragraphs 132 and 133.

[19] See *ICI*, paragraph 135.

[20] See, for example, judgment of 16 November 2000, *Metsä-Serla and Others* v *Commission* (C-294/98 P, EU:C:2000:632).

organisational and legal links between the entities concerned,[21] which may vary from case to case and cannot therefore be set out in an exhaustive list.[22] Regularly applied by the Commission, the economic unit theory has become a key aspect of the investigation and prosecution of infringements of EU competition rules.

30. As we have seen, where there is an economic unit made up of entities belonging to the same group, the case-law has recognised, since *ICI*, that the anticompetitive conduct of the subsidiary may be imputed to the parent company, and that they may be jointly and severally liable for payment of the related fine, both in the case of direct control and where, within the group, control of the parent company is exercised through an interposed company which in turn owns the company that committed the infringement.[23]

31. Furthermore, in the event that the parent company holds, directly or indirectly, all or the majority of the shares in a subsidiary, the Court clarified, on the one hand, that the parent company is able to exercise decisive influence over the conduct of the subsidiary, such as to prevent the subsidiary from deciding independently upon its own conduct on the market,[24] and, on the other, that there is a rebuttable presumption that the parent company exercises decisive influence over the conduct of its subsidiary on the market[25] ('the presumption of actual exercise of decisive influence'). In those circumstances, in order to regard the two companies as jointly and severally liable for the payment of the fine imposed, it is therefore sufficient for the Commission to prove that all or almost all of the capital of the subsidiary is held by the parent company, unless the latter, which has the burden of rebutting that presumption, adduces sufficient evidence to show that its subsidiary acts independently on the market.[26] The Commission routinely applies the presumption of actual exercise of decisive influence, while the Court of Justice has extended its scope to cases of indirect control, at least where this is exercised through an uninterrupted chain of 100% (or virtually 100%) shareholdings.[27] More recently, it has been extended to cases where the parent company, while not holding all or virtually all the capital of the subsidiary, holds all the voting rights associated with its subsidiary's shares,[28] thereby confirming that it is not the shareholding links that give rise to this presumption, but the degree

[21] See, to that effect, inter alia, judgments of 16 November 2000, *Metsä-Serla and Others* v *Commission* (C-294/98 P, EU:C:2000:632, paragraph 27); of 2 October 2003, *Aristrain* v *Commission* (C-196/99 P, EU:C:2003:529, paragraph 96); of 28 June 2005, *Dansk Rørindustri and Others* v *Commission* (C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraph 117); and of 11 December 2007, *ETI and Others* (C-280/06, EU:C:2007:775, paragraph 49); most recently, see judgment of 27 January 2021, *The Goldman Sachs Group* v *Commission* (C-595/18 P, EU:C:2021:73; '*Goldman Sachs*'; paragraph 31 and the case-law cited). In that context, although the existence of shareholding links between the entities concerned is an indication of a power of control over the subsidiary – particularly, as will be seen, where 100% (or nearly 100%) of the shares are held – they are not a prerequisite for finding that an economic unit exists. See judgment of 16 November 2000, *Metsä-Serla and Others* v *Commission* (C-294/98 P, EU:C:2000:632, paragraph 36).

[22] See, inter alia, judgments of 14 September 2016, *Ori Martin and SLM* v *Commission* (C-490/15 P and C-505/15 P, not published, EU:C:2016:678, paragraph 60 and the case-law cited); of 9 September 2015, *Philips* v *Commission* (T-92/13, not published, EU:T:2015:605, paragraph 41 and the case-law cited); and of 12 July 2018, *The Goldman Sachs Group* v *Commission* (T-419/14, EU:T:2018:445, paragraph 82).

[23] See judgment of 20 January 2011, *General Química and Others* v *Commission* (C-90/09 P, EU:C:2011:21; '*General Química*'; paragraph 88).

[24] See, to that effect, *ICI*, paragraphs 136 and 137; see also, inter alia, judgment of 10 September 2009, *Akzo Nobel and Others* v *Commission* (C-97/08 P, EU:C:2009:536; '*Akzo*'; paragraph 60), and, more recently, *Goldman Sachs*, paragraph 32.

[25] To that effect, where the parent company directly holds 100% of the capital of its subsidiary, see judgment of 25 October 1983, *AEG-Telefunken* v *Commission* (107/82, EU:C:1983:293, paragraph 50), subsequently confirmed by *Akzo*, paragraph 60. To that effect, see, more recently, *Goldman Sachs*, paragraph 32. Since the judgment of 29 September 2011, *Elf Aquitaine* v *Commission* (C-521/09 P, EU:C:2011:620, paragraph 63), the Court has recognised the applicability of the presumption of actual exercise of decisive influence even to shareholdings of just under 100% (in that particular case, a 98% shareholding).

[26] See, most recently, *Goldman Sachs*, paragraph 32 and the case-law cited.

[27] See *General Química*, paragraph 88.

[28] See *Goldman Sachs*, paragraph 35, which confirmed on this point the judgment of 12 July 2018, *The Goldman Sachs Group* v *Commission* (T-419/14, EU:T:2018:445).

of control of the parent company over its subsidiary.[29] With some difficulty, the presumption of actual exercise of decisive influence is rebuttable to strike a balance between the objective of combating conduct contrary to the competition rules and of preventing a repetition of such conduct, and the requirements flowing from certain general principles of EU law such as the principle of the presumption of innocence, the principle that penalties should be applied solely to the offender and the principle of legal certainty.[30]

2. The basis of the parent company's 'bottom-up' liability for the anticompetitive conduct of the subsidiary

32. In the context described above, it is appropriate to ascertain the exact legal basis of the parent company's liability for the anticompetitive conduct of its subsidiary, with which it forms a single economic unit for the purposes of competition law.

33. From an initial examination of the case-law, two answers seem theoretically possible.

34. First, there are several passages in the judgments of the Court of Justice where it seems that the decisive factor for imputing liability to the parent company for the anticompetitive conduct of its subsidiary is the exercise by the parent company of decisive influence over the subsidiary, preventing the subsidiary from deciding independently upon its own conduct on the market and simply following, in all material respects, the instructions given to it by the parent company. According to the wording passed down substantially unchanged in numerous judgments of the Court of Justice and the General Court, starting with judgment of 25 October 1983, *AEG-Telefunken* v *Commission* (107/82, EU:C:1983:293), 'the conduct of a subsidiary may be imputed to the parent company in particular where, although having a separate legal personality, that subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company'.[31] From this perspective, the parent company to which the unlawful conduct of the subsidiary is imputed 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 and by which it was able to determine the subsidiary's conduct on the market.[32]

35. Second, several other aspects of the case-law suggest that it is the very existence of an economic unit that determines the liability of the parent company for the anticompetitive conduct of the subsidiary. The Court has consistently held that the formal separation between two entities, resulting from their separate legal personality, cannot outweigh the unity of their conduct

[29] See *Goldman Sachs*, paragraph 35.

[30] See judgment of 29 September 2011, *Elf Aquitaine* v *Commission* (C-521/09 P, EU:C:2011:620, paragraph 59), and, most recently, *Goldman Sachs*, paragraph 38. Moreover, it is settled case-law that the presumption of actual exercise of decisive influence does not infringe the right to be presumed innocent, inasmuch as (i) it does not lead to a presumption of guilt on the part of either one of those companies (see judgment of 26 January 2017, *Villeroy & Boch* v *Commission*, C-625/13 P, EU:C:2017:52, paragraph 149 and the case-law cited), and (ii) the presumption of actual exercise of decisive influence is rebuttable (see judgment of 19 June 2014, *FLS Plast* v *Commission*, C-243/12 P, EU:C:2014:2006, paragraph 27 and the case-law cited). The Court has also clarified that the fact that it is difficult to adduce the evidence necessary to rebut a presumption of actual exercise of decisive influence does not in itself mean that that presumption is in fact irrebuttable (see, to that effect, judgment of 16 June 2016, *Evonik Degussa and AlzChem* v *Commission*, C-155/14 P, EU:C:2016:446, paragraph 44 and the case-law cited).

[31] See, inter alia, *Akzo*, paragraph 58 and the case-law cited; judgments of 19 July 2012, *Alliance One International and Standard Commercial Tobacco* v *Commission* (C-628/10 P and C-14/11 P, EU:C:2012:479, paragraph 43); of 11 July 2013, *Commission* v *Stichting Administratiekantoor Portielje* (C-440/11 P, EU:C:2013:514, paragraph 38); and of 5 March 2015, *Commission and Others* v *Versalis and Others* (C-93/13 P and C-123/13 P, EU:C:2015:150, paragraph 40).

[32] See judgment of 27 April 2017, *Akzo Nobel and Others* v *Commission* (C-516/15 P, EU:C:2017:314, paragraph 56 and the case-law cited).

on the market,[33] and that, therefore, they constitute an economic unit – that is to say, a single undertaking – for the purposes of applying the rules on competition. Although the functional concept of an undertaking does not require that the economic unit concerned should have legal personality,[34] the case-law nevertheless recognises it as a kind of separate and autonomous subjectivity with respect to that of the entities that constitute it, which overlaps with any legal personality that such entities may have. Thus, since *Akzo*, the Court has had no hesitation in defining the economic unit as an 'entity' capable of infringing the competition rules and able to 'answer for that infringement'.[35] From this perspective, the decisive test for imputing the responsibility of the parent company for the anticompetitive conduct of the subsidiary would therefore be the unity of their conduct on the market,[36] which links together in a single economic unit several legally independent entities.

36. It should be observed at once that the adoption of one of the two different perspectives described in the previous points makes the answer to the question contingent on the Court's examination in the present case.

37. Although the basis of the parent company's liability for the anticompetitive conduct of its subsidiary is the decisive influence that the parent company exercises over its subsidiary, it is implicitly recognised that such conduct is in some way attributable to the parent company, not so much in the sense that it participated directly in it, which clearly may not have been the case,[37] but in that it facilitated such conduct, either through an active influence over it or by failing to exercise its powers of management and control. Looking at the matter from this perspective, there should be no scope to hold a subsidiary liable for the anticompetitive conduct of the parent company, since, by definition, the subsidiary exercises no decisive influence over the parent company.

38. Conversely, if the basis of the joint liability of the parent company and the subsidiary is the economic unit acting as a single undertaking in the market, then there is no logical reason to prevent liability from being attributed either by applying a bottom-up process – as has happened in the cases decided thus far by the Court – or by applying a top-down process. If joint liability is based on unity of action in the market, all the parties that make up that unit may, in certain circumstances, be held liable for the anticompetitive conduct materially engaged in by one of them.

39. The choice between the two perspectives is complicated by the fact that, in the public enforcement of competition law, given the almost criminal nature of the penalties imposed, several fundamental principles come into play: first, the principle of personal responsibility, and its corollary according to which the imposition of a penalty and the identification of liability

[33] See *ICI*, paragraph 140. See, to that effect, judgment of 14 December 2006, *Confederación Española de Empresarios de Estaciones de Servicio* (C-217/05, EU:C:2006:784, paragraph 41).

[34] See judgment of 28 June 2005, *Dansk Rørindustri and Others* v *Commission* (C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraph 113).

[35] See *Akzo*, paragraph 56. More recently, see, to that effect, inter alia, judgment of 27 April 2017, *Akzo Nobel and Others* v *Commission* (C-516/15 P, EU:C:2017:314, paragraph 49).

[36] See, to that effect, judgment of 14 December 2006, *Confederación Española de Empresarios de Estaciones de Servicio* (C-217/05, EU:C:2006:784, paragraph 41).

[37] See, inter alia, *Akzo*, paragraph 59.

presuppose guilt ('*nulla poena sine culpa*').[38] The identification of the legal basis for the joint liability of the parent company and the subsidiary for the subsidiary's anticompetitive conduct must therefore take into account the need to respect that principle.

40. For the reasons set out below, I believe that the Court should adopt the second of the abovementioned perspectives, which, as has been seen and as I will explain in more detail below, has already been largely adopted in case-law.

41. In this regard, it is worth pausing to consider the importance of the concept of 'decisive influence' and the role attributed to it in the scheme of the Court's reasoning, which has resulted in the parent company consistently being held liable for the anticompetitive conduct of the subsidiary.

42. As we have seen, it is for the Commission, if it wishes to affirm the liability of the parent company, to check whether the parent company is in a position to exercise decisive influence over the conduct of its subsidiary and whether that influence was actually exercised,[39] without resorting to the rebuttable presumption referred to in point 31 of this Opinion.

43. For this purpose, proof of a 'specific influence' which directly or indirectly concerns the unlawful conduct is not required. The liability of the parent company depends neither on establishing its personal involvement in the infringement,[40] nor on demonstrating the exercise of a decisive influence over the conduct of the subsidiary, classified as contrary to competition law. Nor is it necessary that special instructions should be adopted with regard to the conduct in question[41] or that the parent company should refrain from properly exercising its powers of management and control in order to avoid such conduct.[42] Moreover, the assessment of the existence of decisive influence need not be restricted to matters relating solely to the subsidiary's commercial policy on the market *stricto sensu*,[43] as a result of which it is not necessary to establish the involvement of the parent company in the commercial management of the subsidiary.[44] As Advocate General Kokott stated in her Opinion in the case that gave rise to the judgment in *Akzo*,[45] a single commercial policy within a group may also be inferred indirectly from the totality of the economic and legal links between the parent company and its subsidiaries – on which the Court has placed increasing emphasis as the case-law has evolved – since the parent company's

[38] For an analysis of the relationship between the concept of an undertaking as an economic unit and the principle of personal responsibility, see, inter alia, the Opinion of Advocate General Mengozzi in Joined Cases *Commission* v *Siemens Österreich and Others* and *Siemens Transmission & Distribution and Others* v *Commission* (C-231/11 P to C-233/11 P, EU:C:2013:578, points 74 to 82 and the references contained therein).

[39] See, inter alia, judgments of 26 September 2013, *EI du Pont de Nemours* v *Commission* (C-172/12 P, not published, EU:C:2013:601, paragraph 44 and the case-law cited); of 26 September 2013, *The Dow Chemical Company* v *Commission* (C-179/12 P, not published, EU:C:2013:605, paragraph 55 and the case-law cited); and of 9 September 2015, *Toshiba* v *Commission* (T-104/13, EU:T:2015:610, paragraph 95 and the case-law cited).

[40] See *Akzo*, paragraph 59.

[41] Even in *ICI*, in mentioning the instructions issued by the parent company to the subsidiary, the Court was referring more to the existence of the parent company's general power of control, which corresponded to the subsidiary's lack of independence on the market, than to the existence of specific instructions regarding the anticompetitive conduct. See also, inter alia, judgments of 14 September 2016, *Ori Martin and SLM* v *Commission* (C-490/15 P and C-505/15 P, not published, EU:C:2016:678, paragraph 60 and the case-law cited), and of 12 July 2018, *The Goldman Sachs Group* v *Commission* (T-419/14, EU:T:2018:445, paragraph 83).

[42] As pointed out by Advocate General Kokott in her Opinion in *Akzo Nobel and Others* v *Commission* (C-97/08 P, EU:C:2009:262, point 91), the existence of a decisive influence can also be established even where the parent company 'does not make use of any actual rights of co-determination and refrains from giving any specific instructions or guidelines on individual elements of commercial policy'.

[43] See, to that effect, judgments of 15 July 2015, *HIT Groep* v *Commission* (T-436/10, EU:T:2015:514, paragraph 127 and the case-law cited), and of 12 July 2018, *The Goldman Sachs Group* v *Commission* (T-419/14, EU:T:2018:445, paragraph 152); see also Opinion of Advocate General Kokott in *Akzo Nobel and Others* v *Commission* (C-97/08 P, EU:C:2009:262, point 87).

[44] See judgment of 12 July 2018, *The Goldman Sachs Group* v Commission (T-419/14, EU:T:2018:445, paragraph 152).

[45] C-97/08 P, EU:C:2009:262, point 91.

influence over its subsidiaries as regards corporate strategy, operational policy, business plans, investment, capacity and provision of finance may have indirect effects on the market conduct of the subsidiaries and of the whole group.[46] This is particularly apparent in situations of 100%, or nearly 100%, control where, as we have seen, a decisive influence is presumed to exist.[47] Although it is true that the parent company can counter this presumption by adducing evidence that it does not determine the commercial policy of the subsidiary on the market, such proof is extremely difficult to provide in practice[48] – although the presumption remains within acceptable limits[49] – such that, in the presence of a 100% or virtually 100% shareholding, the parent company will almost certainly be held liable for the anticompetitive conduct of the subsidiary.

44. It follows from this that, for the purpose of imputing liability to the parent company for the anticompetitive conduct of the subsidiary under its decisive influence, what matters is the 'general relationship' between them as legal entities forming a single undertaking under competition law.[50] In summary, as Advocate General Kokott observed in her Opinion in the case that gave rise to the judgment in *Akzo*, the decisive factor is 'whether the parent company, by reason of the intensity of its influence, can direct the conduct of its subsidiary to such an extent that the two must be regarded as one economic unit'.[51] This finding is expressly confirmed in the case-law of the Court of Justice, which has stated on several occasions that, where a parent company and its subsidiary form part of a single undertaking, 'the factor which entitles the Commission to address the decision imposing fines to the parent company is not necessarily a parent-subsidiary relationship in which the parent company instigates the infringement; nor, *a fortiori*, is it because of the parent company's involvement in the infringement; rather, it is because the companies concerned constitute a single undertaking'.[52]

45. It follows that the basis of the parent company's liability lies in economic unity, or in the existence of a single economic unit.

46. Since this basis is entirely independent of any fault on the part of the parent company,[53] the only way to reconcile it with the principle of personal responsibility is to consider that this principle operates at the level of the undertaking within the meaning of competition law, or at

[46] See, for an application to that effect, judgment of 8 May 2013, *Eni* v *Commission* (C-508/11 P, EU:C:2013:289, paragraph 64).

[47] See point 31 of this Opinion.

[48] To date, the application of the presumption of actual exercise of decisive influence has been criticised by the EU Courts only for a lack of reasoning in refuting the evidence to the contrary provided by the companies concerned – see judgments of 29 September 2011, *Elf Aquitaine* v *Commission* (C-521/09 P, EU:C:2011:620, paragraphs 144 to 171), and of 16 June 2011, *Air Liquide* v *Commission* (T-185/06, EU:T:2011:275) – or for a failure to apply the principle of equal treatment – see judgment of 27 October 2010, *Alliance One International and Others* v *Commission* (T-24/05, EU:T:2010:453).

[49] See footnote 30 to the present Opinion.

[50] See, to that effect, Opinion of Advocate General Kokott in *Akzo Nobel and Others* v *Commission* (C-97/08 P, EU:C:2009:262, point 94).

[51] See Opinion of Advocate General Kokott in *Akzo Nobel and Others* v *Commission* (C-97/08 P, EU:C:2009:262, point 93); see also, to that effect, judgments of 2 February 2012, *EI du Pont de Nemours and Others* v *Commission* (T-76/08, not published, EU:T:2012:46, paragraph 62), and of 12 July 2018, *Fujikura* v *Commission* (T-451/14, not published, EU:T:2018:452, paragraph 48).

[52] See, inter alia, judgments of 29 September 2011, *Elf Aquitaine* v *Commission* (C-521/09 P, EU:C:2011:620, paragraph 88); of 14 September 2016, *Ori Martin and SLM* v *Commission* (C-490/15 P and C-505/15 P, not published, EU:C:2016:678, paragraph 60); and of 30 September 2009, *Arkema* v *Commission* (T-168/05, not published, EU:T:2009:367, paragraph 77).

[53] Ultimately, as the Italian Government rightly states, if the basis used were concurrent fault between the parent company and the subsidiary, there would be no need to refer to the concept of economic unit for the purpose of imputing the subsidiary's anticompetitive conduct to the parent company.

the level of the economic entity that negligently or intentionally committed the offence.[54] That entity, as an economic entity acting jointly on the market, is liable because one of its members acted in a way that infringes the competition rules.[55] However, since this entity is not a legal person, the infringement of the competition rules must be attributed to an entity, or jointly to several entities, on which fines may be imposed.[56] Even though the European Union's competition rules refer to undertakings and are directly applicable to them, regardless of the manner in which they are organised and their legal form, in view of the need for those rules to be effectively implemented, the Commission's decision to put an end to and penalise the infringement must be addressed to persons against whom enforcement measures may be taken to secure payment of the fine in question.[57]

47. It must also be noted that although, as interpreted above, the economic unit theory allows liability for an infringement of the competition rules to be attributed to the undertaking as a single entity, thus giving precedence to an economic view of the relationship between the members of a corporate group over a purely legal view – according to which each company constitutes a separate person which answers only for its own actions or omissions – it nevertheless maintains a balance between lifting the corporate veil that such a view necessarily entails and respecting the rights of the entities that make up the undertaking.[58] It is in this light that, relying on the functional concept of an undertaking in competition law, the Court rejected as manifestly unfounded the criticisms of the economic unit theory based on the alleged conflict with the principle of the autonomy of legal persons and the limited liability of capital companies.[59] I would also add that the principle of the autonomy of legal persons is not mandatory and coexists, in the legal systems of the Member States and internationally,[60] with the idea of the economic unit of the group, and that there are various theories based on the lifting of the corporate veil in order to assert the 'corporate liability' of members of a corporate group, as well as the trends in the literature that argue for the rejection of limited liability within corporate groups.[61]

[54] To that effect, see judgment of 10 April 2014, *Commission* v *Siemens Österreich and Others* and *Siemens Transmission & Distribution and Others* v *Commission* (C-231/11 P to C-233/11 P, EU:C:2014:256, paragraph 56). In her Opinion in *Akzo Nobel and Others* v *Commission* (C-97/08 P, EU:C:2009:262), Advocate General Kokott expressed that view in particularly clear terms: 'the fact that the parent company which exercises decisive influence over its subsidiaries can be held jointly and severally liable for their cartel offences does not in any way constitute an exception to the principle of personal responsibility, but is the expression of that very principle. That is because the parent company and the subsidiaries under its decisive influence are collectively a single undertaking for the purposes of competition law and responsible for that undertaking' (see point 97). Moreover, according to Advocate General Kokott, the responsibility of the parent company has nothing to do with strict liability, since the parent company is one of the principals of the undertaking which negligently or intentionally committed the competition offence: 'in simplified terms, it could be said that it is (together with all the subsidiaries under its decisive influence) the legal embodiment of the undertaking' (see point 98).

[55] To that effect, see *Akzo*, paragraph 56; see also, inter alia, judgments of 29 March 2011, *ArcelorMittal Luxembourg* v *Commission* and *Commission* v *ArcelorMittal Luxembourg and Others* (C-201/09 P and C-216/09 P, EU:C:2011:190, paragraph 95); of 5 March 2015, *Commission and Others* v *Versalis and Others* (C-93/13 P and C-123/13 P, EU:C:2015:150); and of 27 April 2017, *Akzo Nobel and Others* v *Commission* (C-516/15 P, EU:C:2017:314, paragraph 49). However, I note that, in paragraph 77 of *Akzo*, while confirming that EU competition law is based on the principle of personal responsibility of the economic entity that committed the infringement, the Court, in rejecting the applicant's argument that the parent company has strict liability, states that 'even if the parent company does not participate directly in the infringement, it exercises, in such a case, a decisive influence over the subsidiaries which have participated in it'.

[56] See *Akzo*, paragraph 57, and, inter alia, judgment of 5 March 2015, *Commission and Others* v *Versalis and Others* (C-93/13 P and C-123/13 P, EU:C:2015:150, paragraph 89).

[57] See Opinion of Advocate General Mengozzi in the Joined Cases *Commission* v *Siemens Österreich and Others* and *Siemens Transmission & Distribution and Others* v *Commission* (C-231/11 P to C-233/11 P, EU:C:2013:578, point 78 and the references contained therein); see also judgment of 12 December 2007, *Akzo Nobel and Others* v *Commission* (T-112/05, EU:T:2007:381, paragraph 59).

[58] In competition infringement proceedings, the autonomy of the legal persons making up the economic unit is respected both as regards the exercise of their rights of defence (sending of the statement of objections, option of submitting observations, hearing, right to a judicial remedy) and for the purpose of fixing the fine.

[59] See judgment of 8 May 2013, *Eni* v *Commission* (C-508/11 P, EU:C:2013:289, paragraphs 81 and 82).

[60] See discussions on a draft United Nations Treaty on liability of corporate groups for human rights violations, available at https://www.littler.com/publication-press/publication/united-nations-further-deliberates-treaty-seeking-impose-corporate.

[61] See, for an analysis of those trends, Petrin, M. and Choudhury, B., 'Group Company Liability', *European Business Organization Law Review*, 2018, p. 771 et seq.

3. From the economic unit theory to the 'top-down' liability of the subsidiary for the anticompetitive conduct of the parent company

48. The unity of action on the market of several companies and the decisive influence of the parent company become, in the reconstruction proposed above of the economic unit theory, not so much two alternative bases for the liability of the parent company, but two logically necessary steps in the process of attributing liability for anticompetitive conduct.

49. The first step is to establish the decisive influence of the parent company over its subsidiaries; the second step is to identify a single economic unit. Decisive influence is a necessary condition for the existence of an economic unit – in other words, a single undertaking in the functional sense.

50. These two steps are followed by a third: the attribution of obligations relating to compliance with the competition rules and liability for having intentionally infringed them to the single undertaking thus identified and made up of several separate legal entities.

51. The final step consists of actually attributing liability for the infringement committed by the undertaking to the individual entities that comprise it, which, having legal personality, may be held liable and bear the relevant financial consequences.

52. In this reconstructed model of the economic unit, there is no logical reason why liability cannot be attributed not only in the 'bottom-up' sense (from the subsidiary to the parent company), but also in the 'top-down' sense (from the parent company to the subsidiary).

53. Although this possibility has not yet been recognised in case-law, some signs of it do exist. Thus, several judgments of the General Court, including the recent judgment in *Biogaran* v *Commission*, cited by the referring court, seem to have considered the possibility of this process in the light of the concept of 'economic unit'.[62] In *Biogaran*, against which an appeal is currently pending before the Court of Justice,[63] the General Court held that the Commission could hold the subsidiary and the parent company jointly and severally liable for the infringement at issue, resulting in part from the conduct of the parent company and in part from the conduct of the subsidiary, even though the subsidiary claimed that it was unaware of the conduct of the parent company.[64] The General Court held the joint and several liability to be justified because the

[62] Judgment of 12 December 2018, *Biogaran* v *Commission* (T-677/14, EU:T:2018:910; '*Biogaran*'). See also judgment of 11 March 1999, *Unimétal* v *Commission* (T-145/94, EU:T:1999:49, paragraphs 601 to 606), in which the General Court considered the increase in the fine imposed on a subsidiary to be legitimate in view of the conduct of the parent company (in that case, however, the subsidiary had been regarded as the principal author and beneficiary of the infringements committed). Several judgments of the General Court and of the Court of Justice make a similar case with regard to reoccurrence, allowing a subsidiary to be held to account for the previous anticompetitive conduct of another subsidiary belonging to the same group and for which, according to the concept of economic unit, the parent company could have been held jointly and severally liable. See judgments of 30 September 2003, *Michelin* v *Commission* (T-203/01, EU:T:2003:250, paragraph 290), and of 5 March 2015, *Commission and Others* v *Versalis and Others* (C-93/13 P and C-123/13 P, EU:C:2015:150, paragraph 92).

[63] Case C-207/19 P.

[64] See *Biogaran*, paragraph 217. In paragraph 218, the General Court pointed out that if it is possible to impute to a parent company liability for an infringement committed by its subsidiary and, consequently, to make both companies jointly and severally liable for the infringement committed by the undertaking which they comprise, without infringing the principle of personal responsibility, the same applies *a fortiori* where the infringement committed by the economic entity comprising a parent company and its subsidiary results from the combined conduct of both those companies.

respective conduct of each had contributed to the infringement [65] and that, if the Commission had to prove that the subsidiary was aware of the parent company's conduct in order to impute the infringement to the group, this would have an effect on the concept of economic unit. [66] According to the General Court, the condition for the attribution of various anticompetitive acts constituting the cartel as a whole to all the parts of the undertaking is satisfied where each part of that undertaking has contributed to its implementation, even in a subsidiary, accessory or passive role. [67] It is also interesting to note that the General Court held that, under those conditions, the Commission had not imputed liability to the subsidiary for the anticompetitive conduct of the parent company, but imputed all the conduct of each of those parties to the economic unit of which they were part. [68]

4. The conditions for the recognition of the joint and several liability of the subsidiary for the anticompetitive conduct of the parent company

54. What conditions must be met in order for the parent company and its subsidiary to be held jointly and severally liable for the anticompetitive conduct of the parent company?

55. To answer this question, we must once again refer to the functional concept of an undertaking which encompasses legally separate entities operating in a unified manner in the market in which they pose as a single economic entity.

56. Where such unity of conduct on the market has to be established in order to impute to the parent company the anticompetitive conduct of the subsidiaries, the only thing that matters is whether the parent company exercises decisive influence over the commercial policy of its subsidiaries. Conversely, where it is a case of imputing to the subsidiaries the anticompetitive conduct of the parent company (or rather, imputing such conduct to the economic unit of which they form part and holding them jointly liable for such conduct), it is also necessary that those subsidiaries should have taken part in the economic activity of the undertaking managed by the parent company which materially committed the infringement.

57. In other words, in the case of bottom-up liability, subsidiaries engage in anticompetitive conduct within the general framework of the parent company's power to influence them, which is sufficient to ascertain the existence of an economic unit and to establish the joint liability of the parent company. In the reverse case of top-down liability, in which the parent company commits the infringement, the unity of the economic activity results not only from the decisive influence exercised by the parent company, but from the fact that the subsidiary's business is in some way necessary to give effect to the anticompetitive conduct (for example, because the

[65] See *Biogaran*, paragraph 220. In that case, it was, on the one hand, an unlawful settlement agreement concluded between the parent company, a holding company of a pharmaceutical group, and a company manufacturing generic drugs, concerning the freeze on the production and marketing of a generic drug which the former considered to be in breach of a patent held by it, and, on the other hand, an agreement concluded between the subsidiary and the same third company for the latter to transfer three product dossiers and a marketing authorisation for a pharmaceutical product in return for the payment of a sum of money. In essence, the Commission took the view that the latter agreement constituted a further incentive for the third party to renounce the production of the generic held to be infringing the patent. I note, however, that the subsidiary was not active in the market for the drug marketed by the pharmaceutical group on the basis of that patent.

[66] See *Biogaran*, paragraph 225.

[67] See *Biogaran*, paragraph 225.

[68] See *Biogaran*, paragraphs 209, 222 and 227.

subsidiary sells the goods that are the subject of the cartel).[69] Since the functional concept of an undertaking as an economic unit relates to how several legal entities actually operate on the market, its exact scope must be defined precisely in view of the economic activities that those entities carry out and the role that they play within the corporate group: on the one hand, the decisive influence exercised by the parent company; on the other, the activity of the subsidiary or subsidiaries objectively necessary to give effect to the anticompetitive practice.

58. If, therefore, a subsidiary – including in the case of a 100% or virtually 100% shareholding – carries out an activity unrelated to the economic sector in which the parent company has engaged in anticompetitive conduct, the 'functional' concept of an undertaking no longer applies. As a result, the subsidiary cannot be held jointly liable for the anticompetitive conduct of the parent company.

59. The criteria for establishing such liability are therefore different from those used to hold the parent company liable for infringements committed by its subsidiaries. What is not essential for the former operation may be essential for the latter operation. For example, although to recognise bottom-up liability the case-law does not require proof that the parent company influences its subsidiary's policy in the specific area in which the infringement occurred, for the purpose of recognising top-down liability, it is crucial that the subsidiary operates in the same area in which the parent company has engaged in anticompetitive conduct and that, through its conduct on the market, it has been able to give effect to the infringement.[70]

5. Extension of the proposed interpretation to 'private enforcement'

60. Actions for damages for infringement of EU competition rules constitute an integral part of the system for enforcement of those rules.[71]

61. The Court has consistently held that the right to claim compensation for damage caused by an agreement or conduct prohibited by Article 101 TFEU ensures the full effectiveness of that article and, in particular, the effectiveness of the prohibition laid down in paragraph 1 thereof.[72] That right strengthens the working of the EU competition rules, since it discourages agreements or practices, frequently covert, which are liable to restrict or distort competition, thereby making a significant contribution to the maintenance of effective competition in the European Union.[73]

62. Although the Court has recognised that, in the absence of EU rules governing the matter, it is for the domestic legal system of each individual Member State to lay down the detailed rules governing the exercise of the right to claim compensation for the harm resulting from an agreement or practice prohibited under Article 101 TFEU, provided that the principles of

[69] A similar solution has been reached by several English courts. See, inter alia, *Roche Products Ltd & Ors* v *Provimi Ltd* [2003] EWHC 961 (Comm) (2 May 2003) (http://www.bailii.org/ew/cases/EWHC/Comm/2003/961.html, paragraphs 25 to 35); *Cooper Tire & Rubber Co & Ors* v *Shell Chemicals UK Ltd & Ors* [2009] EWHC 2609 (Comm) (27 October 2009) (http://www.bailii.org/ew/cases/EWHC/Comm/2009/2609.html, paragraphs 48 to 65); *Vattenfall AB and Others* v *Prysmian SpA* [2018] EWHC 1694 (Ch D); *Media-Saturn Holding GmbH & Ors* v *Toshiba Information Systems (UK) Ltd & Ors* [2019] EWHC 1095 (Ch) (2 May 2019) (http://www.bailii.org/ew/cases/EWHC/Ch/2019/1095.html, paragraphs 129 to 155). Moreover, the Court drew those judgments to the attention of the parties and of interested parties within the meaning of Article 23 of the Statute, who had the opportunity to submit their observations during the proceedings before the Court.

[70] See, for example, judgment of 13 July 2011, *Eni* v *Commission* (T-39/07, EU:T:2011:356, paragraph 97).

[71] Judgment of 14 March 2019, *Skanska Industrial Solutions and Others* (C-724/17, EU:C:2019:204; '*Skanska*'; paragraph 45).

[72] *Skanska*, paragraphs 25, 26 and 43; see also judgment of 5 June 2014, *Kone and Others* (C-557/12, EU:C:2014:1317, paragraphs 21 and 22 and the case-law cited).

[73] *Skanska*, paragraph 44; see also judgment of 5 June 2014, *Kone and Others* (C-557/12, EU:C:2014:1317, paragraph 23 and the case-law cited).

equivalence and effectiveness are observed, it has, nonetheless, pointed out that the determination of the entity which is required to provide compensation for damage caused by an infringement of Article 101 TFEU is directly governed by EU law. [74]

63. In *Skanska*, the Court, referring to *Akzo*, recognised that the functional concept of an undertaking is the same in 'public' and 'private enforcement' and refers to an economic unit even if in law that economic unit consists of several persons, natural or legal. [75]

64. The Court also stated, rejecting the arguments to the contrary put forward by the Commission, that, since the liability for damage caused by infringements of EU competition rules is personal in nature, the undertaking which infringes those rules must answer for the damage caused, and that therefore 'the entities which are required to compensate for the damage caused by a cartel or practice prohibited by Article 101 TFEU are the undertakings, within the meaning of that provision, which have participated in that cartel or that practice'. [76]

65. Because of that parallelism, in *Skanska*, the Court extended to civil actions for damages resulting from the infringement of the prohibition of anticompetitive arrangements the theory of 'economic continuity', already recognised in case-law in the sphere of 'public enforcement', according to which, when an entity that has committed an infringement of EU competition rules is subject to a legal or organisational change, this change does not necessarily create a new undertaking free of liability for the conduct of its predecessor that infringed the competition rules, when, from an economic point of view, the two are identical. [77]

66. On the basis of the same parallelism, I consider that the definition of the term 'economic unit' at which I have arrived in this Opinion applies not only when the Commission identifies the scope of the undertaking responsible for the infringement of the competition rules and the legal entities which, within that scope, are jointly and severally liable for the penalties imposed, but when private individuals harmed by anticompetitive conduct committed by an undertaking within the meaning of competition law bring a civil action for damages. Having identified the limits of the economic unit that, under competition law, constitutes the undertaking responsible for the infringement, the interested parties can then decide against which legal entity within that economic unit the action for damages should be brought.

67. As recognised by the Court, 'private' and 'public enforcement' are both essential tools for strengthening the effectiveness of the policy of pursuing anticompetitive practices. In that respect, private enforcement not only has a compensatory function intended to satisfy private interests, but also a deterrent function which contributes to the pursuit of the public-interest objectives underlying the protection of competition. As the number of parties able to claim liability for the damage caused by infringements of competition rules increases, so too does the deterrent effect on those infringements, which is crucial if EU competition law is to achieve its objectives. [78] Similarly, the fewer practical obstacles there are for injured parties to bring actions for damages against infringements of competition rules, the stronger this deterrent function will be.

[74] See *Skanska*, paragraphs 27 and 28 and the case-law cited.

[75] See *Skanska*, paragraphs 29, 30, 36, 37 and 47.

[76] See *Skanska*, paragraphs 31 and 32.

[77] See *Skanska*, paragraphs 38 to 40, in which the Court refers to the judgments of 11 December 2007, *ETI and Others* (C-280/06, EU:C:2007:775, paragraph 42); of 5 December 2013, *SNIA* v *Commission* (C-448/11 P, not published, EU:C:2013:801, paragraph 22); and of 18 December 2014, *Commission* v *Parker Hannifin Manufacturing and Parker-Hannifin* (C-434/13 P, EU:C:2014:2456, paragraph 40).

[78] On the importance of the deterrent effect of actions for damages, see the Opinion of Advocate General Wahl in *Skanska Industrial Solutions and Others* (C-724/17, EU:C:2019:100, points 46 to 50).

68. In a situation such as that at issue in the main proceedings, allowing an individual to bring legal proceedings against the subsidiary with which he or she had a direct or indirect business relationship, in order to obtain compensation for the harm suffered as a result of the effects on that relationship of the anticompetitive conduct of the parent company, contributes to that dual function in that it enables the action for damages to be brought in cases where the parent company, unlike the subsidiary, is established in a country different from that of the injured party. Indeed, although it is true – as MBTE correctly points out – that, in accordance with Article 7(2) of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2012 L 351, p. 1), the victim of an infringement of competition rules may bring an action against the perpetrator of that infringement in the courts for the place where the harmful event occurred – that is to say, in a situation such as that obtaining in the main proceedings, the place where the market prices were distorted and in which the victim claims to have suffered that damage [79] – allowing the victim to bring an action against the subsidiary domiciled in its Member State circumvents the practical difficulties associated with the service abroad of the document instituting the proceedings and the enforcement of any judgment. From a substantive, rather than a merely procedural, point of view, allowing the injured party the choice of the company against which the action is brought increases the prospects of achieving full satisfaction of its claims for compensation.

69. It is still necessary to comment on the principal argument put forward by MBTE in its observations before the Court, to the effect that, in circumstances such as those at issue in the main proceedings, where the action for damages is purely a follow-on action, the national court cannot depart from the definition of the undertaking which committed the infringement as identified in the Commission decision without infringing Article 16(1) of Regulation No 1/2003, according to which 'when national courts rule on agreements, decisions or practices under Article [101 TFEU or Article 102 TFEU] which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission …'.

6. Compliance with Article 16(1) of Regulation No 1/2003 in the context of follow-on actions for damages

70. MBTE argues that, since the action for damages brought by Sumal is based solely on the 2016 Decision and since Sumal considered that Daimler alone was liable for the infringement, a court decision recognising MBTE's liability for that infringement would necessarily be based on a different concept of undertaking from the one adopted by the Commission, and would thus be at odds with the 2016 Decision.

71. Let me say straight away that the case-law referred to by the Spanish Government in its observations before the Court on the parallel application of EU law and national competition law [80] does not strike me as relevant in the present case, since, in the circumstances of the dispute in the main proceedings, it is not a question of applying national competition law, but of identifying those liable to pay compensation for the harm resulting from an infringement of Article 101 TFEU – a process that, as we saw earlier, [81] is directly governed by EU law.

[79] See judgment of 29 July 2019, *Tibor-Trans* (C-451/18, EU:C:2019:635, paragraph 37). That judgment appears to have set aside the *forum actoris* criterion previously enshrined by the Court in its judgment of 21 May 2015, *CDC Hydrogen Peroxide* (C-352/13, EU:C:2015:335, paragraph 56).

[80] The Spanish Government cites the judgment of 3 April 2019, *Powszechny Zakład Ubezpieczeń na Życie* (C-617/17, EU:C:2019:283, paragraph 25 and the case-law cited).

[81] See point 62 of this Opinion.

72. That being so, it has already been pointed out that, according to the case-law of the Court of Justice, the infringement of EU competition law for which – according to the principle of personal responsibility – the economic unit is liable must be imputed unequivocally to a legal person on whom fines may be imposed and to whom the statement of objections must be addressed. [82] In that respect, the Court has explained that neither Article 23(2)(a) of Regulation No 1/2003 nor the case-law lays down which legal or natural person the Commission is obliged to hold responsible for the infringement or to punish by the imposition of a fine. [83]

73. It follows that the Commission has considerable discretion in this respect [84] and may choose – essentially for reasons linked to procedural expediency or the evidentiary basis available to it – the legal person or persons, of those comprising the undertaking, to which the statement of objections and the decision imposing a penalty are to be addressed. However, such a choice does not imply, either explicitly or implicitly, a finding of non-liability on the part of the legal entities which were not penalised but which are still part of the economic unit that committed the infringement.

74. It follows from this that, contrary to MBTE's contention, the national court may, without falling foul of the prohibition laid down in Article 16(1) of Regulation No 1/2003, identify as liable for the damage caused by an infringement of EU competition rules a legal person not directly concerned by the decision by which the Commission confirmed and sanctioned that infringement, provided, however, that the criteria for holding that legal person jointly and severally liable with the person or persons to whom that decision is addressed are met.

75. This finding is not contradicted by the fact that, in the 2016 Decision, the Commission designated Daimler alone as the 'undertaking' liable for the infringement. This designation is consistent with the choice made by the Commission to bring proceedings against and impose penalties solely on the parent company for the anticompetitive conduct directly committed by it. However, as we have seen, it does not prevent – for the purposes of liability for the harm caused by the infringement – action from being brought against other entities belonging to the same group, where they make up, together with the penalised company, a single economic unit.

76. Lastly, MBTE's argument that, in order to recognise as liable for the harm caused by an infringement of the competition rules a legal person other than the one concerned by the Commission's decision (on which the action for damages is based) is contrary to paragraph 47 of *Skanska* – in which the Court held that the concept of 'undertaking' within the meaning of Article 101 TFEU '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 with actions for damages for infringement of EU competition rules' – must be rejected. In that respect, it is sufficient to note that, at that point, the Court was referring in general to the interpretation to be given to the concept of undertaking, which cannot differ in 'public' and 'private enforcement', rather than to the Commission's application of that concept in a specific case. Consequently, as the Commission itself acknowledges in its answer to the written questions put by the Court by way of measures of organisation of procedure, the ability of the national court to determine whether

[82] See *Akzo*, paragraph 57.

[83] See judgment of 27 April 2017, *Akzo Nobel and Others* v *Commission* (C-516/15 P, EU:C:2017:314, paragraph 51 and the case-law cited).

[84] See, to that effect, judgment of 11 July 2013, *Team Relocations and Others* v *Commission* (C-444/11 P, not published, EU:C:2013:464, paragraphs 159 and 160). The Commission may therefore decide to extend the liability for an infringement to a parent company, in addition to the company directly involved in the anticompetitive conduct, without, however, being obliged to do so; see judgment of 16 June 2011, *Team Relocations and Others* v *Commission* (T-204/08 and T-212/08, EU:T:2011:286, paragraph 156), confirmed by judgment of 11 July 2013, *Team Relocations and Others* v *Commission* (C-444/11 P, not published, EU:C:2013:464, paragraph 161).

the subsidiary is liable for damages is not precluded by the mere fact that the decision by which the Commission found that there had been an infringement did not impose an administrative penalty on that company.

7. Conclusion on the first three questions referred for a preliminary ruling

77. For the reasons set out above, I propose that the Court should answer the first three questions referred for a preliminary by ruling that, in the context of an action for damages such as the one at issue in the main proceedings, a company may be held liable for the harm caused by an infringement of Article 101 TFEU for which only the company controlling it has been penalised by the Commission, where it is established, on the one hand, that, in the light of the economic, organisational and legal links between those companies, they formed an economic unit at the time when the infringement was committed, and, on the other, that the conduct of the subsidiary on the market affected by the unlawful conduct of the parent company contributed substantially to the achievement of the objective pursued by that conduct and to the materialisation of the effects of the infringement.

III. Conclusion

78. In the light of all of the foregoing considerations, I propose that the Court should declare inadmissible the fourth question referred for a preliminary ruling by the Audiencia provincial de Barcelona (Provincial Court, Barcelona, Spain) and answer the first three questions referred for a preliminary ruling in the following terms:

Article 101 TFEU must be interpreted as meaning that, in the context of an action for damages such as the one at issue in the main proceedings, a company may be held liable for the harm caused by an infringement of that article for which only the company controlling it has been penalised by the Commission, in the case where it is established, on the one hand, that, in the light of the economic, organisational and legal links between those companies, they formed an economic unit at the time when the infringement was committed, and, on the other, that the conduct of the subsidiary on the market affected by the unlawful conduct of the parent company contributed substantially to the achievement of the objective pursued by that conduct and to the materialisation of the effects of the infringement.