

## **Don't Blame the Children. Why Inverted and Horizontal Liability for Antitrust Infringements Should Be Rejected\***

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**ABSTRACT:** This article analyses some new questions that have emerged as a result of the transposition of the single economic unit doctrine to the realm of private enforcement. The doctrine, originally developed in the context of public enforcement of EU competition law, allows liability to be attributed to parent companies for infringements committed by their subsidiaries, thereby disregarding the corporate separateness of the legal entities involved in order to reflect their economic unity in the market. As antitrust damages become more common throughout Europe, the single economic unit doctrine requires further clarification. In particular, it is not evident whether the doctrine may also apply in an inverted or horizontal manner: whether subsidiaries might be held liable for antitrust infringements committed by their parent companies or whether companies might be held liable for antitrust infringements committed by other entities controlled by the same parent company. This question has led to divergent decisions by national courts throughout Europe. This article rejects the idea of group company liability for antitrust infringements and argues against the automatic recognition of horizontal or inverted liability, which is believed to amount to a violation of general principles of EU law and which cannot be justified on grounds of deterrence, nor on the principle of effectiveness.

**KEYWORDS:** Single economic unit doctrine; parent company liability; inverted liability; horizontal liability; actions for damages.

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## ***I. Introduction***

As is well known, the subjects of EU Competition Law are undertakings, and EU Courts have consistently defined this concept as any entity engaged in an economic activity, *regardless of its legal status*. In other words, what is relevant, for antitrust purposes, is the economic unit, i.e., the unitary organisation of personal, tangible and intangible elements that pursues a specific economic aim on a long-term basis<sup>1</sup>. This means that the concepts of undertaking and legal personality do not have to coincide: the economic unit might not have legal personality<sup>2</sup> and/ or it might be composed of several legal persons<sup>3</sup>. Moreover, the term is functional and flexible: “undertaking” designates an economic unit for the purpose of the subject matter of the agreement in question<sup>4</sup>.

According to well-established case law, this definition of undertaking (also referred to as the single economic unit doctrine) allows the Commission to attribute liability to a parent company for an infringement committed by a subsidiary when two conditions are verified: (i) when the parent company was in a position that enabled it to exercise decisive influence over the subsidiary, and (ii) that influence was effectively exercised during the infringement period<sup>5</sup>. According to the European Court of Justice (CJ), such will be the case whenever the subsidiary did not decide independently upon its own conduct in the market, but carried out, in all material respects, the instructions given to it by the parent company, particularly with regard to the economic, organisational and legal links that tie those two legal entities<sup>6</sup>. Furthermore, when a parent company holds all, or virtually all, of the shares of a subsidiary, the Court allows the Commission to presume that decisive influence was effectively exercised.

<sup>1</sup> Judgment of 10 of March 1992, *Shell v. Commission*, T-11/89, EU: T:1992:33, paragraph 311.

<sup>2</sup> Judgment of 8 June 2005, *Dansk Rørindustri and others v. Commission*, C-189/02 P, EU:C:2005:408, paragraph 113.

<sup>3</sup> Judgment of 20 January 2011, *General Química v. Commission*, C-90/09 P, EU:C:2011:21, paragraph 35.

<sup>4</sup> Judgment of 12 of January 1995, *Viho v. Commission*, T-102/92, EU: T:1995:3, paragraph 50. According to the Court, the way in which this economic entity is financed is also irrelevant in its qualification as an undertaking.

<sup>5</sup> Judgment of 27 September 2006, *Avebe v. Commission*, T-314/01, EU:T:2006:266, paragraph 136.

<sup>6</sup> Judgment of 12 December 2007, *Akzo Nobel et al. v. Commission*, T-112/05, EU:T:2007:381, paragraph 59.

In these cases, the burden of rebutting the presumption (known as the *Akzo* presumption) falls on the parent company<sup>7</sup>.

The Court frequently affirms that when an economic entity infringes competition rules, it falls – according to the principle of personal responsibility – on that entity to answer for that infringement<sup>8</sup>. However, this does not mean that the single economic unit doctrine entails a complete disregard of the legal separateness of the entities that are deemed to compose an undertaking. First of all, the Commission can only address its decisions to natural or legal persons, which may not completely coincide with the economic unit which is deemed to have committed the infringement<sup>9</sup>. Moreover, EU case law indicates a constant struggle to honour economic reality while respecting the procedural and substantial rights of the different legal entities composing the undertaking<sup>10</sup>. For instance, in *ARBED*, the Court annulled the Commission's decision because it was addressed to the parent company while the statement of objections had only been notified to the subsidiary. In the words of the Court, “the statement of objections must specify unequivocally the legal person on whom fines may be imposed and be addressed to that person”<sup>11</sup>. Likewise, in *Bolloré*, the Court annulled the Commission's decision because the statement of objections had not specified that the parent company could be held liable for the infringement committed by the subsidiary<sup>12</sup>. The case law on succession of legal entities, recidivism, and limitation periods also reflects this constant conflict.

Much has been written about the Commission's practice of attributing liability to the parent company for antitrust infringements committed by the subsidiary and the controversial *Akzo* presumption. However,

<sup>7</sup> See Opinion of AG Kokott, *Akzo Nobel et al. v. Commission*, C-97/08 P, EU:C:2009:262, paragraphs 74-75. Judgment of 27 October 2010, *Alliance One International and Others v. Commission*, T-24/05, EU: T:2010:453, paragraph 132.

<sup>8</sup> Judgment of 10 September 2009, *Akzo Nobel and Others v. Commission*, C-97/08 P, EU:C:2009:536, paragraph 56.

<sup>9</sup> The infringement decision had to be addressed to a natural or legal person due to Article 299 TFEU. Wils, W. (2000), The undertaking as subject of E.C. competition law and the imputation of infringements to natural or legal persons. *European Law Review* 25, no. 2, 99-116, 105. See judgment of 24 October 1991, *Rhône-Poulenc v Commission*, T-1/89, EU:T:1991:56, paragraph 38.

<sup>10</sup> Marcos A. Boyd, “Should children pay for their parent's sins? The *Sumal* preliminary reference”, *Journal of European Competition Law & Practice* 12, no. 1 (2021): 25-33.

<sup>11</sup> Judgment of 2 October 2003, *ARBED v. Commission*, C-176/99, EU:C:2003:524.

<sup>12</sup> Judgment of 3 September 2009, *Papierfabrik August Koehler AG (C-322/07 P)*, *Bolloré (C-327/07 P)* and *Distribuidora Vizcaína de Papeles (C-338/07 P) v. Commission*, EU:C:2009:500.

new questions have recently emerged as actions for damages proliferate throughout the EU and as a result of the *Skanska* ruling<sup>13</sup>, which offered a positive answer to the question of whether the single economic unit doctrine should also apply in the realm of private enforcement.

A particularly interesting question is whether an innocent subsidiary may be held liable for an infringement committed by the parent company (what might be referred to as “inverted liability”) or by a sister company (“horizontal liability”) solely on the grounds of their membership to the same corporate group as the legal infringer.

While the advantages of holding a parent company liable for the conduct of a subsidiary are obvious<sup>14</sup>, the reasons why an authority or an injured party would choose to sue a subsidiary *in lieu* of a parent company are less evident. Indeed, in the domain of public enforcement, cases of *inverted* liability are extremely rare. The CJ has handed down a vast amount of cases on parent company liability, but it has very few cases on horizontal or inverted liability. These cases come up more frequently in the context of actions for damages. The reason for this is that if a local subsidiary is in a healthy financial situation and has enough assets to pay for the demanded compensation, plaintiffs might wish to avoid the extra costs and difficulties of suing a foreign parent company<sup>15</sup>. The decision to sue a subsidiary might also be to anchor a claim in jurisdictions that have a tradition of private enforcement and a reputation for being “claimant-friendly”. Especially before the adoption of the Private Enforcement Directive, obtaining compensation for an antitrust infringement was notably easier in certain Member States<sup>16</sup>.

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<sup>13</sup> Judgment of 14 March 2019, *Vantaan kaupunki v. Skanska Industrial Solutions Oy et al.*, C-724/17, EU:C:2019:204. Moreover, the ECN+ Directive also requires Member States to apply the EU concept of undertaking in the context of national public enforcement. Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018, OJ L 11, 14.1.2019, 3-33.

<sup>14</sup> Attributing liability to the parent company allows the imposition of a higher fine, as the maximum threshold will be 10% of the group’s, not the subsidiary’s, total worldwide turnover in the preceding year; the parent company is much more likely to have the necessary funds to pay the fine, and it prevents opportunistic corporate restructurings engaged to avoid the payment of fines or damages.

<sup>15</sup> See Hans-Markus Wagener, “And again: *Liability for Cartel Damages*”. *D-Kart* (2019), <https://www.d-kart.de/en/blog/2019/11/15/auf-ein-neues-haftung-von-konzerngesellschaften/#comments>.

<sup>16</sup> See Christian Kersting, “Liability of sister companies and subsidiaries in European competition law” (2019), <https://ssrn.com/abstract=3355816>.

This contribution describes how national courts across Europe offer very disparate answers regarding these issues (sections 2 and 3). The disparity of solutions has led to a request for a preliminary ruling regarding the possibility of holding subsidiaries liable for wrongs committed by their parent companies (section 4). This article analyses how previous EU case law on the concept of undertaking does not offer a clear answer (section 5). In the eloquent words of Caravaca and González, the legal debate around the single economic unit doctrine has become a Cretan labyrinth with a difficult exit<sup>17</sup>. This ruling offers the Court the possibility of clarifying its case law and the opportunity to make some important choices regarding the single economic unit doctrine. By the time that this article went to press, only the opinion of the Advocate General (AG) was available.

The article describes (section 6) and analyses this opinion (section 7). It is argued that the attribution of liability *downwards* should not depend solely on the existence of a relationship of control. Finally, some brief comments are made on how to articulate the binding effects of infringement decisions with the concept of undertaking in follow-on actions (section 8).

## ***II. Divided courts throughout the EU***

National courts that have addressed the question of “inverted liability” in actions for damages have reached very different conclusions throughout the EU.

In the Netherlands, the Court of Appeal, in *Arnhem-Leeuwarden*, held a subsidiary liable for damages merely on the basis that it was part of the same undertaking as its parent company who had been fined by the Commission in a gas insulated switchgear cartel<sup>18</sup>. The Court reached this conclusion despite the lack of involvement of the subsidiary in the Commission’s investigation. The subsidiary was not an addressee of the infringement decision, which made no reference whatsoever to its involvement in the cartel<sup>19</sup>. Moreover, the Dutch Court went well beyond EU case law and considered that the parent company addressed by the decision and

<sup>17</sup> Alfonso-Luis Caravaca and Javier González, “El derecho internacional privado de la Unión Europea frente a las acciones por daños anticompetitivos”, *Cuadernos de Derecho Transnacional* 10, no. 2 (2018): 7-178, 137.

<sup>18</sup> Commission Decision of 24/01/2007 C (2006) 6762.

<sup>19</sup> See Caroline Cauffman, “Beyond Skanska. The Court of Appeal of Arnhem Leeuwarden’s latest decision in TenneT” (2020), [https://www.researchgate.net/publication/338293534\\_Beyond\\_Skanska\\_The\\_Court\\_of\\_Appeal\\_Arnhem-Leeuwarden's\\_latest\\_decision\\_in\\_TenneT/link/5e0c484692851c8364a9334c/download](https://www.researchgate.net/publication/338293534_Beyond_Skanska_The_Court_of_Appeal_Arnhem-Leeuwarden's_latest_decision_in_TenneT/link/5e0c484692851c8364a9334c/download).

the subsidiary formed a single undertaking, despite the shareholding of the parent company being as low as 48%.

On the contrary, in Germany, courts have been unwilling to accept the liability of legal entities solely by reason of their membership in the same corporate group as the company directly involved in the infringement<sup>20</sup>. They have argued that the breaching conduct of a sister or parent company cannot be imputed to the defendants, as these are independent legal persons<sup>21</sup>. According to these courts, the criterion of exercise of decisive influence is unsuitable to justify the attribution of liability to a subsidiary for the conduct of a parent or a sister company as these are the receivers and not the issuers of instructions.

However, albeit only in an *obiter dictum*, the District Court of Dortmund<sup>22</sup> accepted the idea that liability for antitrust damages might fall on the corporate group as a whole. According to this Court, any company belonging to a group where a legal entity is involved in an antitrust infringement might be held liable for damages. The legal obligation to compensate arises merely from the company's affiliation to the infringing undertaking.

In Spain, the Commission's decision in the famous truck cartel case<sup>23</sup> led to a flood of damage claims. Notwithstanding the fact that the decision was addressed to the parent companies of the groups involved in the cartel and to a couple of German subsidiaries, most Spanish injured parties decided to bring their claims against the local subsidiaries of the truck manufacturers. Roughly half of these damage claims have been dismissed, the most common reason being the lack of legal standing of the defendant. Various courts have reasoned that the Spanish subsidiaries cannot be held liable for damages as they are not the addressees of the Commission's decision. The subjects of the decision are the parent companies, which are different legal entities, and there is no specific mention of the subsidiaries in the infringement decision<sup>24</sup>.

<sup>20</sup> Christian Kersting, "German premiere: Dortmund Court on group liability". *D-Kart* (2020), <https://www.d-kart.de/en/blog/2020/07/15/deutschlandpremiere-lg-dortmund-zur-haftung-von-konzernunternehmen/>.

<sup>21</sup> The *Manheim District* court ruled against a claimant who sued a legal entity for an infringement committed by a sister company (April 2019). Sister company liability was also rejected by the First District Court of Munich.

<sup>22</sup> July 2020.

<sup>23</sup> Commission Decision of 19 of July 2016, AT.39824.

<sup>24</sup> *Juzgado de lo Mercantil de Murcia* of 16 October 2018, no. 148/18; *Juzgado de lo Mercantil de Barcelona* of 23 of January 2019, no. 898/17; *Juzgado de lo Mercantil de Valencia* of 18 February

For instance, the *Juzgado de lo Mercantil de Madrid* refused to recognise passive legal standing to the subsidiary, arguing that EU case law permits liability from the subsidiary to the parent company, but not the inverse<sup>25</sup>. This attribution of liability is not automatic and depends on the verification of certain criteria, namely whether the parent company was in a position that enabled it to exercise decisive influence over the subsidiary's conduct in the market, and whether that influence was effectively exercised. The liability attributed to undertakings by EU judicature is not of an objective nature<sup>26</sup>. The economic unit doctrine does not represent an exception to the principle of legal personality: it allows the extension of liability to an entity that, even though it was not directly involved in the infringing conduct, exercised control over the subsidiary that took part in the antitrust violation<sup>27</sup>. The Court considered the fact that the subsidiary imported cartelised trucks irrelevant, since liability does not arise from the commercial relationship, but from the collusive agreement in which the subsidiary played no role<sup>28</sup>.

On the other hand, quite surprisingly, some other courts readily accepted the legal liability of the subsidiaries because they were part of the same economic unit as the parent companies targeted by the decision<sup>29</sup>.

Some courts discussed this problem at length. For instance, the *Juzgado de lo Mercantil de Valencia* considered in two different cases that the plaintiffs' legal standing on the *follow-on* actions could be justified on several different grounds<sup>30</sup>.

First of all, the Court held that the EU principle of effectiveness required it to abandon a reductionist view of legal personality and to discard the classical attribution mechanisms. The argument that the plaintiff lacked

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2019, no. 298/18; *Juzgado de 1ª instancia de Jaén* of 14 of March 2019 no. 183/18; *Juzgado de lo Mercantil de Madrid* of 2 of July 2019, no. 609/18; *Juzgado de lo Mercantil de Madrid* of 3 of July 2019, no. 584/18; *Juzgado Mercantil de Madrid* of 17 of July 2019, no. 543/2018; *Juzgado de lo Mercantil de Coruña* of 31 of July 2019, no. 166/18; *Juzgado 1ª Instancia Jaén* of 10 of September 2019, no. 569/17; *Juzgado de lo Mercantil de Madrid* of 24 of September 2019, no. 564/18; *Juzgado de lo Mercantil de Madrid* of 8 of October 2019, no. 1264/17.

<sup>25</sup> *Juzgado de lo Mercantil de Madrid* of 2 of July 2019, no. 609/18.

<sup>26</sup> Paragraphs 44 and 45.

<sup>27</sup> Paragraph 50.

<sup>28</sup> Paragraph 51.

<sup>29</sup> See *Juzgado de lo Mercantil de Murcia* of 27 of September 2018, no. 144/18, *Juzgado de lo Mercantil de Murcia* of 15 of October 2018, no. 143/18.

<sup>30</sup> Paragraph 29 of both decisions of the *Juzgado de lo Mercantil de Valencia* of 20 of February 2019 and of 7 of May 2019, no. 287/18 and no. 338/18.

legal standing was seen as an artificial obstacle undeserving of legal protection<sup>31</sup>. The Court stated that the enlarged concept of undertaking as an economic entity applied not only in the context of public enforcement, but also in actions for damages.

Second, the Court relied on the characteristics of the infringement itself. The Commission stated in its decision that all the parent companies involved in the cartel sold their products through distributors throughout Europe, which were either owned by them as part of their internal sales organisation or through independent players<sup>32</sup>. The plaintiffs were wholly owned subsidiaries whose activity was to distribute the vehicles, the object of the cartel, in Spain. The Court emphasised the fact that the defendants were not active in secondary tasks related to the sale of the vehicles (such as financing or repair services). Their role consisted in selling the trucks affected by the cartel enacted by their parent companies. It was thus possible to invert the mechanism of attribution of liability used by the EU judiciary and impute liability to the subsidiaries, as they acted as mere instruments of the parent companies: they were used to implement the distorting effects of the cartel in the Spanish market<sup>33</sup>. The subsidiaries would only be able to escape liability if they managed to prove that they had acted autonomously, thereby breaking the economic unit and preventing the transfer of the damaging effects of the cartel to the Spanish market<sup>34</sup>.

The Commercial Court of Valencia then suggested that damage claims against subsidiaries should be construed as a special type of *follow-on action* where all the relevant elements derive from the administrative decision, with the exception of the persons that can be held liable. It is then for the judge to consider the relevant circumstances of the case and to determine whether the attribution of liability to the subsidiary is justified in that specific case. In the case under analysis, the Court decided that the general references of the Commission's decision on the role played by the subsidiaries in the implementation of the price-fixing agreement sufficed to attribute the conduct carried out by the parent company to the subsidiaries.

<sup>31</sup> Paragraph 34 of both decisions of the *Juzgado de lo Mercantil de Valencia*.

<sup>32</sup> Paragraph 37 of both decisions of the *Juzgado de lo Mercantil de Valencia* and paragraph 25 of the Commission's decision.

<sup>33</sup> Paragraphs 37 and 38 of both decisions of the *Juzgado de lo Mercantil de Valencia*.

<sup>34</sup> Paragraph 39 of both decisions of the *Juzgado de lo Mercantil de Valencia*.

### **III. Insight from “a far and distant land”: subsidiary liability in UK case law**

In the United Kingdom, one of the few countries in Europe where actions for damages were common before the adoption of the Directive, the question of whether it is possible to claim damages from a subsidiary that is not an addressee of a Commission decision has been thoroughly discussed in various court cases.

One of the first of such cases was *Provimi*<sup>35</sup>. In order to prove jurisdiction, the claimants had to make a *prima facie* case showing sufficient links between the entities with which they had contractual relations and the entities found responsible of having engaged in cartel activity by the Commission. The claimants argued that these entities were all part of the same undertaking.

The court decided in favour of the claimants, holding that they were not required to plead and prove that the subsidiaries knew about the infringement. According to the judge, while English law does not allow knowledge of one corporation to be readily imputed to another entity, under the EU concept of undertaking, if two entities are deemed to be part of the same economic unit, they have no independence of action or will. Therefore, there is no need to impute the knowledge or will from one entity to another. The Court thus accepted an analysis that holds liable any company within a single undertaking which implements – even if innocently – an infringing agreement entered into by another entity within the same undertaking with third parties.

However, in subsequent decisions, British courts adopted a more conservative approach. They have argued that under EU competition law the imputation of knowledge, intent, or unlawful conduct from one legal entity to another does not depend merely on the two entities belonging to the same economic concern. Imputation of liability depends on the verification of an additional threshold: the exercise of control. Accordingly, an entity can only be held liable for the conduct of another if it exercised decisive influence over the latter. Given that a subsidiary does not control a parent company, such imputation is not possible<sup>36</sup>.

<sup>35</sup> Judgment of the English High Court of 2 of May 2003, *Roche Products et al. v. Provimi* [2003] EWHC 961 (Comm) paragraphs 30-36.

<sup>36</sup> See Judgment of the English High Court of 27 of October 2009, *Cooper Tire & Rubber Company v. Shell Chemicals UK et al.* [2009] EWHC 2609 (Comm); Judgment of the England and Wales

In *Sainsbury's Supermarkets*, the Competition Appeal Tribunal considered that – even though they were closely related – the question as to the existence of an undertaking is a different question from the attribution of liability between different companies. In the words of this court, even though it might be tempting to apply logic and “hold that each and every constituent person forming part of an “undertaking” should be liable for an infringement for which that undertaking is responsible. Yet, as we have seen, the Court of Justice has not stated the position in such wide terms. Nor in our view would it be appropriate to go so far”<sup>37</sup>. In the Court’s view, “a person is not ipso facto liable for an infringement of Article 101 by reason only of the fact that he, she or it is a member of an undertaking responsible as a matter of EU law for the infringement, in circumstances where the person in question neither participated in the infringement nor had decisive influence over the conduct in the relevant market of other member(s) of the undertaking who did participate”<sup>38</sup>.

#### ***IV. The Spanish preliminary ruling (Sumal)***

As a result of the disparity of solutions among Spanish courts, the *Audiencia Provincial de Barcelona* decided to file a request for a preliminary ruling before the European Court of Justice essentially asking whether the doctrine of the single economic unit as developed by the EU judicature can only attribute liability to the parent company for an infringement committed by the subsidiary or whether it can also be applied inversely to attribute liability to a subsidiary for the conduct of the parent company<sup>39</sup>. If the CJ considers such inverse attribution of liability to be permitted, the question is then what conditions must be fulfilled to attribute liability in these cases. In particular, whether the attribution of liability depends solely on the subsidiary being controlled by the parent company or whether other

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Court of Appeal of 13 September 2012, *KME Yorkshire et al. v. Toshiba Carrier UK et al.* Civ. 1190. Case no. A3/2011/2818.

<sup>37</sup> Paragraph 363.

<sup>38</sup> Judgment of the Competition Appeal Tribunal of 14 July 2016, *Sainsbury's Supermarkets v. Mastercard et al*, 1241/5/7/15 (T) More recently, the English High Court rejected a challenge to jurisdiction and confirmed that a UK domiciled company which is not an addressee of a Commission decision can nonetheless be used to anchor a claim in British courts, where it can be shown that the UK subsidiary knowingly implemented the cartel (Judgment of the English High Court of 4 July 2018, *Vattenfall AB and others v. Prysmian SPA and others* [2018] EWHC 1694).

<sup>39</sup> Request for a preliminary ruling from the *Audiencia Provincial de Barcelona* lodged on 3 December 2019, *Sumal v. Mercedes Benz*, C-882/19.

circumstances should be taken into account, such as whether the subsidiary benefited from the cartel.

If the CJ considers the extension of liability from the parent to the subsidiary permissible, the national court asks whether national norms that only foresee the possibility of imputing the infringing conduct of the subsidiary to the parent company, and not the other way round, are compatible with EU law.

### ***V. Will the Court embrace a full form of enterprise liability?***

This preliminary ruling offers the Court the opportunity to clarify the concept of undertaking and its effects. Despite being decades-long, the case law remains unclear regarding the crucial question of whether the exercise of control criterion is (i) an additional threshold that needs to be verified for liability to be attributed to a legal entity not directly involved in the infringement, or (ii) whether it is part of the test used to decide whether distant legal persons belong to the same undertaking. It will be interesting to see whether the Court is prepared to take a step forward and extend the effects of the economic unit even further by confirming the possibility of attributing liability to one legal entity solely on the grounds that it belongs to the same economic concern despite the lack of exercise of control over the infringing entity<sup>40</sup>.

The lack of clarity in EU case law has also led to contradictory interpretations among scholars. Some authors claim that the crucial test to impute liability is not the exercise of control, but unity of conduct in the market. They therefore recognise the possibility of holding innocent sister companies and subsidiaries liable<sup>41</sup>. For instance, Kersting argues that the decisive factor regarding liability is the notion of “undertaking”: joint liability derives from the unity of action of the undertaking; the existence of

<sup>40</sup> The doctrinal incongruence in the CJ’s case law regarding the classification of the parent company’s liability, whether of a primary/original or a derivative/ secondary nature, has been remarked by some scholars. See Carsten Koenig, “An economic analysis of the single economic doctrine in EU competition law”, *Journal of Competition Law and Economics* 13, no. 2 (2017): 281-327.

<sup>41</sup> See Christian Kersting, “Kartellschadensersatz: Haftungstatbestand – Bindungswirkung – Schadensabwälzung”, in *Die 9. GWB-Novelle*, eds. Christian Kersting and Rupprecht Podszun (Munich: CH Beck, 2017), 115-173.; Georg-Klaus de Bronett, “Unternehmen als Wiederholungstäter im EU-Kartellrecht vor und nach der Akzo Nobel-Rechtsprechung des EuGH zum Unternehmensbegriff”, *Europäisches Wirtschafts- und Steuerrecht* 6 (2014): 313-321; Max Heinrich, *Rechtsfragen der wirtschaftlichen Haftungseinheit des europäischen Kartellbußgeldrechts* (Baden-Baden: Nomos, 2016), 175.

decisive influence is not relevant, it merely serves to determine whether there is an economic unit<sup>42</sup>.

However, other authors, such as Van Leuken, believe that the single economic unit doctrine plays no decisive role in determining the legal entities responsible for the infringement: a parent company's liability is based on the fact that it exercises decisive influence over the subsidiary that committed the cartel infringement<sup>43</sup>.

Suarez<sup>44</sup> also believes that it is the exercise of decisive influence that justifies the transfer of liability from one legal entity to the other. The author argues that the parent company is held liable as a result of the control exercised over the subsidiary which allows the conclusion that the parent company committed the infringement itself. However, unlike Van Laeken, Suarez suggests that the existence of an economic unit is also dependent on the exercise of control between the two entities. Therefore, according to this author, the determination of the boundaries of the economic unit and the attribution of liability are not two distinct issues<sup>45</sup>.

#### *In between corporate separateness and economic unity*

If the single economic unit doctrine were followed all the way through, liability would unmistakably fall originally on the economic unit, and the corporate separateness of the various legal entities would be completely ignored. Cases dealing with the effects of recidivism, limitation periods

<sup>42</sup> Kersting, "Liability". Sharing the same opinion: Hans-Markus Wagener, "Follow-up to Skanska – The 'implementation' by national courts so far" (2019), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3455993&dgcid=ejournal\\_html\\_email\\_antitrust:antitrust:law:policy:ejournal\\_abstractlink](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3455993&dgcid=ejournal_html_email_antitrust:antitrust:law:policy:ejournal_abstractlink).

<sup>43</sup> Roel Van Leuken, "Parental liability for cartel infringements committed by wholly owned subsidiaries. Is the approach of the European Court of Justice in *Akzo Nobel* also relevant in a private-law context?" *European Review of Private Law*, 3 & 4 (2016): 513-527, 527.

<sup>44</sup> Carmen Suárez, "Responsabilidad de la 'empresa' en el ámbito del derecho de la competencia. ¿Hacia una responsabilidad civil del grupo de sociedades?", *La Ley Mercantil* 65, no. 1 (2020): 1-8. See also Rais Amils, "La legitimación activa en el cártel de los camiones: ¿Debe responder la filial por los daños generados por su matriz como consecuencia de una infracción del derecho de la competencia?", *Comunicaciones en Propiedad Industrial y Derecho de la Competencia* 88 (2019): 137-156.

<sup>45</sup> In any case, in practice, the results are the same whether (i) one understands that the economic unit corresponds to a larger universe of companies (for e.g., to the corporate group) but to attribute liability the additional threshold of exercise of decisive influence must be verified, or (ii) one believes that – for attribution of liability purposes – the undertaking must be interpreted more restrictively and only the entity that exercises control over the other can be said to form part of the same undertaking. This is largely a theoretical debate.

and succession of legal entities within the same economic unit would be easy to solve. The case law of the Court, however, illustrates a very different picture.

(i) *Recidivism*

In the first few cases dealing with recidivism, the General Court (GC) allowed the Commission to apply higher fines to entities when their parent, their subsidiaries or their sister companies had been involved in previous infringements<sup>46</sup>. The Court reasoned that since the economic entity is the only relevant criterion for the purpose of defining an “undertaking”, in order to establish the aggravating circumstance of recidivism, it suffices that the legal entities involved in the distinct infringements are all part of the same economic unit<sup>47</sup>.

However, in *Versalis and Eni v. Commission*<sup>48</sup>, the GC adopted a more cautious approach, placing emphasis on the rights of defence of the parent company. The GC considered necessary to articulate previous case law on recidivism with the presumption developed in *Akzo Nobel*<sup>49</sup>, according to which the Commission can only impute the conduct of a wholly owned subsidiary to the parent company when the latter fails to rebut the presumption that it exercised decisive influence over the subsidiary’s conduct. Since the parent company had not been the addressee of the previous infringement decision, it did not have the opportunity to rebut the presumption. Moreover, in the previous decisions the Commission had not even tried to prove that the subsidiaries formed an economic unit with the parent company. The parent company did not have any role in the administrative proceedings leading to the adoption of those decisions. The GC agreed with the parent company that charging it with recidivism amounted to a violation of its rights of defence<sup>50</sup>.

However, the case law on this matter changed when it made its way to the CJ<sup>51</sup>. This Court confirmed that for the aggravating circumstance of

<sup>46</sup> Judgment of 30 September 2003, *Manufacture française des pneumatiques Michelin v. Commission*, T-203/01, EU: T:2003:250, paragraph 290, judgment of 8 July 2008, *BPB v. Commission*, T-53/03, EU:T:2008:254, judgment of 8 July 2008, *Lafarge v. Commission*, T-54/03, EU:T:2008:255.

<sup>47</sup> Judgment of 6 March 2012, *UPM-Kymmene v. Commission*, T-53/06, EU: T:2012:101, paragraph 129.

<sup>48</sup> Judgment of 13 December 2012, *Versalis and Eni v. Commission*, T-103/08, EU: T:2012:686

<sup>49</sup> *Akzo Nobel*, C-97/08.

<sup>50</sup> Paragraphs 273, 274 and 281.

<sup>51</sup> Judgment of 5 of March 2015, *Commission v. Versalis and Eni*, C-93/13 P, EU:C:2015:150.

repeated infringement to be established, it is not necessary for that company to have been the subject of previous legal proceedings; what matters is an earlier finding of a first infringement carried out by a subsidiary with which the parent company involved in the second infringement formed, prior to the time of the previous infringement, a single undertaking<sup>52</sup>. But – in disagreement with the GC – the Court considered that the observance of the rights of defence of the legal person against whom an allegation of repeated infringement has been made does not require the legal person to have had the opportunity, in the administrative proceedings regarding the previous infringement, to dispute that it formed a single economic unit. The crucial question is whether that a legal person is able to defend itself at the time when the repeated infringement is alleged against it<sup>53</sup>. As such, the statement of objections in the second proceeding has to contain all the information necessary for the person to defend itself against the aggravating circumstance of recidivism. If that is the case, then the rights of defence of the undertaking are fully observed<sup>54</sup>.

In *Deutsche Telekom*<sup>55</sup>, the problem of interaction between recidivism and the single economic entity was discussed from a different perspective: in this case, it was the parent company who argued that the finding of recidivism should be made in relation to the whole economic unit and not only in relation to itself. The previous infringement decision had been addressed solely to the parent company (*Deutsche Telekom*), whereas in the second infringement decision the Commission attributed liability to the subsidiary (*Slovak Telekom*), due to the latter's direct participation in the infringement, and to *Deutsche Telekom*, because it was deemed to form an economic unit with *Slovak Telekom*. When calculating the fine, the Commission applied the aggravating circumstance of recidivism only to the *Deutsche Telekom* but not to *Slovak Telekom*. However, *Deutsche Telekom* argued that since its responsibility, in the second decision, was of a pure derivative nature, the Commission could not attribute to it solely the consequences of recidivism. The GC rejected this argument. According to the GC, EU case law on the principle of the individual nature of penalties must be reconciled with the case law according to which certain factors may characterise the conduct of the parent company individually and may

<sup>52</sup> Paragraph 91.

<sup>53</sup> Paragraphs 93 and 94.

<sup>54</sup> Paragraphs 95 and 96.

<sup>55</sup> Judgment of 13 December 2018, *Deutsche Telekom v. Commission*, T-827/14, EU: T:2018:929.

justify the application of a higher sanction than the sanction to be applied to its subsidiary<sup>56</sup>. Even though the unity of an undertaking's conduct in the market justifies holding the legal entities composing such undertaking jointly and severally liable, an exception must be made regarding aggravating and attenuating circumstances and, more generally, in relation to circumstances that are only present in relation to some entities but not to others<sup>57</sup>. In particular, an aggravating circumstance might only characterise the individual conduct of a parent company and justify that its responsibility exceeds the one of its subsidiary<sup>58</sup>. In this case, the first infringement decision was only addressed to *Deutsche Telekom* and it only referred to its conduct. Even though *Slovak Telekom* was already part of the corporate group during a significant part of the infringement period, it took no part in the previous infringement. The GC went on to add that, in any case, according to case law, the Commission can only apply the aggravating circumstance of recidivism to a company that was not the addressee in the prior infringement decision if the company is given the opportunity – in this second case – to understand in what quality it was deemed to be involved in the first infringement<sup>59</sup>. *Slovak Telekom* had no involvement in the first decision: it was not the parent company and it took no part in the infringement. Thus, the GC considered that the Commission, in applying the aggravating circumstance of recidivism only to the parent company, had not committed an error of law.

(ii) *Limitation periods*

Regarding limitation periods, EU judicature has applied the economic unit doctrine all the way through. A good example is the *Akzo Nobel* decision<sup>60</sup>. In this case, even though the parent company was not directly involved in the infringement, the CJ confirmed that the parent company's liability was not affected by the fact that the limitation period had expired in relation to the subsidiaries that participated in the infringement and with which it formed an economic unit<sup>61</sup>. According to the Court, the Commission's power to impose penalties can be time-barred via-à-vis the subsidiary

<sup>56</sup> Paragraph 504.

<sup>57</sup> Paragraph 505.

<sup>58</sup> Paragraph 506.

<sup>59</sup> Paragraph 510.

<sup>60</sup> Judgment of 27 April 2017, *Akzo Nobel and Others v. Commission*, C-516/15 P, EU:C:2017:314.

<sup>61</sup> Paragraphs 125-129.

but not the parent company, even when the parent company's liability is entirely based on the unlawful conduct of the subsidiary. The CJ explained that *Akzo Nobel*, as the ultimate parent company of the group, was individually liable for actions contrary to competition law that it was itself deemed to have taken<sup>62</sup>. The fact that the limitation period had expired in relation to the subsidiaries "[did] not preclude another company, which [was] considered personally responsible and jointly and severally liable with those companies for the same anticompetitive behaviour, and in respect to which the limitation period [had] not expired, from having proceedings instituted against it"<sup>63</sup>. The CJ added the fact that the parent company's liability was purely derivative could not affect this conclusion<sup>64</sup>.

*(iii) Succession of legal entities*

The single economic unit doctrine also plays an important role in cases of succession, transfer and restructuring of companies that are involved in antitrust infringements. According to the reasoning of the EU judicature, when an infringing company goes through a legal or organisational change, such change does not create a new undertaking free of liability for the conduct of its predecessors<sup>65</sup>. Likewise, when an undertaking that was involved in an anticompetitive practice is sold and ceases to exist, the acquiring company, as the purchaser, takes over the assets and liabilities of the acquired company, including liability for the competition law infringement<sup>66</sup>. This solution is dictated by the need to deter anticompetitive conduct; otherwise, infringers would find an easy way to evade liability<sup>67</sup>.

Holding that a change in the legal form or organisation of the infringing undertaking does not have any consequences with respect to the allocation of liability for previous infringements is a natural consequence of the theory of economic continuity. This theory and the economic unit doctrine

<sup>62</sup> Paragraphs 57-70.

<sup>63</sup> Paragraph 71.

<sup>64</sup> Paragraph 72. Criticising this solution, Jens Peter Schmidt, "Akzo Nobel and Others v. Commission: When can parent companies be liable for the acts of subsidiaries even if action against the subsidiary is time-barred?" *Journal of European Competition Law & Practice* 9, no. 1 (2017): 31-33, 33.

<sup>65</sup> Judgment of 5 December 2013, *SNIA v. Commission*, C-448/11 P, EU:C:2013:801, paragraph 22.

<sup>66</sup> *Skanska*, C-742/17, paragraphs 39 and 40. See Marco Botta, "The economic succession doctrine in private enforcement of EU competition law", *Market and Competition Law Review* 3, no. 2 (2019): 171-186.

<sup>67</sup> Judgment of 20 of April 1999, *Limburgse Vinyl Maatschappij*, T-305/94, EU:T:1999:80, paragraph 953.

share the same starting point that informs the finding that the corporate separateness of distinct legal persons might be disregarded if they behave as a single entity in the market<sup>68</sup>. In other words, the principle of economic continuity is an expression of the broad definition of undertaking in EU competition law<sup>69</sup>, the rationale being that liability is imputed to the economic unit, rather than the legal unit, and therefore it will follow the economic unit, regardless of under which corporate shell it is integrated. From an economic point, the new undertaking and its predecessor that committed the infringement of competition law are identical. Their different legal forms are irrelevant.

It is, however, important to remark that EU case law does not take the theory of economic continuity all the way through, but confines it to a narrow field of application. In fact, the main rule remains that of personal responsibility. As such, if the company that committed the infringement is still in existence, it will remain liable rather than the acquirer. According to the Court, the “economic continuity” test can only apply where the legal person responsible for running the undertaking has ceased to exist in law after the infringement. While the legal person exists, responsibility for the undertaking’s infringement will follow the legal person, even though the assets and the personnel involved in the infringement have been transferred to third parties<sup>70</sup>. This prevents the infringing company from escaping liability by selling the assets involved in the anticompetitive conduct.

However, there are cases where the Court applied the economic continuity test, in derogation of the principle of personal liability, even though the legal person who committed the infringement was still in existence. In these cases, the Court recognised the possibility of attributing liability to the acquirer but only when certain conditions are verified, namely: (i) when the two entities are under the control of the same person; and (ii) have, given the close economic and organisational links between them, carried out, in all material respects, the same commercial instructions<sup>71</sup>.

<sup>68</sup> Karen Dyekjaer-Hansen and Katja Hoegh, “Succession of liability for competition law infringements with special reference to due diligence and warranty claims”, *European Competition Law Review* 24, no. 5 (2003): 203-221.

<sup>69</sup> Opinion of AG Wahl, *Skanska*, C-724/17, EU:C:2019:100, paragraph 73.

<sup>70</sup> Judgment of 14 May 1998, *SCA Holding v. Commission*, T-327/94, EU: T:1998:96, paragraph 63.

<sup>71</sup> Judgment of 24 September 2020, *Prysmian et al. v. Commission*, C-601/18 P, EU:C:2020:751, paragraph 87. Previous case law referred to an additional criterion: The legal infringer no longer

(iv) *Sister company liability*

The Court has never affirmed that the Commission is entitled to hold a sister company liable solely on the basis that it is part of the same corporate group as the infringing company. The two relevant cases dealing with sister company liability – *Jungbunzlauer*<sup>72</sup> and *Knauf Gips*<sup>73</sup> – have very specific contours, making it impossible to extrapolate their findings.

In *Jungbunzlauer*, the Court of First Instance (CFI) allowed the Commission to attribute liability to the appellant for its sister company's wrongdoings since the activities of the latter were limited to the mere production of the relevant product, while the entire management of the group business was in the hands of the appellant<sup>74</sup>. The sister company could not decide independently upon its own conduct on the market but carried out, in all material respects, the instructions given by the appellant<sup>75</sup>. In other words, the appellant controlled the sister company and therefore the Commission was allowed to attribute to it liability for the infringement<sup>76</sup>.

In *Knauf Gips*, the appellant was held responsible for all the actions of the group to which it belonged, including those of its sister company and its subsidiaries. The appellant and its sister company were held by 22 common shareholders, all members of the same family. The appellant argued that it did not form an economic unit with the other entities of the group since none of the shareholders had a majority of shares or votes, and that it could not be held liable for the infringements committed by them. The CFI dismissed the appeal, and the case was brought to the CJ.

The CJ began by agreeing with the CFI's assessment that the appellant was part of the same economic unit as the other entities and held that the possibility of varying majorities forming within a group of companies did not exclude the possibility of the existence of such unit<sup>77</sup>.

Moreover, the CJ considered that the appellant could be held liable for the activities of the group for a number of reasons, including (i) the fact that the sister company was only a holding and depended on the appellant

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carried out an economic activity on the relevant market. See judgment of 7 January 2004, *Aalborg Portland et al. v. Commission*, C-204/00 P, EU:C:2004:6, paragraph 359.

<sup>72</sup> Judgment of 27 September 2006, *Jungbunzlauer v. Commission*, T-43/02, EU: T:2006:270.

<sup>73</sup> Judgment of 8 July 2008, *Knauf Gips v. Commission*, T-52/03, EU: T:2008:253 and judgment of 1 July 2010, *Knauf Gips v. Commission*, C-407/08 P, EU:C:2010:389.

<sup>74</sup> Paragraph 127.

<sup>75</sup> Paragraph 129.

<sup>76</sup> Paragraph 130.

<sup>77</sup> Paragraph 37.

for both its premises and for its staff; (ii) most of the documents seized during the investigation contained the appellant's letterhead, and (iii) the appellant was the company within the group with the largest turnover in the relevant market. The Court saw this as an indication of "its predominance within that group, at least as regards to that market"<sup>78</sup>.

As stated above, it is difficult to draw conclusions from this case or to interpret it as an outright acceptance of sister company liability given the peculiar structure of the group at stake. Moreover, the Court attributed relevance to the predominant role that the appellant adopted. In other words, this case cannot be interpreted as a green light from the Court to the Commission allowing it to hold liable any entity that is part of an economic unit that committed an antitrust infringement, regardless of its role in the infringement or position in the group.

*(v) Inverted liability? Mixed signals from the Biogaran case*

The GC has recently considered the possibility of holding a subsidiary liable for an infringement committed by the parent company in the *Biogaran* case<sup>79</sup>. Unfortunately, the ruling lacks clarity. An appeal to the CJ is currently pending and the ruling of the Court will hopefully shed further light on this issue.

In *Biogaran*, the applicant argued that the Commission had disregarded the principle of personal responsibility by imputing to it liability for an agreement concluded by its parent company. It claimed to be unaware both of the conduct of its parent company and of the unlawful nature of the settlement concluded between its parent company and a third party.

The GC began by affirming, however, that the applicant had misinterpreted the Commission's decisions and that the Commission had never intended to impute to the subsidiary the acts alleged against the parent company. According to the GC, there were several elements in the decision demonstrating that the appellant was aware of the anticompetitive nature of the agreement and was directly involved in it<sup>80</sup>.

Nonetheless, the GC went on to argue that *Biogaran*, a wholly owned subsidiary, was part of the same undertaking as its parent company for the purposes of competition law<sup>81</sup>. For the first time ever, the GC applied the

<sup>78</sup> Paragraph 105.

<sup>79</sup> Judgment of 12 December 2018, *Biogaran v. Commission*, T-677/14, EU: T:2018:910.

<sup>80</sup> Paragraph 209.

<sup>81</sup> Paragraph 215.

*Akzo* presumption and considered that the subsidiary had failed to reverse the burden of proof since it had not presented sufficient evidence demonstrating that it determined its commercial policy independently. The GC went on to conclude that the Commission was entitled to consider that the subsidiary and the parent company “were jointly and severally liable for the conduct which was alleged against them since the acts committed by each were accordingly deemed to have been committed by one and the same undertaking”<sup>82</sup>.

However, the GC does not go further and affirm that if a parent company not directly involved in an infringement can be held liable for the subsidiary’s conduct because they belong to the same economic unit, then logically a subsidiary not directly involved in an infringement can be held liable for the parent company’s conduct. Instead, the GC states that since, in the case under analysis, the infringement resulted *both* from the conduct of the parent and the conduct of the subsidiary, the Commission must be allowed to hold both entities jointly and severally liable<sup>83</sup>.

Therefore, since the GC did not limit its analysis to whether the subsidiary and the parent were part of the same economic unit but focused on the role played by the subsidiary and its direct involvement in the infringement, it is not possible to draw a recognition of horizontal or inverted liability from this case.

However, the following paragraphs of the judgment confuse the problem a bit further since the GC adds “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”<sup>84</sup>. According to the GC, this would make the finding of infringements of competition law in groups of companies more difficult, and would render action to combat anticompetitive practices less effective<sup>85</sup>. Nonetheless, the GC recognises that the Commission had drawn sufficient evidence to establish that the subsidiary was aware of the parent company’s conduct and the unlawful nature of the agreement<sup>86</sup>.

In brief, the GC seems tempted to recognise liability of the subsidiary solely because it belongs to the same economic unit, but being afraid to

<sup>82</sup> Paragraph 216.

<sup>83</sup> Paragraph 218.

<sup>84</sup> Paragraph 225.

<sup>85</sup> Paragraph 226.

<sup>86</sup> Paragraph 232.

take this step, the GC relies on the argument that, in any case, the subsidiary was directly involved and knew about the unlawful nature of the conduct.

### **VI. A réponse de Normand from the AG in the Sumal case**

Before analysing AG Pitruzella's opinion in *Sumal*, it is interesting to note that in the proceeding's initial phase, the Commission argued that the current context of EU case law did not allow the extension of liability to the subsidiary given its lack of control over the parent company's conduct. However, the Commission then changed its stance and suggested that the subsidiary might be held liable whenever it is part of the same economic unit as the parent company and (i) the subsidiary's conduct was connected to an integral element of the infringement, or (ii) when it is impossible or excessively difficult for the injured parties to claim compensation for the totality of the damages suffered.

To answer the question of whether liability might be attributed downwards, AG Pitruzella believes it is necessary to identify the legal justifications underpinning parent company liability. The AG acknowledges that there are two different strains of case law. As we have seen above, in certain decisions the Court suggests that the parent company is personally responsible for the infringement because it exercised control over the subsidiary and thus determined its behaviour in the market; in others, the Court reasons that it is the existence of an economic unit between a parent and subsidiary company that justifies holding the former liable for the behaviour of the latter.

The AG, albeit recognising the quasi-criminal nature of competition law and the crucial role that fundamental principles such as personal liability and *nulla poena sine culpa* play in this context, argues that it is the existence of an economic unit, and not the exercise of control, that ultimately justifies the attribution of liability to the parent company for the subsidiary's infringement. In the AG's words, "the justification for the liability of the parent company resides in the unitary character of the economic conduct of the entities"<sup>87</sup>. The AG reaches this conclusion after a thorough analysis of the concept of the exercise of decisive influence, which the Court has gradually outstripped of any meaning. According to case law, the control exercised by the parent company does not need to have a direct

<sup>87</sup> Paragraph 45. Translated by the author.

relationship with the infringement itself, nor is there a need to prove that specific instructions were issued or that the parent company failed to use its powers to prevent the infringement. Moreover, the assessment of the exercise of decisive influence is not restricted to matters relating solely to the subsidiary's commercial policy on the market.

Therefore, the AG argues that unity of action in the market and exercise of decisive influence are not, in fact, alternative grounds but two logic steps in the process of attributing liability: there is an economic unit because the parent company exercises decisive influence over the subsidiaries<sup>88</sup>. Competition law obligations fall on this economic unit, but it is then necessary to concretely attribute liability to the legal entities that compose the undertaking and which will bear the respective financial consequences. The AG believes that there are “no logic reasons” under this model to exclude the attribution of liability downwards.

If the AG took this logic all the way through, being under the control of a parent company would thus suffice for liability to be attributed. However, the opinion takes a welcoming turn at this point. The AG reasons that since the concept of undertaking is a functional one and relates to the conduct adopted by the legal entities on the market, its boundaries must be defined by reference to the economic activity exercised by those entities and the role they play within the corporate group. This means that in cases where liability is attributed *upwards*, the power to exercise decisive influence is enough to define the economic unit and to hold the parent company liable for the subsidiary's infringement. But the existence of control between legal entities is not sufficient to attribute liability *downwards*. In such cases, the subsidiary might only be held liable if, besides being under the control of the parent company, it exercises an activity that is somehow required to carry out the infringement. In other words, it is necessary to prove that the subsidiary participated in the economic activity of the undertaking under the control of the parent company that committed the infringement. The AG gives as an example a subsidiary that sells a cartelised product<sup>89</sup>. It follows that liability for a parent company's infringement cannot be

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<sup>88</sup> One should note that this logic means that the concept of economic unit and the definition of its boundaries will be dependent on the type of effects one wants to attribute. For instance, an agreement between two companies wholly owned by the same parent will escape the prohibition of article 101 regardless of whether they pursue the same economic activity. The two entities will be deemed part of the same economic unit.

<sup>89</sup> Paragraphs 54-59.

attributed to a subsidiary, even if totally owned, if it exercises a different economic activity.

### ***VII. Analysis of the AG's opinion***

Two very important conclusions may be extracted from the AG's opinion. First of all, unlike some national courts seem to believe, the concept of *undertaking* or *economic unit* in competition law does not automatically coincide with the corporate group for attribution of liability purposes. Second, being under the control of another legal entity is not enough to justify liability for antitrust fines or damages. Both these conclusions are laudable for the reasons we shall next explore.

#### ***(a) Corporate groups and economic units may not coincide***

When attributing liability to groups of companies, one cannot forget the hybrid and malleable nature of these organisations. If, on the one hand, legal entities that belong to corporate groups might not enjoy the same level of autonomy as fully independent legal persons, on the other hand, groups of companies are not “super-companies”. Reality demonstrates the existence of a wide range of forms of corporate groups with various degrees of centralisation: from groups composed exclusively of wholly owned subsidiaries, to groups characterised by their decentralised organisation, where subsidiaries act as mere profit centres with high decisional autonomy and their parent company's intervention is limited to the group's survival, solvability and profit maximisation<sup>90</sup>. As has been advocated by some authors, corporate groups, as organisational networks, demand a rupture with the traditional techniques of *unitary imputation* conventionally used in relation to legal persons given their anthropomorphic conception as unitary centres of action and will.

As argued by Teubner, the problems posed by corporate groups cannot be solved (i) by insisting on the distinct legal personality, the corporate separateness and the limited liability of the companies that compose the group while completely disregarding the collective identity of the group and its common interests, (ii) nor through the opposite solution, which sees the group as one single person and liability of one legal entity immediately extends to all the other entities of the group. Corporate groups

<sup>90</sup> José E. Antunes, *Os grupos de sociedades. Estrutura e organização jurídica da empresa plurisocietária* (2.<sup>nd</sup> ed., Coimbra: Almedina, 2002), 155-156.

cannot be regarded as single hierarchical units controlled by the parent company. The reality is much more complex. As such, we should be prepared to accept a technique of *multiple imputation* of rights, duties and liabilities, in lieu of the technique of *unitary imputation*<sup>91</sup>.

The concept of undertaking can be seen in competition law as an expression of this multiple imputation technique. It allows the possibility of attributing rights, duties or liabilities (i) to the various entities composing the group; (ii) to only one of the entities; or (iii) partially to the various co-participants. Imputation to one entity will depend on the specific circumstances of the case. Emphasis should be on the aim of the attribution of the right, duty or liability.

***(b) Why attribution of liability downwards should not depend solely on the existence of a relationship of control***

*(1) The role of fundamental law principles and previous case law*

Since the punitive nature of measures imposed by competition authorities for punishing cartel offences is at least akin to criminal law<sup>92</sup>, fundamental criminal law principles such as the principle of personal responsibility and the presumption of innocence play a crucial role in the context of public enforcement. Attributing liability to entities solely on the grounds that they belong to the same corporate group would amount to recognising an objective form of liability and would represent a violation of the referred principles. The EU judicature itself has acknowledged that the automatic attribution of liability would be contrary to the principle of personal liability and that the single economic unit doctrine is compatible with criminal law principles because proof is required that the parent company exercised decisive influence over the subsidiary<sup>93</sup>. It is for the same reasons that the Court insists on the rebuttable nature of the *Akzo* presumption<sup>94</sup>.

<sup>91</sup> See Gunther Teubner, “Unitas multiplex”, translated by José E. Antunes, *Revista Direito GV* 2, no. 1 (2005): 77-110.

<sup>92</sup> Opinion of AG Kokott in *Autorità Garante della Concorrenza e del Mercato v. ETI et al*, C-280/06, EU:C:2007:404, paragraph 71; opinion of AG Kokott in *Toshiba Corporation et al*, C-17/10, EU:C:2011:552, paragraph 48.

<sup>93</sup> Judgment of 9 September 2011, *Alliance One International v. Commission*, T-25/06, EU:T:2011:442, paragraph 92.

<sup>94</sup> Judgment of 29 September 2011, *Elf Aquitaine v. Commission*, C-521/09 P, EU:C:2011:620, paragraph 59.

In order to reject the argument that imposing liability on the parent of an infringing subsidiary conflicts with the principle of personal responsibility, AG Kokott sustained in her opinion in the *Akzo Nobel* case<sup>95</sup> that even though “the parent company’s involvement in the commission of the offence may not have been directly apparent outwardly, for example, through the participation of its own staff in meetings of the cartel members (...) that does not detract from its personal (co-)responsibility for the offence. As the parent company exercising decisive influence over its subsidiaries, it pulls the strings within the group of companies”<sup>96</sup>. The CJ then expressed the same view in the judgment by stating 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. It follows that, in that context, the liability of the parent company cannot be regarded as strict liability”<sup>97</sup>. In other words, it is because the parent company is able to control the conduct of the subsidiary that attribution of liability to the former for the behaviour of the latter does not violate the principle of personal responsibility. This justification fails when liability is attributed to companies not because “they were pulling strings”, but because *their strings were being pulled*.

However, the Court also frequently argues that the single economic unit doctrine does not violate the principle of personal liability because in competition law the “person” is the economic unit.

This argument presupposes a very flexible understanding of said principle, which is normally understood as meaning that natural and legal persons may *only* be penalised for acts attributed to them individually. Indeed, some authors argue that it should not be possible to attribute liability to an entity that is not capable of being the holder of rights<sup>98</sup>.

Even if we accept the Court’s controversial understanding of this principle, it results from the AG’s opinion that a wholly owned subsidiary that carries out a different economic activity from that where the infringement took place cannot be said to be part of the same undertaking. Attributing

<sup>95</sup> *Akzo Nobel*, C-97/08.

<sup>96</sup> Paragraph 99.

<sup>97</sup> Paragraph 77.

<sup>98</sup> Bettina Leupold, “Effective enforcement of competition law gone too far? Recent case law on the presumption of parental liability”, *European Competition Law Review* 34, no. 11 (2013): 570-582 and 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* 3, no. 1 (2012): 11-28.

liability to such entities would therefore amount to a clear violation of the principle of personal liability, even if understood in its widest conception.

Nonetheless, it is possible to affirm that in the context of private enforcement, as we are outside the realm of criminal law, these principles and formalities play a less relevant role<sup>99</sup>. However, the principles of limited liability and corporate separateness constitute the founding principles of national and European corporate law. It is true that these principles are not absolute and accommodate exceptions that might be either statutory or result from judicial practice. However, the corporate veil is normally only pierced when it is deemed necessary in order to achieve fairness or justice in cases, for instance, of disrespect for corporate formalities or commingling of assets and there is typically a measure of fault on the part of the shareholder<sup>100</sup>. Moreover, it results from *Skanska* that the definition of undertaking should remain the same both in public and in private enforcement<sup>101</sup>.

## (2) *Absence of justification*

### (i) *No deterrent purpose*

The reasons that justify parent company liability cannot be used to justify holding a sister company or a subsidiary liable. In the context of public enforcement, parent company liability serves a deterrent purpose. Not only does it allow a fine to be set at a higher amount, but, given that the assets of the parent company are at stake, it creates a strong incentive for the parent company to monitor and control the subsidiary and hinder it from engaging in anticompetitive conduct. This deterrent purpose does not serve to justify the attribution of liability to sister companies or to subsidiaries. Logically, if these entities do not have any power of control over the entity that engaged in the anticompetitive conduct, they are unable to prevent it from violating competition law. The Court has recognised that the Commission should only impose a fine when it is able to play a deterrent role<sup>102</sup>.

<sup>99</sup> See Boyd, “Should children pay”: 30.

<sup>100</sup> See Bruce Wardhaugh, “Punishing parents for the sins of their child: Extending EU competition liability in groups and to subcontractors”, *Issue of Antitrust Enforcement* 5 (2017): 22-48.

<sup>101</sup> Boyd, “Should children pay”: 30.

<sup>102</sup> Judgment of 24 September 2020, *Prysmian and Prysmian Cavi and Sistemi v. Commission*, C-601/18 P, EU:C:2020:751, paragraph 85.

Some authors, addressing the justification of parent company liability from an economic perspective, argue that attributing liability to parent companies for their subsidiaries' infringements leads to efficient results<sup>103</sup>. If a subsidiary does not have enough assets to pay the full sanction, its expected liability will be limited to the value of the assets available to it. Even if the sanction is set at the optimal level, deterrence will be suboptimal. This has been described by Shavell as the judgment proof problem: infringers might be unable to pay the totality of the fine or damages they have been held liable for; consequently, infringers will treat any measure of liability that exceeds their assets as imposing an effective financial penalty only equal to their assets<sup>104</sup>. Holding the parent company liable is one way to provide effective deterrence. However, this reasoning cannot be used to justify sister or subsidiary liability.

*(ii) Not required by the principle of effectiveness*

The goal of deterrence is largely absent in the field of private enforcement, where liability serves mainly a compensatory aim. In this context, the attribution of liability to the parent company can be justified on the principle of effectiveness. The EU recognised right to compensation for antitrust damages would be seriously compromised if it could not be exercised against the parent company given how easy it is through corporate restructuring to extinguish a subsidiary that had been found liable or to deplete it of assets, thereby ensuring that compensation claims would be unsuccessful. On the contrary, holding subsidiaries liable cannot be justified by the need to prevent opportunistic corporate restructurings or by the need to ensure the financial capacity of the liable entity. The question is then whether rejecting the possibility of attributing liability to innocent subsidiaries or sister companies would unduly hamper the exercise of the right to claim compensation.

To answer this question, one should take into account the recent preliminary ruling interpreting Regulation 1215/2012 Brussels I bis, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

In this decision, the CJ interpreted Article 7(2) of said Regulation. This norm establishes certain exceptions to the jurisdictional principle that

<sup>103</sup> Koenig, "An economic analysis": 281-327.

<sup>104</sup> S. Shavell, "The judgment proof problem" *International Review of Law and Economics* 6 (1986): 45-46.

persons domiciled in a Member State (MS) shall be sued in the courts of that MS— namely in matters relating to tort, delict or quasi-delict — and allows for persons domiciled in a MS to be sued in the MS where the harmful event occurred. The CJ held that, in actions for damages for anti-trust infringements, the place where the harmful event occurred should be interpreted as the place where the market prices were distorted and in which the victim claims to have suffered that damage, even where the action is directed against a participant in the cartel at issue with whom that victim had not established contractual relations<sup>105</sup>.

This means that, in principle, injured parties are able to sue the parent companies in the country where they suffered the harm. Suing a foreign parent company instead of a local subsidiary could represent increased legal costs or perhaps a longer procedure, but the impossibility of claiming damages from an innocent subsidiary does not seem to make the exercise of the right to claim damages impossible or extremely difficult. Admittedly, recognising automatic liability to all the entities that are part of an undertaking involved in an infringement would render the right to claim compensation simpler, faster, and cheaper. However, the principle of effectiveness must have limits. It must be tempered by the principle of proportionality. Simpler and swifter claims are not a good enough justification to introduce exceptions to fundamental legal principles, such as the principle of personal liability.

Boyd<sup>106</sup> also raises the question of whether the principle of effectiveness might be considered a sufficient basis to expand liability to subsidiaries. On the one hand, the author acknowledges that there is an obvious risk in implying that any rule that may result in the need to litigate in another jurisdiction constitutes a restriction to the principle of effectiveness. Moreover, the author rightly points out that the argument is especially difficult to make in light of the Damages Directive, which was adopted exactly with the intention of facilitating such claims. On the other hand, the author believes that in *Skanska*, the Court made a generous reading of the principle of effectiveness. However, in our view, there is a considerable difference between *Skanska* and *Sumal*. While the decision of the court in *Skanska* entails transposing to the national context well-established EU case law developed regarding the succession of legal entities, in *Sumal*,

<sup>105</sup> Judgment of 29 July 2019, *Tibor-Trans Fuvarozó és Kereskedelmi v. Daf Trucks*, C-451/18, EU:C:2019:635.

<sup>106</sup> Boyd, “Should children pay”: 30-31.

if the Court did decide to recognise subsidiary liability, it would require national courts to make a very extensive interpretation of the single economic unit doctrine – one which has never been recognised by EU Courts before in the context of public enforcement<sup>107</sup>.

***(c) A better test: liability may only be attributed downwards when subsidiaries knowingly contributed to the implementation of the infraction***

Bearing in mind that the single economic unit doctrine necessarily entails exceptions to the above-discussed principles, such exceptions must have clear justification, and they must be interpreted in a proportional manner. Restrictions to the substantial and formal rights of legal persons should be adequate to achieve their aim and should not go beyond what is strictly necessary. This is not a matter of there being *no logical reasons to exclude* liability downwards, as argued by AG Pitruzella<sup>108</sup>, but *whether there are good reasons* that justify holding such persons liable. As we have seen, while parent company liability is justifiable, there are no good reasons to justify subsidiaries' liability for infringements committed by their parent companies when they do not carry out the same economic activity or when they did not contribute to the concretisation of the infringement.

But what about subsidiaries that did contribute to the concretisation of the effects of the infringement while being completely unaware that the conduct of the parent company was involved in an illicit agreement? Under the AG's model, as these subsidiaries carry out the same economic activity as the parent company, they are deemed part of the same economic unit and may therefore be held liable.

However, the justification behind the attribution of liability to such entities in these cases is rather weak. The AG mentions two main arguments. The first is deterrence. In his words, the greater the number of people that can claim damages, the greater the deterrent effect<sup>109</sup>. This is not exactly true, though: allowing injured parties to claim damages against the subsidiaries does not mean that more people are eligible for compensation. Injured parties may always claim damages against the parent company. Allowing claims to be made against subsidiaries that were not aware of their infringing conduct may actually decrease the deterrent effect. This

<sup>107</sup> Recital 46 of the ECN+ Directive supports this idea.

<sup>108</sup> Paragraph 52.

<sup>109</sup> Paragraph 67.

is because this solution might actually be beneficial to culpable parent companies. If claimants choose whom to sue, this will necessarily mean that parent companies will face fewer claims than they would otherwise. Moreover, if subsidiaries were unaware that they were taking part in an infringement, or they had no freedom to distance themselves from it, holding them liable will not result in increased deterrence. A parallel might be drawn with the Commission's practice of fining undertakings: while the fact that an undertaking was forced to enter into an agreement does not affect the existence of such agreement, the unwillingness of the undertaking may influence the Commission to significantly mitigate the fine, not to impose a fine or even not to initiate proceedings at all<sup>110</sup>.

The second argument presented by the AG is that the possibility of suing a subsidiary domiciled in the same country as the claimant "avoids the practical difficulties" related to the transmission, service and enforcement of judicial decisions between Member-States. Yet, the avoidance of practical, surpassable obstacles seems to be blatantly insufficient as a justification for the attribution of liability. And, as argued above, both the Private Enforcement Directive and the ECN+ Directive were adopted to overcome such difficulties.

The only explanation that might explain holding subsidiaries liable in this situation is the idea of *profit disgorgement*. In other words, by selling a cartelised product, albeit unknowingly, subsidiaries increased their profits at the expense of consumers. However, this justification, when counter-weighted with the absence of deterrent effects, the minimal increase in effectiveness, and the legal uncertainty that the acceptance of inverted liability generates, should not be considered sufficient.

Moreover, especially in the realm of public enforcement, it might be argued that the prosecution of subsidiaries that are not aware of their infringing conduct amounts to an inefficient use of public resources by competition authorities. These resources would probably be better used elsewhere in the investigation of companies that knew and had agency over the antitrust infringement.

As such, the attribution of liability downwards would find a stronger justification and would be better aligned with the above-discussed principles if the requirement of *knowledge* about the illicit conduct were added to the

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<sup>110</sup> See the cases mentioned by Richard Whish and David Bailey, *Competition law*, 9<sup>th</sup> ed. (Oxford: Oxford University Press, 2018), 104-105.

conditions described by the AG. It would then make more sense to talk about a deterrent goal, as subsidiaries that are aware that they are taking part in an infringement could try to distance themselves from it or raise alarm bells within the corporate group, even though one might question how much power or freedom they have to do so.

### ***VIII. Follow-on actions and the binding effect of decisions***

Another problem with recognising inverted or sister company liability is how to articulate it with the binding effects of administrative decisions adopted by the Commission or by NCAs in the context of follow-on actions. In these type of proceedings, national courts are bound by certain elements contained in the infringement decisions. This binding effect was initially recognised by the Court in relation to the Commission's decisions in the *Masterfoods* case<sup>111</sup> and was then extended to decisions of NCAs by the Damages Directive<sup>112</sup>. Recital 34 of the Directive specifies that the binding effect applies to “the nature of the infringement and its material, *personal*, temporal and territorial scope as determined by the competition authority or review court in the exercise of its jurisdiction”. This can be interpreted as meaning that, in follow-on actions, damages may only be claimed from legal persons identified in the administrative decision.

But an argument can also be made that personal scope refers to the economic unit and not the legal persons specified in the administrative decision. This is the suggested solution of AG Pitruzella in *Sumal*<sup>113</sup>. However, this interpretation seems to run counter to previous case law, which, as described above, does not ignore the legal separateness of the entities composing the undertaking and seeks to ensure that the procedural rights of the companies involved are fully observed.

A possible compromise is to accept follow-on actions against subsidiaries whose parent company has been involved in an antitrust infringement where the national courts are only bound to the material, temporal and territorial scope defined in the administrative decision. Regarding personal scope, the burden should be on claimants to prove that the subsidiary was part of the same undertaking as the infringing legal entity and knowingly contributed to the concretisation of the effects of the infringement. It is

<sup>111</sup> Judgment of 14 December 2000, *Masterfoods v. HB Ice Cream*, C-344/98, EU:C:2000:689.

<sup>112</sup> Article 9.

<sup>113</sup> Paragraphs 70-76.

true that the proof of these elements might be quite difficult, but the claimant has always the option to sue the parent company directly.

### **IX. Concluding remarks**

In brief, both in the realm of public and private enforcement, subsidiaries should not be held liable for an infringement committed by another legal entity solely because they belong to the same corporate group. It results from well-established case law and the Commission's practice that, for competition law purposes, the fact that a company belongs to a corporate group does not necessarily mean that the entity is part of the same undertaking as all the other entities belonging to the same group. Determining whether two entities belong to the same economic unit requires a case-by-case analysis where various criteria have to be taken into account, namely the economic, organisational and legal links between such entities and whether the same entities adopt a unified conduct in the market.

While there is strong justification for parent company liability, it is largely absent when holding liable entities that had no involvement in an infringement. Attribution of liability to an entity that was unable to exercise control over the infringer will serve no deterrent purpose. Nor is inverted or sister company liability dictated by the principle of effectiveness, since – as EU law stands today – it is not difficult for those who have suffered damages to demand compensation from the parent company.

As such, in our view, in *Sumal* the AG was right in not holding a subsidiary liable solely by reason of its being totally owned by the infringer and also requiring that its conduct be essential to the infringement. This solution would find a stronger justification and would represent a lesser violation of fundamental legal principles if the existence of knowledge of the infringement were added to the conditions that have to be demonstrated before holding a subsidiary liable for an infringement committed by another legal entity within the same economic unit.

### **Bibliography**

- Amils, Rais. “La legitimación activa en el cártel de los camiones: ¿Debe responder la filial por los daños generados por su matriz como consecuencia de una infracción del derecho de la competencia?”, *Comunicaciones en Propiedad Industrial y Derecho de la Competencia* 88 (2019): 137-156.
- Antunes, José E. *Os grupos de sociedades. Estrutura e organização jurídica da empresa plurissocietária*. 2.<sup>nd</sup> ed. Coimbra: Almedina, 2002.

- Botta, Marco. "The economic succession doctrine in private enforcement of EU competition law". *Market and Competition Law Review* 3, no. 2 (2019): 171-186.
- Boyd, Marcos A. "Should children pay for their parent's sins? The *Sumal* preliminary reference". *Journal of European Competition Law & Practice* 12, no. 1 (2021): 25-33.
- Cauffman, Caroline. "Beyond Skanska. The Court of Appeal of Arnhem Leeuwarden's latest decision in TenneT" (2020) [https://www.researchgate.net/publication/338293534\\_Beyond\\_Skanska\\_The\\_Court\\_of\\_Appeal\\_Arnhem-Leeuwarden's\\_latest\\_decision\\_in\\_TenneT/link/5e0c484692851c8364a9334c/download](https://www.researchgate.net/publication/338293534_Beyond_Skanska_The_Court_of_Appeal_Arnhem-Leeuwarden's_latest_decision_in_TenneT/link/5e0c484692851c8364a9334c/download).
- De Bronett, Georg-Klaus. "Unternehmen als Wiederholungstäter im EU-Kartellrecht vor und nach der Akzo Nobel Rechtsprechung des EuGH zum Unternehmensbegriff". *Europäisches Wirtschafts und Steuerrecht* 6 (2014): 313-321.
- Dyckjaer-Hansen, Karen and Hoegh, Katja. "Succession of liability for competition law infringements with special reference to due diligence and warranty claims". *European Competition Law Review* 24, no. 5 (2003): 203-221.
- Heinrich, Max. *Rechtsfragen der wirtschaftlichen Haftungseinheit des europäischen Kartellbußgeldrechts*. Baden-Baden: Nomos, 2016.
- Kersting, Christian. "Kartellschadensersatz: Haftungstatbestand – Bindungswirkung – Schadensabwälzung". In *Die 9. GWB-Novelle*, edited by Christian Kersting and Rupprecht Podszun, 115-173. Munich: CH Beck, 2017.
- Kersting, Christian. "Liability of sister companies and subsidiaries in European competition law". (2019) <https://ssrn.com/abstract=3355816>.
- Kersting, Christian. "German premiere: Dortmund Court on group liability". *D-Kart* (2020). <https://www.d-kart.de/en/blog/2020/07/15/deutschlandpremiere-lg-dortmund-zur-haftung-von-konzernunternehmen/>.
- Koenig, Carsten. "An economic analysis of the single economic doctrine in EU competition law". *Journal of Competition Law and Economics* 13, no. 2 (2017): 281-327.
- Leupold, Bettina. "Effective enforcement of competition law gone too far? Recent case law on the presumption of parental liability". *European Competition Law Review* 34, no. 11 (2013): 570-582.
- Schmidt, Jens Peter. "Akzo Nobel and Others v. Commission: When can parent companies be liable for the acts of subsidiaries even if action against the subsidiary is time-barred?" *Journal of European Competition Law & Practice* 9, no. 1 (2017): 31-33.
- Shavell, S. "The judgment proof problem". *International Review of Law and Economics* 6 (1986): 45-58
- Suárez, Carmen. "Responsabilidad de la 'empresa' en el ámbito del derecho de la competencia. ¿Hacia una responsabilidad civil del grupo de sociedades?", *La Ley Mercantil* 65, no. 1 (2020): 1-8.

- Teubner, Gunther. “Unitas multiplex”, translated by José E. Antunes. *Revista Direito GV*, 2, no. 1 (2005): 77-110.
- Thomas, Stefan. “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* 3, no. 1 (2012): 11-28.
- Van Leuken, Roel. “Parental liability for cartel infringements committed by wholly owned subsidiaries. Is the approach of the European Court of Justice in *Akzo Nobel* also relevant in a private-law context?” *European Review of Private Law*, 3 & 4 (2016): 513-527.
- Wagener, Hans-Markus. “And again: Liability for cartel damages”. *D-Kart* (2019). <https://www.d-kart.de/en/blog/2019/11/15/auf-ein-neues-haftung-von-konzerngesellschaften/#comments>.
- Wagener, Hans-Markus. “Follow-up to Skanska – The ‘implementation’ by national courts so far”. (2019). [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3455993&dgcid=ejournal\\_html\\_email\\_antitrust:antitrust:law:policy:ejournal\\_abstractlink](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3455993&dgcid=ejournal_html_email_antitrust:antitrust:law:policy:ejournal_abstractlink).
- Wardhaugh, Bruce. “Punishing parents for the sins of their child: Extending EU competition liability in groups and to subcontractors”. *Issues of Antitrust Enforcement* 5 (2017): 22-48.
- Whish, Richard and Bailey, David. *Competition law*, 9<sup>th</sup> ed. Oxford: Oxford University Press, 2018.
- Winckler, Antoine. “Fines: New case extending company liability in the name of the ‘economic unit’ concept and reversing prior case law on admissible arguments”. *Journal of European Competition Law & Practice* 2, no. 1 (2011): 34-35.