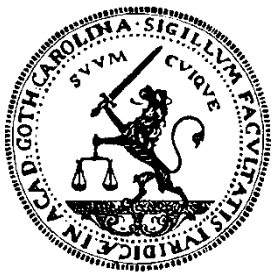

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The potential civil liability of innocent subsidiaries as a consequence of the notion of undertaking in EU Competition Law

an implication from the recent case *Skanska*

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Table of Contents

Summary

In EU Competition Law, the addressee of the prohibition indicated in the Treaty on the Functioning of the European Union (TFEU) is the undertaking. The Court of Justice of the European Union (CJEU) has applied the notion of undertaking using an economic and functional approach, determining that undertaking, as a single economic entity, may consist with several separate legal entities, including natural and legal persons. In addition, a parent company is considered to constitute a single economic entity where the former exercise decisive influence over the latter. As a result, the single economic entity doctrine enables CJEU and the European Commission (The Commission) to attribute antitrust liability of a subsidiary to its parent company. The exercise of decisive influence could also be presumed in case of a wholly subsidiary. The current methodology of the CJEU has been criticised continuously as vague and ambiguous, which leads to the contradiction with the fundamental principle of personal liability. Moreover, the consideration of the single economic entity as a perpetrator of competition law may result in the liability of a subsidiary for an infringement committed by its parent company. The recent judgment of the European Court of Justice (ECJ) in case Skanska implies that the single economic entity doctrine in TFEU is directly applied in actions for damages.

The thesis analyses the methodology of the CJEU regarding the single economic entity doctrine in order to attribute liability of one legal person to another and potential civil liability of a subsidiary. The first chapter of the thesis examines the contemporary concept of the attribution of liability in light of the principle of parental liability. The thesis then analyses the recent case Skanska to determine its implication and potential legal consequences. Subsequently in the second chapter, the thesis scrutinises the reasonings of the CJEU when determining the contradiction of the attribution of liability and the principle of personal liability. The analysis shows that reasonings of the CJEU render the possibility of an innocent subsidiary as a constituent of an infringing economic entity. Subsequently, the role of decisive influence criterion will be analysed to examine the scope of the attribution of liability. Consequently, the thesis discusses, the recent preliminary reference by the Spanish Court in case Sumal and concludes with additional remarks.

Preface

I would like to express my sincere gratitude to my supervisor, Annegret Engel, for the valuable advice from the beginning until the end of the process. The thesis would not be completed without your continual support.

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Lund, May 2020

Krisadhikhun Tangdham

Abbreviations and Glossary

EU	European Union
TFEU	Treaty of the Functioning of the European Union
CFREU	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
ECJ	European Court of Justice
GC	General Court
AG	Advocate General
KHO	Supreme Administrative Court of Finland
KKO	Supreme Court of Finland
APB	Audiencia Provincial de Barcelona

1.Introduction

Multinational corporations are not something new in the current era. They have developed from the period of imperialism and colonialism which their focus is mainly on resources and infrastructure to nowadays dispersed multinational organisations participating in various markets.[1] The structure of corporate groups has developed from a simple relationship to nowadays complex and more expansive global organisations. Consequently, the question might arise when a company, who belongs to a corporate group, commits a violation of the law. Given the complicated connections of companies in the corporate group, they pose questions and challenges for legal authorities in every jurisdiction when determining the liability of violations of law committed by one of the members in a corporate group. In other words, should a company who infringes the law itself solely responsible for any fines or damages, or it is possible to attribute such liability to other members of the same corporate group owning to their complicated connections.

In EU competition law, the addresses of the prohibitions enshrined in the Treaty on the Functioning of the European Union (TFEU) is the undertaking.[2] When considering the characteristic of the undertaking, the Court of Justice of the European Union (CJEU) does not determine that separate legal personalities constitute separate undertaking. In contrast, it is possible that one undertaking consists of several legal persons. One aspect of the undertaking is the relationship between a parent company and its subsidiary. The liability of a subsidiary can be attributed to its parent company and they are deemed to be jointly and severally liable when a subsidiary does not act autonomously but carries out, in all material aspects, the instructions given by a parent company.[3]

The methodology of the attribution of liability is ambiguous. The parent company is liable for its subsidiary infringement since they form a single economic entity. However, the additional reason for parental liability is that a parent company exercise decisive influence over its subsidiary. There is no explicit explanation whether without decisive influence, the parent company is liable

[1] Christoph Dörrenbächer and Mike Geppert, *Multinational Corporations and Organization Theory: Post Millennium Perspectives Research in the Sociology of Organizations* Vol. 49, 2017, p.8-9
[2] Article 101, 102 Consolidated Version of the Treaty on the Functioning of the European Union (2012) OJ C 326/47
[3] Case C-231/11 P to C-233/11 P Commission v Siemens Österreich and Others and Siemens Transmission & Distribution and Others v Commission, P, ECLI:EU:C:2014:256, para 46 and the case-law cited

or not since the statement from the CJEU has been that a parent company liability derived from the fact that it forms a single economic entity along with its subsidiary. Therefore, it could be considered that an innocent subsidiary, as one of the constituents of a single economic entity, can be held liable for an antitrust infringement committed by other members of the same economic entity, such as a parent company.

Regarding to the litigations, on the one hand, the concept of undertaking in relation to the attribution of liability so far has been dominantly concerned with the public litigation which is the imposition of fines by the Commission.[4] On the other hand, the notion of undertaking has not been entirely transposed to the action for damages. In civil procedures, the imputability of the liability can be governed by national competition law, in accordance with the principle of equivalence and effectiveness.[5] Even though the Damages Directive has been recently introduced in order to facilitate the process of action for damages[6], it is still unclear whether the concept of undertaking in Article 101 is to be directly applied in the civil procedures or not. However, the European Court of Justice (ECJ) in case *Skanska* held that to ensure the full effectiveness of the EU competition law, the concept of undertaking in civil procedure shall have the same scope as that in the public procedure.[7] The implication of the case can be inferred as that subsidiary can be now brought into action for damages of the infringement committed by its parent company. The preliminary reference from the Spanish Court on 3 December 2019 in Case C-882/19 *Sumal S.L. vs Mercedes Benz Trucks España, S.L* concerns with the exact question, whether a subsidiary could be held liable for its parent company antitrust infringement according to the single economic entity doctrine.

1.1 Purpose of the Thesis and Research Question

Subscribing to the aforementioned methodology, all legal persons in the same undertaking can be held liable for the infringement committed by one of the constituents of the undertaking.

[4] Council Regulation (EC) No 1/2003 of 16 Dec. 2002 on the implementation of the rules on competition laid down in Arts 81 and 82 of the Treaty, OJ 2003 L 1/1.
[5] Case C-557/12 *Kone and Others v ÖBB-Infrastruktur AG* ECLI:EU:C:2014:1317 para. 24
[6] Directive 2014/104/EU of the European Parliament and of the Council of 26 Nov. 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 349/1.
[7] Case C-724/17 Vantaan kaupunki v Skanska Industrial Solutions Oy and Others ECLI:EU:C:2019:204

Therefore, it is possible that a subsidiary is also liable for the liability of its parent company since they belong to the same economic entity. The EU jurisprudence so far has not clarified whether, under current methodology applied by the CJEU, the attribution of liability occurs only in the situation where a subsidiary participates in an antitrust infringement. The liability is imputed to its parent company, or it is possible for the CJEU and the European Commission (The Commission) to hold an entire corporate group liable for an infringement committed by one of its members. The thesis therefore intends to examine the potential scope of the methodology of the CJEU in relation to the attribution of liability between legal persons in the same corporate group by applying the single economic entity doctrine

The research question is: Is it possible for a subsidiary to be held liable for damages occurred from the anticompetitive infringement committed by a parent company according to the single economic entity doctrine.

1.2 Methodology and Material

The legal dogmatic method will be applied in order to answer the research question. To determine the methodology of the single economic doctrine as an instrument to attribute liability, the thesis will analyse case law, legislation and the Commission decisions in order to clarify the current methodology of the attribution of liability, since there is no explicit definition indicated in the current legislation.

In addition, the thesis will examine academic articles, books and scholar's opinions in various platforms to comprehend theoretical and practical scope of the single economic entity doctrine as an instrument for the attribution of liability in EU Competition law.

1.3 Delimitations

The thesis will mainly concentrate on the attribution of liability regarding the infringement of Article 101 TFEU. Owning to the limit on the length of the thesis and to ensure comprehensive scrutiny, the thesis will analyse the single economic doctrine in the aspect of the relationship

between a parent company and a subsidiary. As a result, the potential liability of other constituents in the corporate group, such as employees, agencies and subcontractors, will not be addressed. In addition, other relative function of the single economic doctrine such as the substantive reach function, such as the inapplication of Article 101 TFEU regarding the agreements between constituents in the same undertaking, will not be addressed in order to avoid the excessively broad scope of the thesis.

1.4 Outline

The thesis is divided into three chapters. The first chapter will lay down the background of the concept of undertaking regarding the single economic entity doctrine. The principle of parental liability will be subsequently scrutinised in order to understand the methodology of the attribution of liability within the same corporate group. The recent judgment of the ECJ in case Skanska will be examined to perceive the potential scope of the concept of undertaking in civil procedure. The second chapter will analyse reasonings and legal consequences of the CJEU concerning the attribution of liability and the analysis on the ongoing preliminary reference by the Spanish Court in case Sumal. The final chapter will provide conclusive remarks on the current methodology of the attribution of liability.

2. The notion of undertaking in EU competition law

The first chapter will cover the legal backgrounds regarding the notion of undertaking. Specifically, the principle of parental liability will be scrutinised to explain how the CJEU applies the notion of undertaking in terms of the single economic entity doctrine to attribute liability of one legal person to another when they form a single economic entity. Subsequently, the focus turns to the judgment of the ECJ in case Skanska and its implication related to the civil liability of an innocent subsidiary.

2.1 Undertaking as a single economic entity

In EU competition law, undertaking is identified as the entity responsible for any anticompetitive conducts.[8] The exact definition of the concept is nowhere indicated in the TFEU. However, it emerged from the CJEU case law.[9] It can be observed that the CJEU applies economic approach when determining the scope of the undertaking. Therefore, legal personality is irrelevant when considering whether various entities, even though having separate legal personalities, belong in the same undertaking subject to competition provisions or not.[10] In that sense, The CJEU, along with The Commission, determine that a parent company and subsidiary constitute a single economic entity and the former could be liable for the infringement of the competition law committed by the latter.[11] In addition, the CJEU also mention the parent company's power to exert

[8] Article 101, 102 TFEU, supra (n.2)
[9] Florence Thépot, *The Interaction Between Competition Law and Corporate Governance - Opening the 'Black Box'* (Cambridge University Press 2019) p.34
[10] Jaime Folguera, Edurne Navarro, *Competition Law Infringements: Has the Application of the Parental Liability Doctrine Gone Too Far?* (2018) Festschrift für Dirk Schroeder. Europäisches, deutsches und internationales Kartellrecht. Juliane Kokott (Herausgeber), Petra Pohlmann (Herausgeber), Romina Polley (Herausgeber). Köln: Otto Schmidt KG, p.578
[11] Case 48/69 *Imperial Chemical Industries (ICI) v the Commission* ECLI:EU:C:1972:70, Joined Cases C-231/11 P to C-233/11 P *Siemens AG Österreich* supra (n.3), Case C-625/13 P. *Villeroy & Boch AG v Commission*. ECLI:EU:C:2017:52

decisive influence, granting the ability to control, over its subsidiary in order to establish parental liability.[12]

In *Höfner*, the ECJ held that "the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed and, secondly, that employment procurement is an economic activity."[13] It can be observed that the most significant criterion for entities to be considered as undertaking is economic activity. Moreover, an undertaking is not limited to only one entity, since in *Hydrotherm Gerätebau GmbH*, the ECJ determined that the notion of undertaking "must be understood as designating an economic unit …. even if in law that economic unit consists of several persons, natural or legal".[14] Therefore, the entities constituting undertaking can be a natural-person individual sole trader, a legal person, principal-agent and parent company-subsidiary.[15] The economic approach of the notion of undertakings, so-called the single economic unit doctrine, causes a certain amount of consequences. Apart from the inapplicability of Article 101 TFEU to agreements or concerted practices between entities belonging to the same economic unit and the effects regarding the application of other EU secondary law, the most critical consequence to our topic is the attribution of liability and responsibility. In several cases, especially cartel, the CJEU has applied the single economic doctrine in order to attribute liability of a subsidiary to its parent company.[16] Therefore, the principle of parental liability will be subsequently examined in order to analyse the methodology of the CJEU concerning the attribution of liability between different legal persons in the single economic entity.

[12] Carsten Koenig, *Comparing Parent Company Liability in EU and US Competition Law* (2018) World Competition 41, no. 1, p. 73
[13] Case C-41/90, Höfner and Elser v Macrotron GmbH ECLI:EU:C:1991:161, para. 21
[14] Case 170/83, *Hydrotherm Gerätebau GmbH v Compact de Dott Ing Mario Adredi & CSAS* ECLI:EU:C:1984:271, para. 11
[15] Alison Jones, Brenda Sufrin, Niamh Dunne, *EU Competition Law: Text, Cases, and Materials* (7th edn, Oxford University Press 2019) p. 151
[16] Ibid, p. 152-155; see also, Frank Wijckmans, André Bouquet, *Horizontal Agreements and Cartels in EU Competition Law* (Oxford University Press, 2015), p.240-241, Richard Burnley, *Group Liability for Antitrust Infringements: Responsibility and Accountability* (2010) World Competition 33, no. 4: p.596-597

2.1.1 The principle of parental liability

The early case the CJEU had a chance to establish the principle of parental liability can be observed in case *ICI*.[17] The case concerns the dyestuffs cartel in the European Economic Community (EEC) between 1964-1967. The Commission imposed fines on ICI, a UK-based company, based on the fact that it had committed an infringement through its subsidiary established in the Common Market at the time. To ensure the Commission's jurisdiction over ICI, since UK was still not a part of the EEC at that time, the ECJ had to determine whether the ICI's conduct had effects in the Common Market or not.[18] The ECJ determined that

> "The fact that a subsidiary has separate legal personality is not sufficient to exclude the possibility of imputing its conduct to the parent company.
>
> Such may be the case in particular where the subsidiary, although having separate legal personality, does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company.
>
> In view of the unity of the group thus formed, the actions of the subsidiaries may in certain circumstances be attributed to the parent company."[19]

In addition, the ECJ held that due to the fact that not only ICI held all or the majority of the shares in its subsidiaries, but also was able to exercise decisive influence and actually employ such power regarding the price increases in the relevant case, ICI and its subsidiaries have the unity of conduct.[20]

It can be observed from the case law on how the ECJ set out specific criteria to determine whether anticompetitive conducts of subsidiaries can be attributed to the parent company. Regardless of the separation of legal personality, a parent company is liable for its subsidiaries conducts when firstly, a parent company can exert decisive influence and secondly, it in fact exercises such influence to the subsidiaries in relation to anticompetitive conducts[21]. In *ICI*, the

[17] Case 48/*69 Imperial Chemical Industries (ICI)*, supra (n.11)
[18] Ibid, para 126
[19] Ibid, para 132-133, 135
[20] Ibid, para 136-140
[21] Carsten Koenig, *An economic analysis of the single economic entity doctrine in EU Competition Law* (2017) Journal of Competition Law & Economics, 13(2), p.288; Karl Hofstetter and Melanie Ludescher, *Fines against*

facts of the case clearly indicated that ICI exercised its decisive influence by giving instructions to the subsidiaries. It should be noted that the fact that ICI held all or most majority of the shares in its subsidiaries was not an outright criterion for parental liability but constituted only supporting evidence.[22] Following similar reasoning, the ECJ in AEG confirmed that two abovementioned criteria are to be met in order to establish parental liability[23].

Nevertheless, in case *Stora*[24], the ECJ upheld the General Court (GC)'s decision dismissing the 'mastermind' criteria.[25] In other words, instead of the need to establish the second requirement which could identify a parent company as a mastermind of its subsidiary because the former actually exercise decisive influence over the latter, the Commission can rely on the presumption that a parent company in fact exerts decisive influence . Even though the ECJ determined that the GC did not base its decision entirely on the fact that the subsidiary is wholly owned by its subsidiary,[26] the ECJ determined that the GC took other supporting evidence when considering the attribution to Stora of the conduct of its subsidiaries, such as the action of Stora as an interlocutor in administrative procedure, which results in the legitimate assumption that a parent company in fact exercise its decisive influence.[27] Moreover, other subsidiaries in Stora group also participated in the same cartel.[28] The judgment of the ECJ in this case indicates a shift from the dual requirement of both the ability to exert decisive influence and the actual exercise of such influence. The ECJ, upholding the GC's decision, indicated that the latter condition could be inferred by considering relevant facts of the case, which in this case it was the fact that there were a number of subsidiaries belongs to Stora group participating in the cartel. However, it should be noted that at this stage, the CJEU still has not established the presumption of the actual exercise of decisive influence by a parent company when its subsidiary is wholly own.[29]

Parent Companies in EU Antitrust Law: Setting Incentives for 'Best Practice Compliance' (2010) World Competition 33, no. 1, p.58;

[22] Karl Hofstetter and Melanie Ludescher, *Fines against Parent Companies in EU Antitrust Law*, ibid

[23] Case 107/82 *AEG-Telefunken v Commission* ECLI:EU:C:1983:293

[24] Case C-286/98 P *Stora Kopparbergs Bergslags v Commission* ECLI:EU:C:2000:630,

[25] Andriani Kalintiri, *Revisiting Parental Liability in EU Competition Law* (2018) ELR 43(2), 145, 148-150

[26] Case C-286/98 P *Stora*, supra (n.24), para 27-28

[27] Ibid, para 29

[28] Ibid, para 31-40

[29] Frank Wijckmans, André Bouquet, *Horizontal Agreements and Cartels*, supra (n.16), p.243

2.1.2 The Akzo case presumption

Afterwards, in 2009 to be precise, the ECJ delivered one of the most influential cases concerning parental liability in case *Akzo*.[30] The judgment has been referred by subsequent cases and discussed by academics on their potential effects toward the principle of parental liability in EU competition law.[31] The case concerns with choline chloride industry cartel, where five subsidiaries in Akzo Nobel group were active in and all of their shares were held by Akzo Nobel. The Commission found that these entities constituted a single economic entity, and since the parent company held all the shares in its subsidiaries, there was a presumption that it was in a position to exert decisive influence over its subsidiary.[32] In the judgment, the ECJ added further determinations of the autonomy aspect of subsidiaries by regarding "in particular to the economic, organisational and legal links between those two legal entities"[33]. The ECJ went on and articulated that "the fact that a parent company and its subsidiary constitute a single undertaking within the meaning of Article [101] enables the Commission to address a decision imposing fines to the parent company, without having to establish the personal involvement of the latter in the infringement."[34]. As a result, the ECJ held that in a case where a parent company owns 100% of shares in its subsidiary which infringed EU competition law, there is "a rebuttable presumption that the parent company does in fact exercise a decisive influence over the conduct of its subsidiary."[35]

In a like manner with *Stora* yet more precise, the ECJ in *Akzo* laid down a bold clarification that establishing only the fact that a subsidiary is wholly owned by its parent company sufficiently constitutes a rebuttable presumption of the actual exercise of decisive influence. Moreover, it can be observed that the ECJ modified the concept of the attribution of liability to a parent company for its subsidiaries' antitrust infringement, from the interactions between a parent company and

[30] C-97/08 P *Akzo Nobel and Others v Commission* ECLI:EU:C:2009:536
[31] Andriani Kalintiri, *Evidence Standards in EU Competition Enforcement: The EU Approach*. (Oxford,: Hart Publishing, 2019), p.161-165; Marco Bronckers and Ann Vallery , *No Longer Presumed Guilty ? The Impact of Fundamental Rights on Certain Dogmas of EU Competition Law* (2011) World Competition 34 no.4, p. 548 – 58; Lukas Solek and Stefan Wartinger, *Parental Liability : Rebutting the Presumption of Decisive Influence* (2015) Journal of European Competition Law & Practice, 2015, Vol. 6, No. 2
[32] C-97/08 P *Akzo Nobel*, supra (n.30), para 15
[33] Ibid, para 58
[34] Ibid, para 59
[35] Ibid, para 60

subsidiaries to the existence of the single economic unit.[36] The effect of the case has been massive since the presumption has been cited by subsequent case law concerning the attribution of liability in a single economic entity. Regarding the presumption, several scholars argue that the presumption is in fact irrebuttable.[37] On the subject of the method for a parent company to rebut the presumption, the ECJ in *Akzo* indicated that a parent company has to adduce sufficient evidence to show that its subsidiary acts independently on the market.[38] Several attempts have been carried out in order to rebut the now-settle principle, but they have failed to do so. For example, even there is a proof that a subsidiary does not follow all the instructions given by its parent company, it is still insufficient to pursue the Court to believe that a subsidiary acts independently in the market if it is not the norm.[39] Besides, the ECJ also refused a claim of the parent company by holding that, despite the fact that a subsidiary did not meet every expectation required by its parent company, it is still possible for the ECJ to conclude that the parent company, in fact, exerted a decisive influence over its subsidiary since it can be inferred from their relationship that a parent company could impose threats and pressure on its subsidiary.[40]

It should be noted that there are several cases that the CJEU dismisses the presumption. However, the ground that the CJEU based its reasoning on is not the fact that parent companies actually prove the autonomy of its subsidiary. The CJEU rejects the presumption in those cases by referring to the procedural ground based on the reason that the Commission fails to state reasons for its decision since the Commission relied solely on the presumption without stating the reasons why the evidence submitted by a parent company was insufficient.[41]

In the absence of a wholly own subsidiary by its parent company, the latter could still be held liable for the subsidiary's misconduct in EU Competition Law.[42] For example, in *Toshiba*, the ECJ, upholding the GC decision, held that parent companies of the joint venture were liable to

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[36] Andriani Kalintiri, *Revisiting Parental Liability in EU Competition Law,* supra (n.25), p.151
[37] See for example, Carsten Koenig, *An economic analysis*, supra (n.21); J. Joshua, Y. Botteman and L. Atlee, *You Can't Beat the Percentage" – The Parental Liability Presumption in EU Cartel Enforcement* (2012) European Antitrust Review 2012; John Temple Lang, *How Can the Problem of the Liability of a Parent Company for Price Fixing by a Wholly-owned Subsidiary Be Resolved?,* (2014) 37 FORDHAM INT'L L.J. 1481
[38] C-97/08 P *Akzo Nobel and Others*, supra (n.30), para 61
[39] Case C-293/13 P *Fresh Del Monte Produce v Commission and Commission / Fresh Del Monte Produce* ECLI:EU:C:2015:416
[40] Ibid, Para 96-100
[41] John Temple Lang, *How Can the Problem of the Liability of a Parent Company for Price Fixing By a Wholly-Owned Subsidiary Be Resolved?* supra (n.37), p.1499-1502; Florence Thépot, *The Interaction Between Competition Law and Corporate Governance*, supra (n.9), p.53
[42] Andriani Kalintiri, *Revisiting Parental Liability in EU Competition Law* supra (n.25), p.153

their joint venture's antitrust infringement.[43] The ECJ determined that the GC was not erroneous in considering that, supported by several factual evidence, the veto rights conferring to Toshiba could be regarded as that it had the ability to exercise decisive influence (together with Panasonic) and in fact exercise such influence since they determined their joint venture collectively.[44]

Regarding the public procedure of EU competition law, especially in cartel cases, the Commission imposes fines on parent company by imputing liability of its subsidiary.[45] The adoption of the attribution of subsidiary competition infringement to its parent company in the public procedure has not been a walk in the park for EU competition authorities. Since the introduction of the presumption of decisive influence in case of a wholly own subsidiary in *Akzo* case[46], several scholars have criticised, among other things, that such presumption is in fact irrebuttable.[47] Nevertheless, subsequent case law refers to the presumption and apply accordingly so, in only limited cases that the CJEU deny the application on procedural grounds that the Commission failed to state reasons.[48]

As for the private enforcement in EU Competition Law, the recent introduction of the Damages Directive ensures the right to claim full compensation from the harm committed by undertaking.[49] By describing that the undertaking is responsible for the damages that occurred, it might be considered that the concept of undertaking, applies directly also in the civil procedure of EU competition law. However, the preamble of the Damages Directive indicates that national rules relating to imputability and culpability can be maintained, in accordance with the principle of equivalence and effectiveness.[50] Therefore, national rules concerning damages claims in EU competition law are still valid, as long as they comply with both principles.[51] Even though the

[43] C-623/15 P - *Toshiba v Commission* ECLI:EU:C:2017:21
[44] Ibid, para 45-52
[45] Article 23(2) Council Regulation (EC) No 1/2003, supra (n.4)
[46] C-97/08 P *Akzo Nobel*, supra (n.30)
[47] John Temple Lang, *How Can the Problem of the Liability of a Parent Company for Price Fixing by a Wholly-owned Subsidiary Be Resolved?* supra (n.37) 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'*, (2012) J. EUR. COMPETITION L. & PRAC. Vol 3 issue 1
[48] Case C-90/09 P. *General Química SA and Others v European Commission*. ECLI:EU:C:2011:21, Case T-185/06 *L'Air liquide v Commission* ECLI:EU:T:2011:275, Case C-446/11 P *Commission v Edison* ECLI:EU:C:2013:798
[49] Article 1 of the Damages Directive 2014/104/EU, supra (n.6)
[50] Recital 11 of the Damages Directive, Ibid.
[51] Caroline Cauffman, *Civil law liability of parent companies for infringements of EU Competition Law by their subsidiaries* (2019). Available at SSRN: https://ssrn.com/abstract=3331083 or http://dx.doi.org/10.2139/ssrn.3331083 a further elaboration of a contribution published in Dutch under the title 'Het begrip "onderneming" in de Kartelschaderichtlijn en de (mogelijke) impact op de civielrechtelijke aansprakelijkheid

Damages Directive refers to the scope of damages claim in relation to the infringement committed by the undertaking[52], it is not explicitly stated in the Damages Directive the details of the notion of undertakings. Therefore, it is uncertain whether the Member States are required to transpose the entire scope of undertakings formulated by the jurisprudence of CJEU or not.[53] In addition, the aim of the Damages Directive is not to ensure the complete harmonisation of private litigation, but to eradicate hurdles which cause difficulties for the possible claimants in action for damages.[54]

In the light of all the foregoing considerations, it is for the national rules to determine the concept of undertaking, in action for damages in EU competition law, insofar as they respect the principle of equivalence and effectiveness. However, such understanding could be obsolete owning to the judgment of the ECJ in case *Skanska.*[55]

2.2 Case C-724/17 Skanska

2.2.1 facts of the case

The case concerns with the preliminary rulings requested by the *Korkein oikeus* (Supreme Court of Finland). In Finland, between 1994 and 2002, several companies in an asphalt market took part in a cartel-related to dividing up contracts, prices, and tendering for contracts. After considering the proposition by the *Kilpailuvirasto* (Competition Authority of Finland), the *Korkein hallinto-oikeus* (Supreme Administrative Court of Finland, KHO) in 2009 imposed fines on abovementioned companies.

Indeed, companies who directly took part in the cartel were subjected to the fine. However, prior to the KHO's decision, some cartel's participants, namely Sata-Asfaltti, Interasfaltti and Asfalttineliö, were wound up following voluntary insolvency procedures. As a result, their

van moedervennootschappen voor gedragingen van hun dochtervennootschappen naar Belgisch recht' in N. Carette, & B. Weyts (eds.), Verantwoord aansprakelijkheidsrecht: Liber amicorum Aloïs Van Oevelen, Antwerpen, Intersentia, 2017, 155-182

[52] Article 1, Directive 2014/104/EU

[53] Caroline Cauffman, *Civil law liability of parent companies for infringements of EU Competition Law by their subsidiaries*, supra (n.51) p.6-7

[54] Niamh Dunne, *The Role of Private Enforcement within EU Competition Law* (2014) Cambridge Yearbook of European Legal Studies , 2014, Vol. 16 Issue: 1, p.168-171; for example, the provisions concerning the bar of the disclosure of leniency program, clarification of the pass-on defence and standing for indirect purchasers.

[55] Case C-724/17 *Skanska*, supra (n.7)

business was transferred to Skanska Industrial Solutions ('SIS'), NCC Industry ('NCC') and Asfaltmix respectively. Accordingly, in its decision, the KHO attributed the dissolved companies' liability to SIS, NCC and Asfaltmix in accordance with the principle of economic continuity.[56]

Regarding the KHO decision, the City of Vantaa who concluded agreements with one of the cartel's participants between 1998 and 2001, brought an action for damages against SIS, NCC and Asfaltmix. The *Käräjäoikeus* (District Court of Finland), based its decision on the principle of the effectiveness of Article 101 TFEU, ordered the defendants to pay damages for the conducts of dissolved companies, as the principle of economic continuity must be applied. The District Court determined that "it is practically impossible or unreasonably difficult for the party who has suffered damage… to obtain compensation….. under Finnish civil liability and company law".[57] On appeal, the *Hovioikeus* (Court of Appeal of Finland) dismissed the application of economic continuity test in civil liability since there is no detailed rules or more specific provisions.[58]

The City of Vantaa consequently appealed to the *Korkein oikeus* (Supreme Court of Finland, KKO). The KKO was uncertain whether the person liable for the damages claim in civil proceedings related to the infringement of the EU competition law is to be determined directly by the application of Article 101 TFEU or by the domestic law of each Member State since the KKO determined that "Finnish law does not lay down rules on the attribution of liability for damage caused by an infringement of EU competition law in a situation such as that at issue in the main proceedings"[59]. Consequently, the KKO stayed the proceedings and referred the questions to the ECJ for a preliminary ruling.

2.2.2 Opinion of the Advocate General Wahl

In his opinion, AG Wahl determined that the action for damages in EU competition law has two-fold functions. The first one relates to the compensatory function, ensuring that individuals are able to seek full compensation for any harm suffered.[60] Another function, as reiterated by the European Court of Justice (ECJ) case law, is a deterrent function which serves to ensure the full

[56] Ibid, para 10
[57] Ibid, para 12
[58] Ibid, para 13
[59] Ibid, para 15
[60] Opinion of AG Wahl in Case C-724/17 Skanska, para 28

effectiveness of EU competition law.[61] He recognised the Court has refrained from defining the specific conditions regarding to action for damages and in the absence of EU rules on the matter, it is for the Member States to lay down detailed rules governing the exercise of the right to claim compensation in respect of the principle of equivalence and effectiveness.[62]

However, based his opinion on the ECJ's decision in case *Kone*[63], he opined that in order to ensure the full effectiveness of Article 101 TFEU, the requirement further than the general principle of equivalence and effectiveness is needed. In other words, he differentiated the full effectiveness of Article 101 from the principle of equivalence and effectiveness, considering that the latter applies when "in relation to 'detailed rules governing the exercise of the right to claim compensation' before national courts"[64] and the former refers to the direct application of Article 101 when determining the "constitutive conditions" of the rights to claim compensation[65]. Thus, he argued that the conditions (in *Kone*, the condition was a causal link) that constitute the very cornerstone of an action for damages could not be governed by domestic law.[66] Furthermore, in *Kone*, the full effectiveness test was also related to the deterrent effect of EU competition law, since the Court, in that case, precluded the national laws which require a direct causal link to establish private liability[67] which as a results increase the number of individuals who are eligible to bring the damages to claim under Article 101 TFEU.

Consequently, he determined that the deterrent function of an action for damages even surpass the compensatory function since the harm caused by anticompetitive conducts can be considered as a loss of economic efficiency which leads to a loss to society as a whole in terms of reduced consumer welfare.[68]

As for the question referred to by the KKO, the Advocate General considered that Article 101 is directly applicable in order to determine the persons liable in action for damages. He stated that in general, Article 101 TFEU has a direct effect; therefore, it confers rights on individuals to rely on in national courts.[69] Furthermore, the AG observed that in his opinion, the determination

[61] Ibid, para 29 et seq
[62] Ibid, para 32
[63] Case C-557/12 *Kone and Others v ÖBB-Infrastruktur AG* ECLI:EU:C:2014:1317
[64] Opinion of AG Wahl, supra (n.60), para 40
[65] Ibid, para 41
[66] Ibid, para 43
[67] The competition infringement in *Kone* concerns with umbrella pr48/ng, which the claimant suffered harm from independent pricing decision of an individual which was not involved in the anticompetitive conduct.
[68] Opinion of AG Wahl, supra (n.60), para 50
[69] Ibid, para 58

of persons liable in action for damages is a constitutive condition, which is governed by EU law. To clarify, he described that the right to claim compensation based on Article 101 TFEU is not a question regarding any details of the concrete application or a rule governing the procedures. Such right also presupposes that there is a person liable for the infringement.[70] The person referred to in Article 101 is indicated as undertakings, which has a flexible and economic concept. He argued against the Commission's comment by stating that joint and several liability of undertakings in Article 11(1) of the Damages Directive does not confer the Member States the autonomy to determine the person liable in private litigation of the EU competition law. He then further explained that such determination is directly related to the existence of the right to claim compensation and hence constitutes a constitutive condition of liability on par with causation criterion.[71]

To ensure the effectiveness of the enforcement of EU competition law, the determination of persons liable for damages cannot be different in each Member States jurisdiction. It would otherwise jeopardise the potential private litigations, conflict with the objective of EU competition law which is to create level playing field in the internal market, lead to forum shopping and lastly affect the deterrent effect of action for damages. Therefore, the persons liable in action for damages is to be directly determined by Article 101 TFEU.[72]

Finally, he considered that the principle of economic continuity could be applicable in private antitrust litigation. Due to the fact that the entity could avoid sanctions from anticompetitive conducts through various corporate organisations, in addition with the objective to ensure the deterrent effect, the principle is to be applied in action for damages.[73]

2.2.3 The judgment of the ECJ

In its judgment, the ECJ at an early state reiterated the direct effects of Article 101 (and also article 102) TFEU.[74] Afterwards, the ECJ recognised the principle of national procedural autonomy, that in the absence of EU rules governing the matter, the domestic legal system is to be

[70] Ibid, para 60-61
[71] Ibid, para 65
[72] Ibid, para 67-68
[73] Ibid, para 74-81
[74] Case C-724/17 Skanska, supra (n.7), para 24

applied in respect of the principles of equivalence and effectiveness.[75] However, coinciding with the AG opinion, the Court considered that it is by the direct application of EU law in term of the determination of the entity liable in action for damages.[76] The ECJ referred to the concept of undertaking stipulated in Article 101 TFEU and mentioned the personal nature of the EU competition infringement, which requires the perpetrator to be liable for the damages that occurred.[77]

The ECJ further articulated, disagreeing with the Commission's observation[78], that Article 11(1) of the Damages Directive does not apply *ratione temporis* in this case, does not apply to the definition of entities liable for damages and ultimately does not confer the power for the Member State to determine such entities.[79] On the other hand, together with Article 1 of the Damages Directive, Article 11(1) reaffirms that the liable entity for damages in EU competition law is "the 'undertakings' which committed that infringement".[80] Therefore, the concept of an undertaking as an economic unit regardless of legal personalities is to be applicable. In this case, the ECJ determined that the change caused by corporate restructuring, even the liable entities have dissolved, does not "necessarily create a new undertaking free of liability for the conducts of its predecessor that infringed the competition rules, when, from an economic point of view, the two are identical", hence not contrary to the principle of individual liability.[81] In addition, the acquiring company is liable due to the fact that not only has it taken over the assets of the dissolved entities but also the liability of for breaches of EU law[82]

Regarding to the argument from the defendants[83], to ensure the full effectiveness and deterrent effect, the ECJ held that the concept of undertakings in Article 101 TFEU in action for damages could not have a different scope with regard to the public enforcement such as the

[75] Ibid, para 27
[76] Ibid, para 28
[77] Ibid, para 29-31
[78] The Commission suggested that due to the entry into force of Damages Directive, the Directive requires Member States "ensure that undertakings which have infringed competition law through joint behaviour are jointly and severally liable". As a result, it is for Member States, in accordance with the principle of equivalence and effectiveness, to determine the person liable for the competition infringement (para.33)
[79] Ibid, para 34
[80] Ibid para 35
[81] Ibid para 38-39
[82] Ibid, para 40
[83] Defendants argued that since Sata-Asfaltti, Interasfaltti and Asfalttineliö were legally independent when they participated in the cartel, SIS, NCC and Asfaltmix are not liable for such conducts.(para.11) Moreover, the City of Vantaa could have lodged its claim in the voluntary insolvency procedure. Besides, the case-law regarding the imposition of a fine does not apply to an action for damages in this case.(para 41)

imposition of fines by the Commission under Article 23(2) of Regulation No 1/2003.[84] Consequently, the Court applied the principle of economic continuity and held that SIS, NCC and Asfaltmix had assumed liability for the damage caused by the cartel in question.

2.3 The implication of the case law

At first glance, the ECJ in *Skanska* renders the principle of economic continuity, which is a well-establish principle of EU competition law in public enforcement, applicable in action for damages in private enforcement. However, with thorough consideration, the decision of the ECJ in *Skanska* potentially leads to a significant impact on future private litigation in the EU competition law field. That is to say, by stating that the notion of undertaking in Article 101 TFEU is to be directly applicable in action for damages, the attribution of liability regarding the single economic entity doctrine, such as the principle of parental liability, would consequently be applied in private litigation.[85]

As discussed earlier in this chapter, the principle of parental liability in EU competition law relies strongly, if not entirely, on the notion of undertaking. When considering the objective to attribute subsidiaries competition liability to their parent company, the primary purpose is to ensure deterrence effect.[86] Holding a parent company jointly and severally liable along with the subsidiary leads to the increasing amount of fine that the Commission can impose since the Commission determine that article 23(2) of the Regulation 1/2003, stipulating that the limit of the fine to 10% of the undertaking's total turnover, refers to the undertaking as an entire corporate group which include not only subsidiaries but also their parent company.[87] In addition, parent company liability can be served to prevent the adverse effects of personal liability. The reason

[84] Ibid, para 43-47
[85] Tatiana Siakka, *Case C-724/17 Vantaan kaupunki v Skanska Industrial Solutions: Transposition of the Concept of an 'Undertaking' into Civil Damages Actions* (2019) Journal of European Competition Law & Practice, 2019, Vol. 10, No. 8; Vasiliki Fasoula *Extending the Principle of Economic Continuity to Private Enforcement of Competition Law. What Lies Ahead for Corporate Restructuring and Civil Damages Proceedings after Skanska: Case Comment to the Judgement of the Court of Justice of 14 March 2019 Skanska Industrial Solutions and Others (Case C-724/17)* (2019), 20 YARS 259;
[86] C-521/09 P - *Elf Aquitaine v Commission* ECLI:EU:C:2011:620 para 59, "…. the importance of the objective of combatting conduct contrary to the competition rules, in particular to Article 101 TFEU, and of preventing a repetition of such conduct…", see also Carsten Koenig, *An economic analysis of the single economic entity doctrine,* supra (n.21); European Commission, Guidelines on the method of setting fines imposed pursuant to Art. 23(2)(a) of Regulation No 1/2003, OJ 2006 C 210/2, para 4
[87] Carsten Koenig, Ibid p.322; Stefan Thomas, *Guilty of a Fault that one has not Committed* supra (n.47), p.11-12

being that to avoid the competition liability, which can be considered as an intentional tort, a parent company might act opportunistically by engaging with the harmful conducts through other forms of a legal entity[88]. In other words, by taking advantages from the classic principle of personal liability in corporate law, a parent company might, for example, enter the cartel agreement through its subsidiaries or implement intricate corporate construction which renders the victims of the corporate torts impossible to claim the damages occurred. The abovementioned statements can be served as possible justifications for the principle of parental liability in EU competition law.[89] Such justifications, resemble the reasonings the ECJ describes in order to apply the principle of economic continuity in the current case.[90] As a result, along with the underlying intention of the ECJ to ensure full effectiveness and deterrent effect of the Article 101 TFEU, the settled principle of parental liability in EU competition law is directly applied in private enforcement in national courts from now on.[91]

Focusing now on the relationship between the notion of undertaking and principle of parent company liability, the methodology of the principle may give rise to another possibility of EU private litigation. The language that the CJEU described in the process of the attribution of subsidiaries competition infringement to their parent company has been ambiguous, hence not entirely precise. There are two doctrinal possibilities for the attribution;[92] The first option is to be understood that the competition infringement is committed by an economic entity through subsidiaries. Therefore, the parent company constituting a part of the same economic entity is to be considered as a perpetrator itself. The second option considers that it is still subsidiaries who commit an infringement, and the liability is imputed to their parent company. To illustrate, in case *Siemens Österreich*[93] the ECJ determined that it is the economic entity who infringes the

[88] Bruce Wardhaugh, *Punishing parents for the sins of their child: extending EU competition liability in groups and to subcontractors* (2017) Journal of Antitrust Enforcement, 2017, 5, p.22, 34; see also Carsten Koenig, Ibid, p.311-319; Henry Hansmann and Reinier Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts* (1991)The Yale Law Journal, Vol. 100, No. 7,; Frank H. Easterbrook and Daniel R. Fischel, *Limited Liability and the Corporation* (1985), The University of Chicago Law Review, Vol. 52, No. 1

[89] Carsten Koenig, *Comparing Parent Company Liability in EU and US Competition Law,* supra (n.12), p.92-93

[90] Case C-724/17 Skanska, supra (n.7), p.46 "Therefore, if the undertakings responsible for damage caused by an infringement of the EU competition rules could escape penalties by simply changing their identity through restructurings, sales or other legal or organisational changes, the objective of suppressing conduct that infringes the competition rules and preventing its reoccurrence by means of deterrent penalties would be jeopardised"

[91] Hans-Markus Wagener, *Follow-up to Skanska – The "Implementation" by National Courts So Far* (2019). Neue Zeitschrift für Kartellrecht (NZKart) 10/2019. Available at SSRN: https://ssrn.com/abstract=3455993 or http://dx.doi.org/10.2139/ssrn.3455993

[92] Carsten Koenig, *An economic analysis*, supra (n.21) p.286

[93] Joined Cases C-231/11 P to C-233/11 P *Siemens AG Österreich* supra (n.3)

competition rules hence the parent company, who is not a perpetrator itself, may be penalised for its subsidiary misconducts, if they form part of the same economic entity, constituting the undertaking.[94] However, the ECJ elaborated later on that subsidiaries illegal conduct is imputed to its parent company, therefore the parent company's liability derives from its subsidiary, allowing the Commission to hold them jointly and severally liable.[95] Similar methodology can also be observed in other case law.[96]

With this ambivalent approach in mind, tethering the principle of parental liability to the notion of a single economic entity could have additional effects on the EU competition litigation. The reason being is that owning to the functional approach of the notion of undertaking in EU Competition Law, the undertaking does not merely consist of an infringing subsidiary and its parent company, but other legal persons that have not participated or acknowledged the antitrust conducts as well.[97] One particular entity that is usually mentioned is a sister company or sibling. Entities are considered to be a sibling when they have a common owner and presumed to form a single economic entity.[98] For example, the parent company A could establish its subsidiary B in one-member state and subsidiary C in another member state in order to provide goods or services in each geographic market. Even though it might seem contemporary, multinational corporations are not something new. They have developed from the period of imperialism and colonialism, which their focus is mainly on resources and infrastructure to nowadays dispersed multinational organisations participating in various markets.[99]

Given the abovementioned considerations, if a single economic entity is deemed to be the perpetrator of the EU competition law by the interpretation of the principle of the parental liability, every legal entity is liable for an infringement committed by one of the constituents in the same economic entity. The interpretation would enable the Commission not only to impute the liability upward (from a subsidiary to its parent company) but also from other directions, such as from a

[94] Ibid, para 44-45
[95] Ibid, para 46-48
[96] Case C-97/08 P Akzo Nobel, supra (n.30), para 58-59; Case C-440/11 P European Commission v Stichting Administratiekantoor Portielje and Gosselin Group NV ECLI:EU:C:2013:514, para 36-40 and case law cited
[97] Alison Jones, *The Boundaries of an Undertaking In EU Competition Law* (2012), ECJ Vol. 8 No 2
[98] Okeoghene Odudu and David Bailey, *The single economic entity doctrine in EU competition law* (2014) Common Market Law Review, (Kluwer Law International; Kluwer Law International 2014, Volume 51 Issue 6) p.1731
[99] Christoph Dörrenbächer and Mike Geppert, *Multinational Corporations and Organization Theory:* supra (n.1), p.8-9

parent company to its subsidiary or from one sister company to another.[100] As a consequence of the *Skanska* ruling, the liability of innocent subsidiaries or sister companies stemming from the single economic doctrine can be relied on in action for damages in private litigation.[101]

Furthermore, the liability of an innocent subsidiary for the infringement committed by its parent company can be considered as a contemporary topic in EU competition law. For example, it can be reflected on in case of the anchor defendant in EU competition private litigation, which can be observed from the English case law.[102] In the UK, the jurisdiction of the national courts can be established when there is a follow-on private damages action, one of the Commission decision addressees is domiciled in England.[103] In addition, Article 8(1) of the Recast Brussels Regulation[104] articulates that Member states-domiciled defendant can be used as an 'anchor defendant', with any and all other defendants, regardless of where they are domiciled. In *Provimi,*[105] it was held to be arguable that, where a defendant company is a member of an economic unit or 'undertaking', and that company implements, however innocently, an anticompetitive agreement entered into by another company within the same 'undertaking', the defendant company can be held liable for infringement of Article 101(1) TFEU committed by the second company. However, the claimant must still establish that the English domiciled anchor defendant engaged in some form of (albeit innocent) participation in, or implementation of, the cartel.

By the effect of the *Skanska* decision, it could be considered that there is no need for the claimant to prove the actual involvement of the Member states-domiciled company since according to the notion of a single economic entity, the infringement is deemed to be committed by the undertaking, therefore constituents of such economic entity are jointly and severally liable. Consequently, claimants can bring an action for damages against Member States-domiciled company as an anchor defendant, by the only to establish that it belongs to the same economic

[100] Okeoghene Odudu and David Bailey, *The single economic entity doctrine in EU competition law*, supra (n.98), p.1746; Tatiana Siakka, *Case Skanska: Transposition of the Concept*, supra (n.98), p.480-481;
[101] Christian Kersting, , *Liability of Sister Companies and Subsidiaries in European Competition Law* (March 19, 2019). (2020) 41 E.C.L.R. 125; Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht (ZHR) 182 (2018), 8. Available at SSRN: https://ssrn.com/abstract=3355816 or http://dx.doi.org/10.2139/ssrn.3355816
[102] Andrew Leitch *Skanska: are jurisdiction challenges now an impossible undertaking* Competition Law Journal (2019) Vol 18 issue 3
[103] Ibid, p.100
[104]Article 8(1) Regulation1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L 351/1.
[105] Provimi Ltd v Aventis Animal Nutrition SA [2003] EWHC 961 (Comm).

entity as the addressee of the Commission decision.[106] The ability conferred to the claimants as such is not limited only in the UK, but similar approaches can also be applied in other EU Member States jurisdictions.

Even though the departure from the EU of the UK is imminent due to the effect of the Brexit, the interpretation in *Provimi* could still be considered as a logical reference. The reason being is that British precedent provides practical significance which judiciary of Ireland, who will remain in the EU, could refer to as guidance.[107] In addition, it is possible for the methodology in *Provimi* to be relied on by Cyprus, one of the EU Member States whose jurisdiction is common law influenced substantially by the English legal system.[108]

Not least of all, the recent preliminary reference by Audiencia Provincial de Barcelona in case *Sumal*[109] is directly concerned with the determination of the liability of the innocent subsidiary. In the case, the Spanish Court referred the question to the ECJ to inquire whether according to the concept of a single economic unit, the antitrust liability can be attributed from the parent company to its innocent subsidiary. To determine whether the implication of the case law can pose a practical impact on EU competition law, it is therefore significant to revisit the methodology of the CJEU and the Commission to attribute subsidiary's infringement to parent company.

With regards to the potential effects of the judgment of the case Skanska, the analysis is required in order to determine whether the methodology of the parental liability in relation to the single economic entity doctrine can be extended to the liability of innocent subsidiaries. The obscure approach of the CJEU creates an uncertainty on the extent of the single economic entity doctrine.[110] In other words, should the decisive influence be considered as a fundamental requirement in order to impute liability of one legal person to another?

Consequently, the following chapter will examine the potential liability of innocent subsidiaries in accordance with the single economic entity. It will first determine the reasoning of

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[106] Andrew Leitch *Skanska: are jurisdiction challenges now an impossible undertaking*, supra (n.102), p.102
[107] Patrick Fitzgerald, *The Status of British Law in Independent Ireland: a Guide for Post-Brexit Britain?* (2017) Irish Journal of European Law Vol.20 issue.1, p.31-32
[108] Nicolas Kyriakides, *Civil procedure reform in Cyprus: looking to England and beyond* (2016) Oxford University Commonwealth Law Journal, Vol. 16, No. 2, p.264
[109] Case C-882/19 *Sumal S.L. vs Mercedes Benz Trucks España, S.L.*, referred to the Court on 3 December 2019
[110] Carsten Koenig, *An economic analysis*, supra (n.21), p. 286; Karl Hofstetter and Melanie Ludescher, *Fines against Parent Companies in EU Antitrust Law: Setting Incentives*, supra (n.21), p.59-60; Simon Burden and John Townsend, *Whose Fault Is It Anyway? Undertakings and the Imputation of Liability* (2013) Competition Law Journal, 3, p.296-297

the CJEU in light of the contradiction between the principle of parental liability and principle of personal liability in order to argue that it is an economic entity who is liable as a whole for an infringement committed by one of its constituents. Secondly, the chapter will analyse the function of the decisive influence to determine the scope of the liability between legal persons in the same economic entity. The Chapter will conclude with the analysis of the recent preliminary reference from the Spanish court.

3. The single economic entity doctrine and liability of innocent subsidiaries

The previous chapter has discussed the scope of the notion of undertaking in accordance with the principle of parental liability in order to demonstrate the potential application regarding the liability of innocent subsidiary. Furthermore, the analysis of the methodology in case Skanska depicts the possibility of the civil liability of innocent subsidiary in action for damages at the national level. With this intention, the potential liability of the innocent subsidiary will be analysed regarding several elements. The first consideration will focus on the reasonings of the CJEU in the case where it was required to justify the contradiction between the single economic entity doctrine and principle of personal liability. The analysis will exhibit the legal consequences of the methodology of the CJEU when it attempts to reconcile the principle of parental liability with the principle of personal liability. The following topic will then examine whether the decisive influence plays a significant role in the attribution of liability or not. The chapter will conclude with the recent preliminary reference from the Spanish Court in case Sumal, which is directly related to the thesis topic.

3.1 The contradiction with the principle of personal liability

3.1.1 the principle of personal liability

One of the contradicting principles against the single economic doctrine is the principle of personal liability. The limited liability is a fundamental principle of corporate law which based on the simple rule that the investors in the corporation are not liable for more than the amount they invest. There are several justifications supporting the application of the principle. [111] As a result,

[111] Frank H. Easterbrook and Daniel R. Fischel, *Limited Liability and the Corporation*, supra (n.88), p.94-97; such as decrease in shareholders' need to monitor the management, elimination of shareholders' need to monitor other shareholders, promotion the free exchange of shares and thereby induces managers to act efficiently, leading to reliable and "fair" share prices allowance of more efficient diversification, and facilitation optimal investment decisions

the principle has been one of the driving instrument to promote investments in the modern era.[112] However, there are some circumstances that the liability may be attributed to the shareholders, known as the 'piercing the corporate veil', in order to prevent companies from taking advantages from the principle. The veil of the corporate organisation is considered to be pierced when specific criteria, which are different in each jurisdiction, are met. For example, in US law, the corporate veil piercing's criteria, which differs in each state, can generally be relied on when the shareholders do not respect corporate formalities and if honouring limited liability would produce an inequitable result.[113] Another example can be observed in the determination of the Finnish Supreme Court in case *Skanska*, stating that

> "…. The rules on civil liability in Finnish law are based on the principle that only the legal entity that caused the damage is liable. In the case of legal persons, it is possible to derogate from this basic rule by lifting the corporate veil. However, that approach is only possible if the operators concerned used the group structure, the relationship between the companies or the shareholder's control in a reprehensible or artificial manner, resulting in the avoidance of legal liability."[114]

It should be borne in mind that the possibility to rely on the derogation of the principle of limited liability by the corporate veil piercing is slim, owing to the economic significance of the principle and hesitant determination of the national courts to permit such derogation.[115]

In EU law perspective, the principle of personal liability is recognised at the primary level. Charter of Fundamental Rights of the European Union (CFREU) stipulates that to hold one liable for any infringements, primarily criminal, and the law enforcer has to prove that he or she is guilty.[116] The requisition of the 'guilt' means that the personal liability must be established before any punishment is to be attributed to any legal persons.[117] In addition, by corresponding with the

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[112] Paul Hughes, *Competition law enforcement and corporate group liability - adjusting the veil*, E.C.L.R. 2014, 35(2), p.75
[113] Carsten Koenig, *Comparing Parent Company Liability in EU and US Competition Law*, supra (n.12), p.76-77
[114] Case C-724/17 Skanska, supra (n.7), para 15
[115] Phillip I. Blumberg, *Limited Liability and Corporate Groups*, Faculty Articles and Papers. 28 available at https://opencommons.uconn.edu/cgi/viewcontent.cgi?article=1027&context=law_papers) accessd 25th May 2020; David W. Leebron, *Limited Liability, Tort Victims, and Creditors*, (1991) Colum. L. Rev. Vol 91, no.7, 1565; Alison Jones, *The Boundaries of an Undertaking In EU Competition Law*, supra (n.97), p.319
[116] Article 48-49 of the Charter of Fundamental Rights of the European Union [CFREU] (OJ 2007 C 303/1
[117] Stefan Thomas, '*Guilty of a Fault that one has not Committed*, supra (n.47), p.15

Convention for the Protection of Human Rights and Fundamental Freedoms[118], the EU law shall respect the minimum requirement of protection in the relevant fundamental rights such as the presumption of innocence.[119] When it comes to EU competition law, the fines imposed by the Commission could be determined as a criminal offence.[120] It is due to the fact that even though article 23(5) of Regulation 1/2003 stipulates that the imposition of fines shall not be of criminal law nature, its characteristics resemble that of a criminal offence. The CJEU jurisprudence is also in accordance with the statement by regarding the nature of the competition infringements and the severity of the imposition of fines in competition law.[121] In light of these considerations, the person liable for competition infringements should be the person committing anticompetitive conducts such as companies directly participated in the cartel, which is also in accordance with the corporate law principle of separate legal personalities. It would be only in some specific circumstances that another legal person, such as a parent company, is to be held liable for other legal person's misconducts, such as its subsidiary.

By a quick comparison between the principle of limited liability and the attribution of subsidiary liability in EU competition law to its parent company, there is a stark contradiction. On the one hand, the separate legal personalities can be interpreted as that one legal entity's liability cannot be attributed to another different legal entity, unless the criteria of corporate veil piercing are met. On the other hand, in EU competition authorities' perspective, the liability of a subsidiary can be attributed to its parent company when they constitute a single economic entity, therefore making them jointly and severally liable. Such contradiction has been argued by academic scholars that the principle of parental liability, at the current state, is contradicted with the principle of personal liability and therefore require a need to reconsider the application of the single economic entity in relation to the principle of parental liability.[122] As a result, it is worth considering how the Commission and the CJEU disentangle the tension caused by two opposing principles.

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[118] Article 52(3) of the CFREU

[119] Article 6 of the European Convention on Human Rights

[120] Jan-Niklas Steinhauer, *The presumption of parental liability and the need for full judicial review An analysis of based on the recent case of Alliance One v European Commission.* (Master thesis, Lund University 2014), p.17-19; Peter Whelan, *The Criminalisation of European Cartel Enforcement: Theoretical, Legal and Practical Challenges* (Oxford University Press, 2014).

[121] C-199/92 P - *Hüls v Commission*, ECLI:EU:C:1999:358, para 150; see also opinion of Advocate General Bot in case C-352/09 P - *ThyssenKrupp Nirosta v Commission*, para 49; C-49/92 P - *Commission v Anic Partecipazioni* ECLI:EU:C:1999:356, para 78

[122] Andriani Kalintiri, *Revisiting Parental Liability in EU Competition Law*, supra (n.25); Simon Burden and John Townsend, *Whose Fault Is It Anyway?* Supra, (n.110) p.294; see also fn.7

3.1.2 Reasoning of the CJEU

To begin the consideration, the scrutiny through CJEU jurisprudence can provide a guideline on the methodology of the EU authorities. Again, in the renowned *Akzo* case[123], the ECJ, apart from establishing the controversial presumption of the actual exercise of decisive influence in case of a wholly-owned subsidiary, had a chance to clarify the current question. The ECJ embarked on the determination by stating that the principle of a single economic unit is in accordance with the principle of personal liability. The reasons given by the ECJ were that the liability in EU competition law is imposed to the notion of undertaking, therefore according to the principle of personal liability, it is eventually the legal persons constituting an undertaking who are liable for the antitrust infringements.[124] Later on, the ECJ held that in the parent company and its subsidiary relationship, the fact that the subsidiary is not autonomous, owning to the "economic, organisational and legal links between them, constitutes a single economic unit – one undertaking – which enables the Commission to attribute subsidiary liability to the parent company without the duty to prove the involvement by the parent company. [125]

It can be observed from the reasoning of the ECJ in the aforementioned paragraph that the approach of the CJEU in relation with the contradiction between two fundamental principles in EU law is unclear. The ECJ firstly described that EU competition law respected the principle of personal liability because the liability is attributed to legal persons (only that in the EU competition law, it is a peculiar concept of undertaking). From then, the methodology is still rational since the ECJ determined that the attribution of a subsidiary liability to its parent company is related to the fact that the actions of the parent company, by providing instructions to its subsidiary in addition with the multidimensional links between them. If it were to concluded here, the parental liability could have the potential to be in line with the personal liability, since it considers that there is a connection between the infringement and the action of the parent company along with supporting evidence indicating that the parent company is involved either directly or indirectly.[126]

However, the following statement from the ECJ renders our consideration obsolete. By entangling the parental liability with the concept of a single economic unit, the language of the

[123] Case C-97/08 P Akzo Nobel, supra (n.30)
[124] Ibid, para 56-57
[125] Ibid, para 58-59
[126] Andriani Kalintiri, *Revisiting Parental Liability in EU Competition Law*, supra (n.25), p.156

ECJ can be interpreted as that it is because the existence of a single economic unit, not because of the illegal acts committed by the parent company, that enable the Commission to impose fines on a parent company. The subsequent determination which stating that the involvement of the parent company in the infringement is not required should also be understood as a supporting indication of such argument.

Due to the failure from the ECJ to clarify the compatibility of parental liability with the principle of personal liability, another glimpse of hope lies within the opinion of the Advocate General Kokott in the same case. In her opinion, the AG started by indicating that there is a difference in the addressees of the competition rules in TFEU and of fines imposed by the Commission since the former is determined by the economic perspective, but the latter shall be legal persons.[127] Furthermore, considering the level of the sanction of the competition law which akin to the criminal offence, the principle of personal responsibility and fault are to be respected, hence the liability is to be attributed to the natural or legal person who operates the undertaking.[128] Nevertheless, due to the increase in the complexity of corporate group, to ensure the principle of personal liability and the effective enforcement of the competition law, a parent company exercising decisive influence over its subsidiaries are to be held jointly and severally liable[129] Consequently, the AG stated that

> "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. If that undertaking deliberately or negligently infringes the competition rules, in particular Article [101 TFEU] and Article 53 of the EEA Agreement, that gives rise to the collective personal responsibility of all the principals in the group structure, regardless of whether they are the parent company or a subsidiary.
>
> This form of parent-company responsibility under antitrust law also has nothing to with strict liability. On the contrary, as mentioned, the parent company is one of the principals

[127] Opinion of AG Kokott in Case C-97/08 P *Akzo Nobel*, para 36-37
[128] Ibid, para 38-39
[129] Ibid, para 42-44

> 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 which negligently or intentionally infringed the competition rules*."[130]

The AG opinion depicts a more explicit expression than the ECJ decision that the principle of parental liability is in accordance with the principle of personal liability, due to the reason that the infringement is considered to be committed by the undertaking. Therefore, the liability is attributed to all legal persons constituting the single economic entity.[131] However, in spite of this reasoning, the AG mentioned the decisive influence rational in a subsequent paragraph[132], therefore still resemble the ambiguous method to attribute liability within a corporate group formulated by the ECJ.

With regards to the AG opinion, it can also be inferred from her statement that the principle of parental liability is to be considered as a fault-based liability.[133] In that aspect, the CJEU's perspective can be observed in case *Villeroy & Boch AG*.[134] The ECJ in the concerned case was inquired to determine the compatibility between the single economic entity in EU competition law and the presumption of innocence enshrined in article 48 CFREU.[135] The ECJ, after reiterated that a parent company could be held liable for its subsidiary liability when they form one single economic entity and the presumption of the actual exercise of decisive influence in a case of a wholly own subsidiary[136], held that such presumption does not lead to a presumption of guilt on the part of parent company or subsidiary, therefore rendering it compatible with the presumption of innocence.[137] Moreover, when allocating the amount of fines between a parent company and its subsidiary, who are jointly and severally liable, it is not necessary for the Commission to specify

[130] Ibid, para 97-98 (emphasis added)
[131] Christian Kersting, *Liability of Sister Companies and Subsidiaries in European Competition Law*, supra (n.101), p.13-14
[132] Opinion of AG Kokott in Case C-97/08 P *Akzo Nobel*, para 99; "….As the parent company exercising decisive influence over its subsidiaries, it pulls the strings within the group of companies."
[133] Ibid, para 39
[134] Case C-625/13 P. *Villeroy & Boch AG*, supra (n.11)
[135] Ibid, para 141
[136] Ibid, para 145-148
[137] Ibid, para 149

the degree of the fine for each company, since the determination as such is beyond the objective of the mechanism of joint and several liability.[138]

It can be inferred from the judgment that the guilt of a parent company does not derive from the presumption of decisive influence. Therefore, it is not contradicted with the presumption of innocence. Regarding the joint and several liability aspects of the parental liability in EU competition law, a fine is imposed on the undertaking, indicated by EU law as the responsible entity, not the legal persons. Therefore, the Commission is not required to determine the amount of fine in each constituent legal entities. The methodology of parental liability reflected in both case law is at the present date, a settle case-law. Several case law in the concerning area mostly, if not all, are delivered with the same argumentation.[139]

3.1.3 legal consequences of the CJEU methodology

Even though there are attempts of the CJEU to justify the principle of parental liability in accordance with the principle of personal liability, after thorough scrutiny, the theoretical argumentation of the CJEU should be considered as an attempt to circumvent such principle in order to attribute subsidiary liability to its parent company. To begin with, one should be borne in mind that the methodology of parental liability does not resemble that of the fault-based liability.[140] By relying on the vague notion of control – the decisive influence exerts or presumably exert by the parent company to its subsidiary – it is difficult, or nearly impossible to determine the fault of the conducts committed by a parent company. In other words, what does a parent company do that render it to be liable for other separate legal person misconducts? The preliminary determination could be that a parent company breach the competition rule by participating in a cartel through its subsidiary.

[138] Ibid, para 150-153
[139] Case law cited in fn.3; see also C-628/10 and C-14/11 P *Alliance One International and Standard Commercial Tobacco v. Commission* ECLI:EU:C:2012:479; C-155/14 P - *Evonik Degussa and AlzChem v Commission* ECLI:EU:C:2016:446; Cases C–93/13 P and C–123/13P *Commission and Others v. Versalis and Others* ECLI:EU:C:2015:150
[140] Carsten Koenig, *Comparing Parent Company Liability in EU and US Competition Law,* supra (n.12), p.73-74, Stefan Thomas, '*Guilty of a Fault that one has not Committed*, supra (n.47), p.18-19

Nevertheless, the attribution of subsidiary liability to its parent company in EU competition law consists of two situations.[141] The first situation occurs when a parent company directly participates in a cartel through its subsidiary, such as providing instructions[142]. The question concerning the compliance with the principle of personal liability would not be raised in this situation due to the fact that a subsidiary concerned explicitly is merely the extension of its parent company since it is not equipped with the genuine autonomy. Therefore, it is in accordance with not only the principle of personal liability[143] but also the general concept of the corporate law regarding the notion of the corporate veil piercing.

The second situation concerns the presumption of the exercise of decisive influence. This aspect of parental liability, on the contrary, raises the question of whether its application contradicts to the principle of personal liability or not. With the intention to explain the paradox between the two principles, it should be noted that it is trite law that when a parent company hold all the shares of its subsidiary, there is a rebuttable presumption that a parent company exercise decisive influence over its subsidiary.[144] The practically irrebuttable effect of the presumption,[145] in accordance with the statement of the CJEU that it is not necessary to establish the personal involvement in order to attribute subsidiary liability to its parent company,[146] results in the departure of the parental liability from the principle of personal liability.

The lack of the need to establish the involvement of a parent company means that, in contrast with the presumption of innocence, the guilt of a parent company is not required to be established in order to hold the parent company liable. Counter-arguments might be observed that, inter alia, a parent company is guilty because of the links between it and its subsidiary.[147] This argumentation will be admissible if the links mentioned by the CJEU are referred to as the actual evidence that there is a connection between the infringement occurred and the action of the parent company. However, after the *Akzo* presumption, such connections are nothing more than an indicia for the CJEU to establish a single economic entity consisted of legal entities linked by indefinite

[141] Okeoghene Odudu and David Bailey, *The single economic entity doctrine in EU competition law*, supra (n.98), p.1747-1752
[142] Case 48/69 *Imperial Chemical Industries (ICI)*, supra (n.11)
[143] Since a parent company itself is considered to be a perpetrator of the competition law.
[144] Case C-97/08 P *Akzo Nobel*, supra (n.30), para 60
[145] See fn. 47
[146] Case T-144/07 *ThyssenKrupp Liften Ascenseurs v Commission*, ECLI:EU:T:2011:364, para 95; Case C-97/08 P *Akzo Nobel*, supra (n.30) para 59; Case C-625/13 P. Villeroy & Boch AG, supra (n.11), para 148
[147] Regarding to the economical, organizational and legal links; see Joined Cases C 231/11 P to C-233/11 P *Siemens AG Österreich* supra (n.3) para 46 and the case-law cited.

elements of the corporate group.[148] In addition, the CJEU, by the statement that the presumption of the actual decisive influence does not lead to the presumption of guilt[149], implicitly lay down the ground rule of the principle of parental liability that the principle is not affiliated with the fault of a parent company. The relevant fact that the Commission needs to establish in order to hold a parent company liable for its subsidiary infringement is that a parent company and its subsidiary belong to the same economic entity. When a single economic entity is founded, it is again trite law that the Commission is able to hold legal persons in the concerning economic entity jointly and severally liable[150], without further considerations required.

Moreover, the rationale and characteristics of joint and several liability are distinct from the principle of personal liability.[151] In his article, Thomas argues that liability in the single economic doctrine does not reflect personal responsibility that derived from the infringement committed by each legal entity, a parent company and a subsidiary. In addition, the objectives of joint liability and personal liability are different. On the one hand, the objective of the joint liability as an inherent instrument of the civil law is to benefit the privileged creditor justified by the financial interest. On the other hand, the Commission interests differ from that of private creditors, since the imposition of fines does not serve as a tool to ensure the income of the European Union but a function to ensure the objective of a deterrent effect.[152] Therefore, the liability of each constituent of the economic entity, be a parent company or subsidiaries, derived from the legal obligation ipso jure of the concept of undertaking.[153]

The practical effect of the presumption of actual decisive influence should also be mentioned in the aspect of the compatibility with the fault-based liability. Since the presumption is criticised for being nearly irrebuttable, parent companies with the burden of proof in almost every case fail to rebut such presumption, making them jointly and severally liable along with their subsidiaries. There are no clear guidelines on the scope of the evidence that the EU authorities will examine in order for the presumption to be rebutted. A parent company has a burden of proof that a subsidiary acts autonomously without the influence of a parent company in all material

[148] See section 3.2 below
[149] Case C-625/13 P. Villeroy & Boch AG, supra (n.11), para 149
[150] C-155/14 P - *Evonik Degussa and AlzChem*, supra (n.139), para 29 and case-law cited.
[151] Stefan Thomas, '*Guilty of a Fault that one has not Committed*, supra (n.47), p.21-23
[152] See fn.63-68
[153] Joined Cases C-231/11 P to C-233/11 P C *Siemens AG Österreich* supra (n.3) para 57

respects.[154] The links under CJEU consideration may include all economic, organisational and legal links.[155] With the expansive potential and no exhaustive lists, a parent company faces with no directions or guidelines of what might be indications to rebut the presumption. For example, even a parent company adduce sufficient evidence to prove that a subsidiary enjoys a considerable measure of autonomy, it is still not an autonomous entity since there is regular monitoring by a parent company.[156] The limited options that parent company could rely on are the exception established in the opinion of the AG Kokott in *Akzo* case, concerning a parent company being a purely financial investor, hold the shares temporarily or legally precluded to exert decisive influence.[157] However, the given circumstances rarely occur, and the reference to such exception could be considered unusual and unrealistic in the case of a wholly own subsidiary.[158] Therefore, in reality, the irrebuttable effect of the presumption turns the parental liability into the strict liability[159]

Consequently, not only that the CJEU is unable to justify the compatibility of the principle of parental liability with the principle of personal liability, but its argumentations also consistently point out that parent company is liable because it belongs in the same economic entity as a perpetrator, its subsidiary. Several attempts by the CJEU to argue otherwise could be considered as lip service.[160] In addition, the attributes of the collective liability of legal persons in the same group as such resemble characteristics of vicarious liability[161] This acknowledgement, along with the observation that the presumption of exercise of decisive influence in a wholly own subsidiary renders the parental liability strict liability, can be interpreted as that when a legal person commits an antitrust infringement, such as participating in a cartel if such legal person belongs in the

[154] Case C-97/08 P Akzo Nobel, supra (n.30), para 72
[155] Ibid, para 74
[156] C-58/12 P *Groupe Gascogne v* Commission, ECLI:EU:C:2013:770, para.39; There are other several arguments of a parent company in order to rebut the presumption which at the end fail to do so e.g. in case T-566/08 - *Total Raffinage Marketing v Commission* ECLI:EU:T:2013:423, para 501-502; the GC held that the obligations under company law and the unity of of the market conducts reflecting from the common management between a parent company and its subsidiary support, in spite of the any autonomy conferred to the subsidiary management, the presumption that there is an actual exercise of decisive influence.
[157] Opinion of AG Kokott in Case C-97/08 P *Akzo Nobel*, footnote 67
[158] John Temple Lang, *How Can the Problem of the Liability of a Parent Company for Price Fixing By a Wholly-Owned Subsidiary Be Resolved?* supra (n.37), p.1502-1503
[159] Carsten Koenig, *An economic analysis*, supra (n.21) p.286, Paul Hughes, *Competition law enforcement and corporate group liability*, supra (n.112), p.78
[160] Antoine Winckler, *Parent's Liability: New case extending the presumption of liability of a parent company for the conduct of its wholly owned subsidiary* (2011) JECL&P Vol. 2 No.3
[161] Andriani Kalintiri, *Revisiting Parental Liability in EU Competition Law*, supra (n.25), p.157-159

economic entity, its infringement is deemed to be committed by the concerned economic entity. Therefore, other constituents belonging in the same economic entity are to be held jointly and severally liable for the infringement, even though they are not part of, or even recognise, the anticompetitive conduct. The argument can be supported by the reasoning of the ECJ in case *Portielje*, which the ECJ held that

> "The only decisive factor for the purpose of the penalty is that all the legal entities which are held jointly and severally liable, in whole or in part, for payment of the same *fine together constitute with the entity whose direct involvement in the infringement has been established ('the author of the infringement') a single undertaking* for the purpose of Article [101 TFEU]. According to the case-law cited at paragraphs 38 to 41 above, it is the actual exercise by the holding entity of decisive influence over the author of the infringement which is important in that regard" [162]

With this intention, the subsequent chapter will examine whether the concept of decisive influence plays a significant role in order for the liability of a subsidiary to be attributed to its parent company or not. The result stemming from the examination will exceedingly contribute to the determination of another related issue, which is the liability of innocent sister companies and subsidiaries.

3.2 Decisive influence as a requirement of the attribution of liability?

Before drawing any conclusion on innocent subsidiary liability, there is a need for further analysis on the relationship between the notion of decisive influence and the attribution of competition liability. Even though the undertaking is considered to be the perpetrator of the infringement, references to the exercise of decisive influence have been reiterated by the EU competition authorities as one of the elements enabling them to hold the parent company liable for

[162] Case C-440/11 *Portielje*, supra (n.96) para. 44 (emphasis added)

its subsidiary anticompetitive conducts.[163] Therefore, should the decisive influence be interpreted as a fundamental requirement in order to attribute one legal person liability to another separate legal person? In other words, is a parent company liable for its subsidiary misconducts not only because they form a single economic entity but also due to the fact that it exerts decisive influence over its subsidiary, directly or presumably? On the one hand, if the parental liability requires a criterion of decisive influence, a preliminary conclusion should be that innocent subsidiary shall not be liable for its parent company liability. On the other hand, if parent company liability merely derives from the argumentation that it belongs to the same economic entity with its subsidiary, all legal persons, including innocent sister company and subsidiary, could be held jointly and severally liable for competition infringement of their parent or sibling companies.

In the first place, it should be observed that the single economic entity doctrine has been triggered in cases where the EU competition authorities attribute liability of subsidiarity to its parent company. As a result, it might be considered that the nature of the attribution of liability in a corporate group is that the imputation direction is only upwards, i.e. from a subsidiary to its parent company.[164] To support this concept, there has been no case law that the Commission attributes the liability of a parent company to its subsidiary or innocent sister company. Besides, the jurisprudence of the CJEU, that liability of competition law infringements requires personal responsibility[165] is another endorsement of this concept. The requirement can be interpreted as that innocent sister company or subsidiary cannot be held jointly and severally liable for the infringement committed by a parent company, since they have not participated directly or indirectly in the antitrust misconducts.[166]

Nevertheless, the methodology of the parental liability can be interpreted as that the notion of decisive influence is not a fundamental requirement in order to attribute liability of one legal

[163] See for example; Case C-625/13 P. *Villeroy & Boch AG*, supra (n.11), para 146; Joined Cases C-231/11 P to C-233/11 P *Siemens AG Österreich* supra (n.3) para 46; C-521/09 P - *Elf Aquitaine v Commission*, supra (n.86), para. 54; Case C-90/09 P. *General Química*¸supra (n.48) para 37

[164] Alison Jones, *The Boundaries of an Undertaking In EU Competition Law*, supra (n.97), p.320; Okeoghene Odudu and David Bailey, *The single economic entity doctrine in EU competition law*, supra (n.98), p.1746-1747; Simon Burden and John Townsend, *Whose Fault Is It Anyway?*, supra (n.110), p.301

[165] See section 3.1.2

[166] See for example the judgment of the German courts in Hans-Markus Wagener, *Follow-up to Skanska*, supra (n.91) p.3 "The Regional Courts of Mannheim and Munich I both argue that since the subsidiaries had no effective control over the conduct of the company that actually participated in the cartel, there are no grounds that could justify to impute the infringement to the defendant"

person to another in the same economic entity. Following observations can be determined as endorsements of the claim.

One supporting argument is that the decisive influence is referred to by the CJEU as an indication that a parent company and its subsidiary shall be deemed to constitute one undertaking, hence they are jointly and severally liable. In other words, the CJEU does not hold a parent company liable for its subsidiary liability precisely because it exerts decisive influence over the subsidiary, which would resemble the character of a regular corporate veil piercing doctrine[167]. The CJEU, in contrast, establishes that since a subsidiary is not independent of its parent company, by receiving instructions from its parent company in all material respects, it forms a single economic entity with the parent company.[168]

Therefore, it can be theoretically inferred from the current methodology that decisive influence is a mere tool to identify the scope of a single economic entity which is a separated issue from the attribution of liability.[169] In his opinion, Kersting articulates that "The ECJ proceeds in several steps in the manner of a hermeneutic circle to establish [parent company] liability"[170]. He subsequently describes four steps of the application of parental liability. The CJEU firstly examine the external perspective of undertaking in a market in an economic sense, then the decisive influence doctrine is applied in order to clarify the extent of the economic entity in practice. Afterwards, the concerned undertaking, with the precise scope of the constituents, can be held liable for the infringement committed by one of its legal persons and consequently the fine is allocated to every legal person.

Earlier analysis on the compatibility with the principle of personal liability also contributes to the interpretation that decisive influence does not play a significant role in the attribution of fines between legal persons in the same economic entity. The analysis exhibits that to avoid the contradiction with the principle of personal liability, the CJEU refers to the parent company's fault derived from the consideration that it is a legal embodiment of undertaking who infringe the competition law prohibitions.[171] As a result, it is theoretically possible to argue that the when the

[167] See section. 3.1.1
[168] Case 48/*69 Imperial Chemical Industries (ICI)*, supra (n.11), para 133, C-520/09 P *Arkema v Commission*, ECLI:EU:C:2011:619, para 38 and case law cited
[169] Christian Kersting, , *Liability of Sister Companies and Subsidiaries in European Competition Law*, supra (n.101), p.16-19
[170] Ibid, p.17
[171] Opinion of AG Kokott in Case C-97/08 P *Akzo Nobel*, para 97-98, see also supra, section 3.1.2

Commission establishes the fault of one of the legal person which belong to an economic unit, such fault is attributed to other legal persons constituting the same economic entity. With this argument, all constituents of the undertaking, including inter alia, innocent sister companies and subsidiary are to be deemed liable for the competition infringement that they commit themselves.

In particular, the approach to establish decisive influence in the presumption of decisive influence, which renders the parent company liability under such circumstance to be strict liability[172], could not be referred to as an important requirement to attribute liability, due to its obscurity and imprecision.[173] That is to say, before the presumption established by Akzo judgment, the Commission has a burden of proof to establish that a parent company has the ability to exercise decisive influence and it practically exerts such influence. The reference to the decisive influence in this circumstance exhibits the act of a parent company which is linked to the infringement. Therefore, without the decisive influence, the liability of a subsidiary cannot be attributed to its parent company. Complying with this statement, other legal persons in the same economic entity are not jointly and severally liable for the infringement committed by another legal person belonging in the same economic entity, since there are no links, i.e. no decisive influence, between them.

Nonetheless, the practically irrebuttable presumption establishes in Akzo case complicate the relationship between the decisive influence and the infringing conducts. The range of the scope that the CJEU take into account when determining the potential decisive influence is expansive. To rebut the presumption, a parent company has to adduce evidence that its subsidiary acts autonomously. According to the presumption, decisive influence can be described as the influence over commercial policy of a subsidiary, by considering all relevant economic, organisational and legal links between them.[174] The presumption therefore can be interpreted as that, resembling the characteristic of vicarious liability, a parent company is always presumed to exercise decisive influence over its subsidiary and as a result, they indeed constitute a single economic entity. Despite mentioning the decisive influence as one of the reasons to attribute liability of a subsidiary to its parent company, the lack of clarity on how exactly a parent company influences the commercial policy, let alone influence of a parent company over conducts concerning the

[172] See fn.159
[173] Andriani Kalintiri, *Revisiting Parental Liability in EU Competition Law*, supra (n.25), p.157
[174] C-521/09 P - *Elf Aquitaine v Commission*, supra (n.86), para 57-58 and case law cited

anticompetitive infringement of a subsidiary, should render the concept of decisive influence inefficient to be considered as a suitable criterion to attribute competition liability.

As a final point, the fact that liability in a corporate group is at the moment only attributed upwards cannot be interpreted as that it is incapable for the CJEU and the Commission to attribute the liability in other directions. The EU competition authorities are not bound by any limitations and they have not explicitly expressed that the single economic entity is to be invoked only in a parent-subsidiary situation. In the same manner as the statement from the CJEU, that there have been no successful cases which can rebut the presumption of the actual exercise of decisive influence does not mean that the presumption cannot be rebutted in any circumstances[175], the fact that there have been no cases to impose fines in other directions does not mean that it cannot occur in any circumstances. The case law concerning sister company liability so far have not given clear answers on the current question.[176]

In the first case, the ECJ had to determine the attribution of liability from one sister company to another.[177] The imputation of liability by the Commission was based on the fact that they formed a single undertaking and was upheld by the Court of First Instance (CFI).[178] The opposing parties argued that the fact that they belong in the same economic entity alone does not enable the Commission to attribute the liability from one constituent to another without other justification.[179] The judgment of the ECJ therefore would be directly related to the determination of liability of innocent sister companies and subsidiaries. In spite of the explicit statement on the methodology of the imputation of fine in the single economic doctrine, the ECJ rejected the CFI decision by ruling that "The simple fact that the share capital of two separate commercial companies is held by the same person or the same family is insufficient, in itself, to establish that those two companies are an economic unit …."[180] In other words, the ECJ denied the attribution based on the fact that no single economic entity had been founded in this case, not because there is no decisive influence between sister companies.

[175] Ibid, para 62-66
[176] Christian Kersting, *Liability of Sister Companies and Subsidiaries in European Competition Law*, supra (n.101), p.16
[177] Case C-196/99 P Siderúrgica Aristrain Madrid SL v Commission of the European Communities ECLI:EU:C:2003:529
[178] Ibid, para 86
[179] Ibid, para 87
[180] Ibid, para 99

The second case also concerns the attribution of one sister company's liability to another sister company.[181] The economic entity in the case had a complex corporate structure due to the reconstruction within the corporate group, Jungbunzlauer group. The result from the reconstruction was that the former management power of the managing company, *Jungbunzlauer GmbH* (JGH), transferred to the new managing company, *Jungbunzlauer AG* (JAG), which were commonly controlled by the holding company, *Jungbunzlauer Holding AG* .[182] The General Court based its judgment on the fact that JAG is equipped with the managing power to conduct group business which as a result had decisive influence over its sister company, JGH and eventually held that the liability of JGH could be imputed to JAG.[183] In other words, the attribution was not accompanied by the consideration not only that sister companies constitute the same economic entity, but also the additional requirement that one of them had decisive influence over another. It is still not certain whether the same doctrine would be applied in case of the liability of innocent sister companies and subsidiaries.

Consequently, decisive influence serves practically as only one of the indicia to determine the relationship between the parent company and its subsidiary, not a fundamental requirement for the attribution of one legal person to another legal person in the same economic entity. Such interpretation, in addition to the earlier analysis that competition law liability is imposed on the notion of a single economic entity, gives rise to the possibility of the liability of innocent sister company and subsidiary. After the *Skanska* judgment, the consideration as such is implied to be applied similarly in the civil proceeding, which will in turn be scrutinised in the following section.

3.3 Preliminary reference in case C-882/19 Sumal

Prior to the Sumal case, the Spanish appellate court had upheld the liability of a legally independent subsidiary to pay damages for the parent company's antitrust violation.[184] In that case, the Spanish Court considered it appropriate to overcome the strict national solutions, such as the limit application of corporate veil piercing, in accordance with the principles of EU law in order

[181] Case T-43/02 *Jungbunzlauer AG v Commission of the European Communities* ECLI:EU:T:2006:270
[182] Ibid, para 102
[183] Ibid, para 123-130
[184] *Juzgado de lo Mercantíl No. 3 de Valencia*, judgment of 20 February 2019, ECLI:ES:JMV:2019:34; see also Hans-Markus Wagener, *Follow-up to Skanska*¸supra (n.91) p.6

to achieve the effective application of substantive Union law. The case before the Commercial Court in Valencia concerns with the follow-on damage litigation on the Commission decision in Truck cartel.[185] One of the addressees in the Commission decision is MAN SE, a parent company who was held jointly and severally liable with its subsidiaries.[186] In the Spanish case, however, the defendant was not the addressees indicated in the Commission decision but was one of the constituents of the MAN group established in Spain, MAN España. The Spanish Court referred to the single economic doctrine and concluded that a subsidiary could be held liable for the liability of its parent company since the anticompetitive conducts founded in the Commission decision is considered to affect the pricing regime of the whole corporate group.[187]

The pending preliminary reference by the Audiencia Provincial de Barcelona ("APB")[188] also concerns with the follow-on action for damages of the Truck cartel decision. The following section will set out the factual background of the case and subsequently analyse the potential effect of the decision of the ECJ.

3.3.1 factual background of the case

In the current case, the ECJ has to determine whether the single economic unit doctrine developed by the CJEU provides 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.

Prior to the current case, the EU Commission imposed fines totalling EUR 2.93 billion on several companies participated in Truck cartel. [189]The decision of the Commission has already had the effects on innocent subsidiary in the earlier judgment of the Commercial Court in Valencia. According to the Commission decision, one of the companies fined at the time was Daimler AG as a direct participant. However, in the same line with the Commercial Court of Valencia case, the plaintiff did not bring its action against the German parent company but rather against its Spanish

[185] Trucks (CASE AT.39824) Commission decision 16 July 2016.
[186] Ibid, para 95
[187] *Juzgado de lo Mercantíl No. 3 de Valencia*, supra (n.184), para 46
[188] Case C-882/19 *Sumal S.L.* supra (n.109), see also Hans-Markus Wagener 'And Again: Liability for Cartel Damages' (2019) D'KART antitrust blog
< https://www.d-kart.de/en/blog/2019/11/15/auf-ein-neues-haftung-von-konzerngesellschaften> accessed 10th May 2020
[189] Trucks (CASE AT.39824), supra (n.185)

subsidiary, Mercedes Benz Trucks España, S.L. In its arguments, the defendant states that, similar to other arguments relating to the parental liability, that it is not the addressee of the Commission decision and it has separate legal personalities with its parent company. In addition, it is not the addressee in the Commission decision.

In the Court of First Instance, the Court dismissed the case as inadmissible.[190] It argued that the defendant was not capable of being sued for cartel damages because the Spanish company itself had not been officially implicated in the infringement as the Commission's decision only established wrongdoing of the parent company. However, on the appeal, the APB determines that there are mixed answers from the national courts when dealing with the potential liability of a subsidiary regarding the anticompetitive infringement of its parent company[191]. In addition, the Spanish Court is uncertain whether the concept of a single economic entity could be entirely applied in civil procedures.[192] Even one part of the doctrine related to the liability of economic successors is in accordance with the national provisions of piercing corporate veil, the other aspect concerning attribution of liability between separated legal persons in the same corporate group is not the concept recognised in the national law regime.

The APB also refers to the recent case law concerning the attribution of liability from a parent company to a subsidiary in the case before the General Court.[193] The APB determine that even though the case justified the extension of liability of a subsidiary[194], the factual basis of the case differs from that of the current case.[195] In addition, if such attribution would be applicable in civil procedure, should the further criteria such as the extraordinary difficulties as a result of the litigation against the addressee of the first case be considered apart from the fact that legal persons form the single economic entity. As a result, the ABP decided to refer the following questions to the ECJ;

[190] Juzgado de lo Mercantíl nº 7 de Barcelona, judgment of 23 January 2019, ECLI: ES:JMB:2019:981 – Sumal SL v. Mercedes Benz Trucks España SL).
[191] *Audiencia Provincial de Barcelona, Sección 15*, order of 24 October 2019, Rollo núm. 775/2019-2a, para. 11
[192] Ibid, para 26-27
[193] Case T-677/14, *Biogaran v Commission* ECLI:EU:T:2018:910
[194] Ibid, para 218 and 223.
[195] *Audiencia Provincial de Barcelona, Sección 15*, order of 24 October 2019, Rollo núm. 775/2019-2a, para 22

"1.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. 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?

3. 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?

4. 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 de Defensa de la Competencia (Law on the Protection of Competition), which provides only for 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 Community doctrine?"

3.3.2 Potential effects of the judgment

By the effect of the case Skanska, the concept of undertaking in Article 101 TFEU is to be directly applied when determining the perpetrator in action for damages.[196] In addition, it has been previously discussed that the judgment implies that principle of parental liability as a part of the single economic entity can be relied on in civil litigation of EU competition law.[197] The ECJ in case Sumal is given an opportunity to clarify such implication.

The focal point of the upcoming case is the clarification of the criteria relating to the attribution of liability between separated legal persons in the same economic entity. The prior analysis of the methodology adopted by the CJEU indicates the lack of explanation concerning the interaction between two fundamental aspects; the existence of a single economic entity and the decisive influence.[198]

[196] Case C-724/17 Skanska, supra (n.7), para 32, 47
[197] See section 1.3
[198] See section 3.1-3.2

It should be reiterated that the concept of undertaking entails every entity engaging an economic activity, regardless of separate legal personalities.[199] In addition, a parent company and its subsidiary constitute a single economic entity where the latter carries out instructions given by the former.[200] As a result, it is inarguable that both legal persons in the case, Daimler AG and Mercedes Benz Trucks España, S.L, belong to the same economic entity. The question arises at this point whether the fact that the single economic entity has been established is sufficient for the subsidiary to liable for the infringement committed by its parent company?

If the ECJ considers that there are further requirements apart from the establishment of a single economic entity in order to attribute intra-group liability, the ECJ would have to elaborate on such requirements. For example, to clarify that the single economic entity doctrine intends to impute the liability only in the upward direction (from a subsidiary to its parent company)[201], a subsidiary cannot be held liable for the infringement committed by its parent company, since a subsidiary does not have a decisive influence over its parent company. The similar interpretation of the methodology can be observed in the ruling of the German courts.[202] Moreover, the ECJ could assert the compliance between the action for damages and the principle of personal responsibility, since the personal involvement, in terms of decisive influence, is required in order to be held liable. The interpretation would also align with the interpretation of the civil liability regarding the single economic doctrine by the national courts in the Netherlands. The Dutch court determines that in order for a legal person to be held liable for the anticompetitive infringement committed by another legal person, the personal culpability is required.[203]

Nevertheless, further concerns arise from the effect of the aforementioned potential ruling. The decision to exclude a subsidiary from the liability of its parent company would jeopardise the deterrent effect of Article 101 TFEU. The penalties in EU competition law, by the imposition of fines or action for damages, has been called upon by the CJEU in order to ensure the deterrent effect of the EU competition law.[204] By implying that, even though a subsidiary belongs in the same economic entity as a parent company, it is not liable for the infringement committed by a

[199] Case C-41/90, Höfner, supra (n.5) para.21
[200] Case 48/*69 Imperial Chemical Industries (ICI)*, supra (n.11), para 133
[201] Hence complying with the argument in fn.164-166
[202] See fn.154
[203] Caroline Cauffman, *Civil law liability of parent companies for infringements of EU Competition Law by their subsidiaries*, supra (n.51) p.12
[204] Case C-724/17 Skanska, supra (n.7), para 46

parent company, it would allow the corporate group to act opportunistically.[205] In other words, by implementing the complex restructuring, a corporate group might be able to avoid the competition liability since a part of the economic entity, a subsidiary with no decisive influence, can not be held liable in action for damages. Furthermore, the exemption from the liability of a subsidiary would be in contrast with the consideration observed in the judgment of the Commercial Court of Valencia that regardless of the absence of decisive influence element, the effect of the anticompetitive infringement is considered to flow through a subsidiary since the commercial activities of a subsidiary should be presumably stemmed from the business strategy of a parent company which related to the infringing conducts.[206]

It follows from the foregoing consideration that the ECJ could consider attributing liability of a parent company to a subsidiary. The potential liability of an innocent subsidiary has been discussed immensely throughout the thesis. By articulating the single economic entity as the perpetrator of the EU competition law, the ECJ is able to impute liability of one legal person to another.[207] The legal person in this circumstance is liable due to the fact that it belongs to an economic entity which one of the constituents has participated in the cartel. Such reasoning is also in accordance with the case law of the CJEU.[208] Therefore, by the direct application of the concept of undertaking in Article 101 TFEU in action for damages due to the effect of the Skanska judgment, a subsidiary is liable for an infringement committed by its parent company, without the need to establish further requirements.

Even though the aforementioned reasoning enables to CJEU to held a subsidiary liable as a part of the infringing undertaking, such methodology would come with additional legal consequences. In order to be in accordance with the principle of personal responsibility governing the civil liability, it can be inferred that a subsidiary can be held liable since its fault derived from the fact that it belongs to the same economic entity as a perpetrator of EU competition law.[209] This potential statement would explicitly render the single economic entity doctrine into group liability[210]. Consequently, directions of the attribution of liability or the decisive influence element are obsolete since the cornerstone of the doctrine is the establishment of a single economic entity.

[205] See the discussion supra, fn. 88
[206] See fn. 184-187
[207] Case C-440/11 *Portielje*, supra (n.96) para. 36-38
[208] C-628/10 and C-14/11 P *Alliance One*, supra (n.139) para 44 and case law cited.
[209] See, by analogy, Stefan Thomas, '*Guilty of a Fault that one has not Committed*, supra (n.47), p.22
[210] Ibid, p.15-16

The methodology in this circumstance aligns with the previous analysis[211] that the decisive influence does not play a significant role when attributing the liability between legal persons but only served as a tool to establish a precise economic entity.[212] In addition, the scope of the liability could be extended to other constituents in a single economic entity, such as employees and subcontractors[213]

However, such argumentation gives rise to the contentious question concerning the contradiction with the principle of personal liability. It can be observed from the previous analysis that the single economic doctrine in relation to the parental liability contradicts with the principle of personal liability.[214] If the principle of parental liability, even with the supplementation of the consideration of decisive influence, is considered to be in contrast with the principle of personal liability, the liability of innocent subsidiaries as constituents of the infringing undertaking, without the requirement of the exercise of decisive influence, cannot be considered, a fortiori, to be in accordance with the principle of personal liability.

Furthermore, the practical effect of the current reasoning can be contributed to the increase in the amount of action for damages. It is due to the fact that nowadays there are several complex and the expansive relationship between the companies in the corporate group. Disregarding other requirement such as decisive influence in order to attribute liability between legal persons constituting one economic entity, such reasoning enables the claimant in civil litigation to bring action for damages against any legal person belonging to the same economic entity as the perpetrator of the EU competition law. If the addressee of the Commission decisions or judgment of the CJEU is a constituent of a multinational corporate group, such as Daimler AG in the current case, it could be implied that subsidiaries in each Member States, for example, Mercedes Benz Trucks España, S.L as a subsidiary in Spain, can be held liable. Similarly, the German subsidiary of the other addressee in the same Truck Cartel decision was also brought into action for damages against the infringement committed by its parent company.[215]

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[211] See section 3.2
[212] Christian Kersting, , *Liability of Sister Companies and Subsidiaries in European Competition Law*, supra (n.101), p.16-19
[213] Okeoghene Odudu and David Bailey, *The single economic entity doctrine in EU competition law*, supra (n.98), p.1746
[214] See section 3.1
[215]Regional Court Mannheim, judgment of 24 April 2019, 14 O 117/18 Kart = NZKart 2019, 389 – Trucks Cartel

In order to reconcile with the principle of personal liability and prevent the spillover effect of the scope of group liability regarding the single economic doctrine, the ECJ might indicate further requirements for the attribution of one legal person to another when they constitute a single economic entity. The third question inquired by the referring court in case Sumal is precisely related to this consideration. One possible additional requirement mentioned by the referring court is the "the impossibility or extreme difficulty of enforcing liability against those found liable for the infringement in the earlier infringement proceeding"[216] In other words, individuals are left with a heavy burden in order to bring follow-on action for damages when the addressees are domiciled in a different Member State. The obstacle might be considered as, for example, a considerably delay caused by difficulties of serving notice on a foreign parent company[217] or the different in communicative language. The question derived from the requirement is already noticed by the referring court that it is dubious whether such requirements should be deemed as a sufficient ground to justify the attribution of liability to a subsidiary or not.[218]

In addition, the introduction of further requirements could affect the methodology of the attribution of liability not only in civil procedures but also public procedures, since the CJEU has confirmed that both are two-side of the same coin and the concept of undertaking in both procedures cannot have a different scope.[219] To illustrate, if the suggested condition concerning the obstacle to bring action for damages against the addressees in the earlier proceeding is required in order to attribute liability to a subsidiary, such condition will be applied when the Commission and CJEU intend to attribute liability referring to the single economic entity doctrine. However, there is the observation that the obstacle condition is brought up by the CJEU when it considers the single economic entity doctrine regarding the principle of economic succession but absence in the principle of parental liability, even both principles ultimately concerns with the attribution of different legal persons in the same economic entity.[220] Another condition such as actual involvement of a subsidiary, even though it will render the civil liability of a subsidiary to be in accordance with the principle of personal liability, should not be considered as a desirable requirement. Were the condition to be deemed as a requirement, it would be directly contradicted

[216] Case C-882/19 *Sumal*, Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice (working document), para.22
[217] Ibid, para 23.
[218] Ibid.
[219] Case C-724/17 Skanska, supra (n.7), para 43-47
[220] Case C-882/19 *Sumal*, Summary of the request, supra (n.216), para 22

with the principle of parental liability since a parent company does not need to be involved in an infringement of a subsidiary in order to be held liable.[221]

It follows from the foregoing considerations that the potential answers of the ECJ will have an influential repercussion to the single economic entity doctrine. As a result, the judgment of the ECJ will be highly anticipated not only by scholars but also by legal practitioners working in the competition law field. Besides, the flaws of the application of the single economic doctrine in order to attribute liability intra-group can be observed by the questions and contradiction which will be derived from the possible statements of the ECJ. As a result, the current preliminary reference can be served as another reminder of the need to reconsider the methodology of the single economic entity doctrine. The following section will therefore remark the alternative methodologies which could be considered when the EU competition authorities intend to impute liability of one legal person to another.

[221] Case C-97/08 P Akzo Nobel, supra (n.30) para.59

4. Closing remarks

It should be borne in mind that the attribution of liability from one legal person to another is justified based on the objective to prevent a company from acting opportunistically[222] and the concept is recognised generally in term of the principle of piercing corporate veil.[223] It is inevitable that a legal person should be held liable when it participates, either directly or indirectly, in anticompetitive conducts. However, the analysis conducted throughout the thesis indicates that there are several theoretical and practical concerns with the application of single economic entity doctrine in order to attribute liability of one legal person to another. Therefore, it could be argued that there is a need to reconsider the concept of a single economic entity.

One possibility, which could be observed from the case law before the case Akzo, is to return to the dual criteria that the Commission is required to establish that a parent company has the ability to exercise decisive influence over its subsidiary and it actually exercises such influence.[224] The attribution of liability under these criteria would also be in accordance with the principle of personal responsibility since a parent company personal guilt derived from its indirect participation in infringing conduct through its subsidiary. In addition, such methodology reflects the criteria of the imposition of fines enshrined in Article 23(2) of the Regulation 1/2003.[225]

However, one could argue that the method could hinder the possibility to attribute liability of a subsidiary to a parent company since it only concerns with the positive control of a parent company, which has been the main focus of the EU competition authorities.[226] Therefore, in addition to the positive control condition, the attribution of liability could be extended in the situation where negative control of a parent company exists. The negative control concerns with the ability of a company to prevent the conducts of another company.[227] In his article, Wardhaugh stipulates that by including the negative control as a possible criterion, a parent company could be liable not only for the anticompetitive conducts of its subsidiaries but also employees and

[222] See fn.88
[223] See section 3.1.1
[224] Andriani Kalintiri, *Revisiting Parental Liability in EU Competition Law*, supra (n.25), p.159
[225] Article 23(2) Council Regulation (EC) No 1/2003; "The Commission may by decision impose fines on undertakings and associations of undertakings where, either intentionally or negligently: (a) they infringe Article [101] or Article [102] of the Treaty"
[226] Bruce Wardhaugh, *Punishing parents for the sins of their child*, supra (n.88), p. 32
[227] Ibid

subcontractors, since it fails to establish a comprehensive and effective compliance programme. Although a compliance programme has been considered as insufficient evidence to establish the autonomy of a subsidiary in order to rebut the presumption of the actual exercise of decisive influence under the current parental liability regime[228], it could play a significant role under the suggested theory.[229]

An antitrust compliance programme is an instrument implemented by corporate group management in order to ensure that their subordinates, such as employees or subsidiaries, comply with the competition provisions.[230] It could be considered as one of a few, if not single, organisational tools which corporate group has in order to prevent the anticompetitive infringements.[231] In their article, Hofstetter and Ludescher stipulate that a parent company which establish the effective and comprehensive compliance programme, based on factual circumstances in each case, should not be held liable for the misconducts of its subsidiary. In addition, the implementation of an effective compliance programme as a possible defence could be served as a safe harbour for a parent company. The suggested methodology therefore provides, to some extent, legal certainty, an element which is absent in the conventional principle of parental liability.

The methodology above could be applied in order to impute liability of a subsidiary to its parent company, which could be observed as the implicit intention of the Commission and CJEU when invoking the single economic doctrine.[232] The legal effect of the reasoning would differ considerably from the one currently applied in the single economic entity doctrine. The methodology is in accordance with the principle of personal liability and corporate law, therefore it could be applied harmoniously when the imputation is to be relied on in action for damages. In addition, it would preclude the potential liability of innocent constituents of a corporate group, such as sister companies or subsidiaries.

Nevertheless, were the ECJ in case Sumal to determine that innocent subsidiary's liability is one of the instruments required in order to ensure the deterrent effect of the EU competition law, it would be necessary for the ECJ to devise further conditions. It is due to the concern that, as the

[228] Stefan Thomas, '*Guilty of a Fault that one has not Committed*, supra (n.47), p.17; Karl Hofstetter and Melanie Ludescher, *Fines against Parent Companies in EU Antitrust Law: Setting Incentives*, supra (n.21), p.61-62
[229] Florence Thépot, *The Interaction Between Competition Law and Corporate Governance,* supra (n.9), chapter 8 "Cartel Enforcement: Corporate Compliance Programmes"
[230] Carsten Koenig, *An economic analysis*, supra (n.21) p.303
[231] Karl Hofstetter and Melanie Ludescher, *Fines against Parent Companies*, supra (n.21), p.64
[232] See fn.164

analysis has indicated, the attribution of liability based purely on the fact that different legal persons form a single economic entity would result in the establishment of other innocent constituents of a corporate group, such as employees, agencies or subcontractors.[233] One possibility of the consideration could be observed in the judgment of the Commercial Court of Valencia, which determines that a subsidiary is deemed to be carried on economic activities stemming from the infringing business strategy.[234] However, it is inadvisable for the ECJ to engage further and shift the burden of proof to a corporate group to adduce sufficient evidence to show that a subsidiary's economic activities are independent of a parent company since it would inevitably follow the methodology of the presumption of the actual exercise of decisive influence establish by the effect of the Akzo case. The subsidiary would consequently be held liable in most, if not all, cases since the presumption is irrebuttable in practice due to the vague and ambiguous interpretation of the notion of the decisive influence of the CJEU.

[233] See section 3.3.2
[234] *Juzgado de lo Mercantíl No. 3 de Valencia*, supra (n.184), para 46

5. Conclusion

The economic approach of the concept of the undertaking as a perpetrator of the EU Competition law precludes corporate groups from relying on the principle of personal liability to avoid the antitrust liability since separated legal personalities are irrelevant when it comes to the determination of the persons responsible for the penalties, be it fines or damages. In term of the attribution of the liability in a corporate group, it is apparent from the jurisprudence of the CJEU that in most cases, the single economic entity doctrine has been invoked in order to attribute liability of a subsidiary to its parent company. Several reasonings have been considered as justifications of the current methodology, which by its nature is arguably contradicted with the fundamental principle of personal liability. It should be borne in mind that national jurisdictions also recognise the attribution of liability of one legal person to another under certain specific criteria, known as a so-called corporate veil piercing doctrine.

Regardless of the justifiable objectives, the methodology of the application of the single economic doctrine regarding the attribution of liability has created further legal consequences. The CJEU constructs its reasoning by determining whether a parent company and its subsidiary, constitute a single economic entity or not. If the answer is affirmative, a parent company and its subsidiary can be held jointly and severally liable for the infringement committed by a subsidiary. The CJEU states further that a single economic entity is established when a parent company has the ability to exercise decisive influence over its subsidiary, and it actually exercises such influence. In addition, the presumption of the actual exercise of the decisive influence in a wholly-owned subsidiary, laid down in Akzo case, renders a parent company automatically liable along with its subsidiary since the presumption is practically irrebuttable.

It can be observed that the current methodology of the CJEU is vague and ambiguous. It is unclear whether a parent company is liable due to the fact that it forms a single economic entity with the perpetrator or it exerts decisive influence over its subsidiary. The analysis of the thesis demonstrates that the former consideration prevails over the latter, which could be considered as an instrument for the CJEU to establish a single economic entity. Consequently, it could be stated that the antitrust liability of one of the constituents of a single economic entity is attributed to all legal persons belonging in the same entity. The direction of the attribution at this point is now immaterial since it is an entire corporate group who is deemed to be a perpetrator. It follows from

the foregoing consideration that the methodology of the CJEU could be applied to attribute the liability of a parent company to its subsidiary.

The decision of the ECJ in case Skanska settles the conflict between the jurisdiction of the TFEU and national provisions when determining persons liable for damages in EU competition law. By the effect of the judgment, the concept of undertaking in Article 101 TFEU is to be directly applicable in action for damages. The statement of the ECJ, in accordance with the foregoing consideration that a subsidiary could be held liable for the infringement of its parent company, can immensely impose an EU-wide impact. It is due to the fact that the methodology enables individuals to bring action for damages against an innocent subsidiary whose parent company participates in an anticompetitive infringement, such as cartel. The recent preliminary reference from the Spanish Court verifies the current concern and therefore inquires the CJEU to clarify the precise criteria of the single economic doctrine regarding the attribution of liability.

It is not for the purpose of the thesis to absolutely preclude the attribution of liability from one legal person to another in EU competition law. On the contrary, the attribution is required in order to prevent the corporate groups from circumventing antitrust liability using the complex reconstruction. However, the current methodology consists of overabundant defects which as a result create undesirable legal consequences without rational justifications. Accordingly, regardless of the ECJ decision in case Sumal, there is a need for the more comprehensive and clarified single economic doctrine in order for the attribution of liability to be effective and reasonable. Several critiques have pointed to the concept enshrined in corporate law such as the use of compliance programme, which is considered to apply more harmoniously with the relevant fundamental principle, i.e. principle of personal liability.

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