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The Single Economic Entity Doctrine: Is There a Common Concept of Undertaking in EU Competition Law?

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CONTENTS

ABSTRACT

The addressees of EU competition rules are designated as undertakings. EU antitrust and merger rules apply only where an entity constitutes an undertaking. The notion of undertaking is not defined in the Treaties, rather it is developed in the case-law of the Court of Justice of the European Union and the decisional practice of the European Commission. An undertaking is defined as any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed. A functional approach is adopted in order to distinguish entities acting as undertakings from those that are not. Further, it is established that the concept of undertaking designates an economic unit, which can include several natural or legal persons. In other words, several persons comprising of a single economic entity form a single undertaking for the application of competition rules. The single economic entity doctrine has been attributed various purposes in order to address different issues in competition law, and therefore it has far-reaching consequences. In this thesis, the concept of undertaking and the functional approach ascribed to the definition, its boundaries, which is delineated with the single economic entity doctrine is analysed in the context of substantive reach of Article 101 TFEU, attribution of liability for the infringement of antitrust rules, defining the group of an undertaking within the meaning of EUMR and establishing extra-territorial jurisdiction of competition rules with an aim to examine whether the concept and its principles are applied the same. It is seen not only that the single economic entity doctrine has been applied inconsistently, but also that it is problematic and an inappropriate instrument to be used in some areas.

ABBREVIATIONS

BLI	Business Law International
CJ	Court of Justice
CJEU	Court of Justice of the European Union
CLR	Columbia Law Review
CompLRev	Competition Law Review
EBLR	European Business Law Review
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ	European Competition Journal
ECtHR	European Court of Human Rights
EU	European Union
EEA	European Economic Area
GC	General Court
JAE	Journal of Antitrust Enforcement
JCL&E	Journal of Competition Law and Economics
JECL & Pract	Journal of European Competition Law & Practice
JV	Joint Venture
NCA	National Competition Authority
OECD	Organisation for Economic Cooperation and Development
SASAC	State-Owned Assets Supervision and Administration Commission
SOE	State-Owned Enterprise
TEU	Consolidated version of the Treaty on European Union
TFEU	Consolidated version of the Treaty on the Functioning of the European Union
US	United States
YARS	Yearbook of Antitrust and Regulatory Studies

1. INTRODUCTION

'Competition is the relationship between any number of undertakings which sell goods or services of the same kind at the same time to an identifiable group of customers.'[1]

The subjects of competition law are undertakings, which are not defined in the Treaties;[2] rather, the concept has been developed by the EU judicature.[3]

The competition rules are addressed to undertakings.[4] Article 101 TFEU applies to agreements and concerted practices[5] between separate, independent *undertakings* and decisions by associations of undertakings, while Article 102 TFEU prohibits abusing a dominant position by one or more *undertakings*. The Merger Regulation,[6] applies to concentrations between *undertakings* that have a Union dimension. For consistency, the notion of undertaking has been ascribed to the same meaning in both Articles 101 and 102 TFEU.[7]

First and foremost, the concept of undertaking is 'not necessarily identical with the notion of corporate legal personality in national commercial company or fiscal law.'[8] Rather, it has been understood as a concept that is unique to EU law.

Furthermore, the concept of undertaking has been said to serve two distinct purposes, first, it determines the material scope of application of competition law: 'the categories of actors to which the competition rules apply.'[9] An entity is subject to competition rules in so far as it is an undertaking, which is determined in relation to the nature of the activities it engages.

The second purpose is concerned with the boundaries of an undertaking, which is delineated with the single economic entity doctrine: 'where does one undertaking end, and the next one begin?'[10] This question determines whether there is a single undertaking or several separate

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[1] DG Goyder, Joanna Goyder, Albertina Albors-Llorens, *Goyder's Competition Law* (5th edn, OUP 2009) 8.

[2] Consolidated Version of the Treaty on European Union [2012] OJ C326/13 (TEU); Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47 (TFEU). There was, however, a definition of undertaking in the ECSC (Article 80) and EURATOM (Article 196) Treaties, with reference to specific activities and also in Art.1 of Protocol 22 EEA, see Okeoghene Odudu, *The Boundaries of EC Competition Law: The Scope of Article 81* (OUP 2006) ch 3, 24.

[3] Case T-99/04 *AC-Treuhand v Commission* EU:T:2008:256, para 144.

[4] Arts. 101/102 TFEU are only applicable where the distortion of competition is caused by undertakings, but competition may be distorted by the behaviour of entities which are not undertakings (eg, the organs of the Member States with regulatory or other functions) to which Arts. 101/102 TFEU are not applied, see Richard Wish and David Bailey, *Competition Law* (9th ed, OUP 2018) 83-84.

[5] Together referred to as agreements or arrangements.

[6] Council Regulation (EC) 139/2004 of 20 January 2004 on the Control of Concentrations Between Undertakings [2004] OJ L24/1 (EUMR).

[7] Joined Cases T-68, 77, 78/89 *Società Italiana Vetro SpA v Commission* EU:T:1992:38, para 358; Wish and Bailey (n 4) 185. See also Wouter PJ Wils, 'The undertaking as subject of EC competition law and the imputation of infringements to natural or legal persons' (2000) 25(2) EL Rev 99 (suggests it should have the same meaning including merger control).

[8] *Pre-Insulated Pipe Cartel* (Case IV/35.691/E-4) Commission Decision 1999/60/EC [1998] OJ L24/1, para 154.

[9] Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* EU:C:1999:28, Opinion of AG Jacobs, para 206; see also Wils, 'The undertaking as subject of EC competition law' (n 7)100-101.

[10] Wils, 'The undertaking as subject of EC competition law' (n 7) 100.

undertakings, which is of critical importance for the relationship between Articles 101 and 102 TFEU, as it determines which one is to be applied. The single economic entity doctrine is also employed to determine the responsible entity in finding an infringement of competition law; to ascertain whether there is a concentration between undertakings and their turnovers within the meaning of EUMR; and to establish the extra-territorial reach of the competition rules. Therefore, the concept of undertaking is central to understand and apply the EU competition rules.

This thesis is divided into eight chapters, including this introduction. In the second chapter, the definition of an undertaking with respect to its first purpose is provided, in order to gain a better understanding of the concept and to distinguish it from entities that are not undertakings.

In the third chapter, the meaning of an undertaking as designating a single economic entity is provided, the reasons for adopting such designation are explained, and the consequences of the doctrine in various areas of competition law are set out. The purpose of this chapter is primarily to start the discussion on the assessment of the doctrine.

Chapter four starts the analysis of the first strand of cases where the doctrine is applied, ie substantive reach cases, in relation to different relations where separate entities form a single economic entity.

In the fifth chapter, the most controversial use of the doctrine is discussed: the attribution of liability cases. The analysis takes a similar form to that of the substantive reach cases, in the context of different relations and their assessments.

Chapter six analyses the concept undertaking for the purposes of mergers, particularly in relation to State-owned enterprises ('SOEs'). These entities have become major global players, as more SOEs are now engaging in cross-border activities and involving in cross-border mergers, challenges arises for competition authorities both in the field of antitrust enforcement and merger review.[11]

In the seventh chapter, the doctrines applied in EU competition law, compared to US law, in order to enforce competition rules to entities established outside the EU, one of which is again the single economic entity doctrine, will be discussed.

Finally, a final discussion will take place in the last chapter to answer the research question.

[11] See eg, Deborah Healey, 'Competition Law and State-Owned Enterprises: Enforcement'(DAF/COMP/GF(2018)11, OECD Global Forum on Competition) <https://one.oecd.org/document/DAF/COMP/GF(2018)11/en/pdf>

1.1 Research Question and Purpose

The research question is: Is there a common concept of undertaking in EU Competition law?

In order to conduct this research, I aim to analyse the meaning of the concept of undertaking in relation to purposes it serves, and to explore how the definition of undertaking as designating a single economic unit has been developed in various areas of competition law. The single economic entity doctrine answers wide-ranging problems (and creates many) of competition law, therefore I seek to look closely at the principles of the doctrine in its different fields of applications, in order to determine whether the principles are applied the same or not.

1.2 Methodology and Sources

For the purposes of this thesis, mainly a doctrinal legal research method was used.[12] A comparative method was also used to a limited extend, in order to explain the similarities, differences and the reasons for those differences in the application of single economic entity doctrine between EU and US antitrust law.

The concept of undertaking is subject to comprehensive case-law and academic literature. Related EU legislation; case-law of the CJEU and the Commission, and a limited number of cases from other jurisdictions; opinions of Advocates General; scholarly publications including both textbooks and articles; Commission's Notices and other related publications have been used.

1.3 Delimitations

The rules on competition are set out in two sections in TFEU, first of which is 'the rules applying to undertakings' addressed to undertakings and includes Articles 101 and 102 TFEU, and the second is 'aids granted by States' addressed to the Member States, concerning state aid granted to undertakings. For the purposes of this thesis, mainly due to the lack of space, I will not address the concept of undertaking in relation to the rules addressed to Member States, including state aid and internal market rules. Further, due to lack of space, the concept of 'association of undertakings' provided for in Article 101 TFEU will not be discussed.

[12] Rob van Gestel and Hans-W Micklitz, 'Revitalizing Doctrinal Legal Research in Europe: What About Methodology?' (2011) EUI Working Paper LAW No. 2011/05 <http://ssrn.com/abstract=2644088> accessed 20 May 2020; Jan M. Smits, 'What is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research' (2015) Maastricht European Private Law Institute Working Paper No. 2015/06 <http://ssrn.com/abstract=2644088> accessed 20 May 2020, 5.

2. THE CONCEPT OF UNDERTAKING

2.1 Economic Activity: Functional Approach

The Court defines undertakings as 'every entity *engaged in an economic activity*, regardless of the legal status of the entity and the way in which it is financed…'[13] And an economic activity is '*offering goods and services on a given market'*,[14] 'which could, at least in principle, be carried out by a private actor in order to make profits'.[15]

A functional approach is adopted to identify undertakings; where the focus is on the nature of the activity, rather than the characteristics of the actors performing it.[16] Neither the social objectives associated with it, nor the regulatory or funding arrangements to which it is subject are relevant.[17] According to the Court, the functional approach serves for the unity and effectiveness of the Union law, making the way a body is formed under national laws irrelevant.[18] Since the legal status is irrelevant, natural persons, legal persons such as public or private companies, associations, State/public entities, or entities without a legal personality can be an undertaking.[19] Competition rules apply to a broad notion of bodies subject to private or public law; which can be the State or its agencies that engage in commercial activities.[20]

As Odudu concludes from the Court's definition of undertaking that 'Article [101] is not addressed to *entities* at all; rather it addresses *activities*. The approach is functional rather than institutional… The functional approach means that the relevant question is not *who* is an undertaking but *what* is economic activity?'[21] While the notion of economic activity is of critical importance to determine whether an entity is an undertaking for the purposes of competition law, it is not at all simple and clear to distinguish between economic and non-economic activities. The

[13] Case C-41/90 *Höfner and Elser v Macrotron* EU:C:1991:161, para 21 (emphasis added).
[14] Case C-35/96 *Commission v Italy* EU:C:1998:303, para 36 (emphasis added).
[15] Case C-218/00 *Cisal di Battistello Venanzio & C. Sas v Istituto Nazionale per l'assicurazione contro gli Infortuni sul Lavoro (INAIL)* EU:C:2001:448, Opinion of AG Jacobs, para 38.
[16] Joined Cases C-264, 306, 354 and 355/01 *AOK Bundesverband v Ichthyol-Gesellschaft Cordes* EU:C:2003:304, Opinion of AG Jacobs, para 26.
[17] ibid.
[18] Case C-118/85 *Commission v Italy* EU:C:1987:283, para 11.
[19] CW Bellamy and GD Child, *European Union Law of Competition* (David Bailey and John Laura Elizabeth eds, 8th edn, OUP 2018) 2.008ff; Alison Jones and Brenda Sufrin, *EU Competition Law: Text, Cases and Materials* (6th edn, OUP 2016) 117.
[20] Victoria Louri, '"Undertaking" as a Jurisdictional Element for the Application of EC Competition Rules' [2002] 29(2) Legal Issues of Economic Integration 143, 159-160.
[21] Odudu, *The Boundaries of EC Competition Law* (n 2) 25. For the interpretation of economic activity in various provisions of the Treaty, see Okeoghene Odudu, 'Economic Activity as a Limit to Community Law' in Catherine Barnard & Okeoghene Odudu (eds) *The Outer Limits of European Union Law* (Hart Publishing 2009); cf Vassilis Hatzopoulos, 'The Economic Constitution of the EU Treaty and the Limits between Economic and Non-economic Activities' (2012) EBLR 23(6) 973.

question of economic/non-economic activity has been subject to an extensive case-law, that 'relies on concurrent criteria, which are used either cumulatively or alternatively.'[22]

An important consequence of functional approach is that each activity of an entity is analyzed separately, meaning that for its economic activities it can be regarded as an undertaking, whereas its non-economic activities fall outside the application of competition rules.[23] Although activities which fall within the exercise of public powers are not of an economic nature,[24] the fact than an entity is vested with public powers does not preclude it from being classified as an undertaking regarding the rest of its economic activities, and therefore, the classification as economic or public power sphere must be conducted separately (if they can be separated from each other[25]) for each activity.[26]

2.1.1 Offering Goods and Services on a Market

An economic activity is the offering of goods or services on a given market. A comparative criterion has sometimes been used. In *Höfner*, the Court found the German Employment Agency as undertaking because, 'Employment procurement has not always been, and is not necessarily, carried out by public entities.'[27] Although the fact that goods and services are offered by private actors indicates that it is an economic activity, the absence of such example does not necessarily prevent the activities from having an economic nature if they consist of offering goods and services on a market.[28] But if an activity can be carried *only* by a public body (or on behalf of it) and cannot be carried out by private undertakings, it can be found as non-economic activity.[29] If an activity can be subject to actual or potential competition, it indicates the economic nature of it.[30]

Another criterion is looking at the market context and market participation; which is not related to the possibility of a private actor providing the same services, but whether the activity of offering goods or services has been carried on under market conditions (regardless of no-profit making motive).[31] For example, a non-profit-making medical aid organization was found as an

[22] Case C-205/03 P *Federación Española de Empresas de Tecnología Sanitaria (FENIN) v Commission* EU:C:2005:666, Opinion of AG Maduro, para 10.
[23] ibid. Undertaking is a relative concept, as referred by AG Jacobs in Case C-475/99 *Firma Ambulanz Glöckner v Landkreis Südwestpfalz* EU:C:2001:284, para 72.
[24] See section 2.2.2.
[25] Case C-113/07 P *SELEX Sistemi Integrati SpA v Commission* EU:C:2009:191, paras 76-77.
[26] Case C-49/07 *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Dimosio* EU:C:2008:376, paras 24-25.
[27] *Höfner* (n 13), para 22.
[28] Bellamy & Child (n 19) 2.005.
[29] Joined Cases C-159-160/91 *Poucet and Pistre v Assurances Générales de France* EU:C:1992:358, Opinion of AG Tesauro, para 12. See also section 2.2.3.
[30] Alexander Winterstein, 'Nailing the Jellyfish: Social Security and Competition Law' (1999) 20(6) ECLR 324, 325.
[31] *FENIN* (n 22), Opinion of AG Maduro, para 13-14; *Commission v Italy* (C-35/96) (n 14), para 37.

undertaking as it provided services for remuneration on the market for emergency transport services.[32]

As a consequence of the functional approach, some arguments have been rejected by the Court as they were found to be irrelevant for a finding of economic activity. Firstly, the legal personality of the entity or the way in which it is financed is irrelevant as long as it provides goods or services on the market. The fact that an entity does not have a separate legal personality distinct from that of the State does not play a role.[33] Consequently, an activity neither loses its economic character by the mere fact that it is exercised by the State (or a public body), nor becomes economic only because it is performed by a private company.[34] Further, the non-profit-making character of an entity, [35] the non-profit objectives it pursues,[36] or carrying public service obligation (or having a legal monopoly) [37] does not alter the finding of an economic activity. Finally, the complex and technical nature of the services provided and that it's a practice of profession which is regulated does not affect the nature of the activity being economic;[38] as well as the fact that some activities are generally entrusted to public agencies.[39]

Some relationships and activities have been found to not involve the activity of offering goods and services; these will be explained below.

2.1.1.1 Purchasing

In *FENIN*,[40] it was made clear that it is the *offering* of goods or services on a market that is the characteristic feature of the economic activity, not the purchasing of those. Whether purchasing constitutes an economic activity is assessed in relation to subsequent use to which purchased goods or services are put; if the subsequent use amounts to an economic activity, only then the purchasing can constitute an economic activity.[41] Therefore, when SNS (Spanish Health Service) purchased goods (the fact that it was in great quantity was irrelevant) and subsequently used them in non-

[32] *Ambulanz Glöckner* (n 23) EU:C:2001:577, para 20.
[33] *Commission v Italy* (C-118/85) (n 18), paras 7-10 (AAMS was found to be a public undertaking for offering goods and services on the manufactured tobacco market).
[34] Winterstein (n 30) 327. See also Case C-343/95 *Diego Calì v Servizi ecologici porto di Genova SpA* EU:C:1997:160.
[35] *Albany* (n 9) para 85.
[36] Case C-222/04 *Ministero dell'Economia e delle Finanze v Cassa di Risparmio di Firenze SpA* EU:C:2006:8, paras 122-123; *AOK* (n 16), Opinion of AG Jacobs, para 26.
[37] Otherwise it would render Article 106(1) and (2) TFEU meaningless, *Albany* (n 9), Opinion of AG Jacobs, para 312. See also Wish and Bailey (n 4) 185.
[38] Case C-309/99 *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten* EU:C:2002:98, para 49.
[39] *Höfner* (n 13), para 22.
[40] Case T-319/99 EU:T:2003:50, para 36 (it was complained that Spanish Health Service was abusing its dominant buyer power by delaying payments).
[41] ibid (upheld on appeal in Case C-205/03 P EU:C:2006:453).

economic activities (those of purely social nature based on principle of solidarity[42]), it did not engage in economic activity.[43]

2.1.1.2 Employment Relationships

An individual may be classified as an undertaking if he/she is an independent economic actor in the market providing goods or services in his/her own right and takes on the financial risks, as that person is fulfilling the function of an undertaking.[44] However, an employee does not fulfill that function because of the lack of independence given to that subordinate position and the absence of carrying the risks of the economic activity.[45] An employment relationship is characterized by an employee performing a work for and under the direction of the employer (within the meaning of Article 45 TFEU) and during that relationship they are incorporated into the undertaking that employs them.[46]

In *Albany*, AG Jacobs explains the reasons why providing labour for remuneration cannot be considered as offering goods or services:

> Dependent labour is by its very nature the opposite of the independent exercise of an economic or commercial activity. Employees normally do not bear *the direct commercial risk* of a given transaction. They are *subject to the orders* of their employer. They do not offer services to different clients, but work for a single employer. For those reasons there is a significant functional difference between an employee and an undertaking providing services. That difference is reflected in their distinct legal status in various areas of Community or national law.[47]

2.1.2 Potential to Make Profit

As mentioned before, in order there to be economic activity, it is neither required to actually make profit, nor to have a profit-making motive.[48] But an economic activity 'could, at least in

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[42] See section 2.2.3.
[43] *FENIN* (T-319/99) (n 40), para 37.
[44] Louri (n 20) 148-151. See also *Wouters* (n 38) paras 48-49 (where members of the Bar were found as an undertaking); Joined Cases C- 180-184/98 *Pavlov v Stichting Pensioenfonds Medische Specialisten* EU:C:2000:428, para 76 (self-employed medical specialists).
[45] Paul Nihoul, 'Do workers constitute undertakings fort the purpose of the competition rules?' (2000) 25(4) EL Rev 408, 411.
[46] Case C-22/98 *Criminal proceedings against Becu* EU:C:1999:419 para 26.
[47] *Albany* (n 9), Opinion of AG Jacobs, para 215 (footnotes omitted) (emphasis added). For a critical analysis of AG Jacob's opinion and the Court's approach to employees, see Chris Townley, 'The Concept of an 'Undertaking': The Boundaries of the Corporation — A Discussion of Agency, Employees and Subsidiaries' in Giuliano Amato and Claus-Dieter Ehlermann (eds), *EC Competition Law: A Critical Assessment* (Hart 2007).
[48] Bellamy & Child (n 19) 2.007. See also, Case C-244/94 *Fédération Française des Sociétés d'Assurance (FFSA) v Ministère de l'Agriculture et de la Pêche* EU:C:1995:392, para 21; *Albany* (n 9), paras 84-47.

principle, be carried on by a private undertaking in order to make profit. If there were no possibility of a private undertaking carrying on a given activity, there would be no purpose in applying the competition rules to it.'[49] It is sufficient with the possibility that the activity can be carried out to make profit.

2.2 Non-economic Activities

As mentioned before, the State and public bodies may be considered as undertaking when they engage in economic activities. It is, however, rather complicated to classify the State bodies or the SOEs as undertakings, since these bodies can have a 'hybrid status': they both carry out activities flowing from their sovereignty which do not fall within the scope of competition rules (exercise of imperium), and activities of an economic in nature that are subject to competition rules.[50] In each case, it is necessary to determine the category in which an activity belongs.[51]

The activities in the exercise of imperium promotes for the common good, have a social nature and can only be performed by or on behalf of a public body.[52] The case-law dealing with state activities distinguishes between public bodies acting as public authorities and as public undertakings.[53] The Court has systematically excluded from the application of competition rules the activities in the exercise of imperium, as they can never be economic activities, but these are different from the activities that serve the general economic interest, which are, by virtue of Article 106(2) TFEU, subject to competition law as long as its application does not obstruct the performance of those services.[54]

AG Mayras explains why exercise of public imperium (or official authority/public power) fall outside from the scope of competition rules:

> Official authority is that which arises the sovereignty and majesty of the State; for him who exercises it, it implies the power of enjoying the prerogatives outside the general law, privileges of official power and powers of coercion over citizens. Connexion with the exercise of this authority can therefore arise only from the State itself, either directly or by delegation to certain persons who may even be unconnected with the public administration.[55]

[49] *AOK* (n 16), Opinion of AG Jacobs, para 27 (footnotes omitted).
[50] Louri (n 20) 160.
[51] *Commission v Italy* (C-118/85) (n 18), para 7.
[52] *Poucet and Pistre* (n 29), Opinion of AG Tesauro, para 12.
[53] Louri (n 20) 160.
[54] Winterstein (n 30) 327.
[55] Case C-2/74 *Reyners v Belgium* EU:C:1974:59, Opinion of AG Mayras, 664-665.

Three lines of cases have been found to exclude the activities as they emanate from the public imperium. Commonly, these activities cannot be provided by private entities in order to make profit, therefore they are not subject to any actual or potential competition either.

2.2.1 Regulation

Regulation is one type of activity of the State which is distinguished from economic activities.[56] The classification of the State either as public authority or public undertaking applies also to regional and local authorities. In *Bodson*, CJ held that Article 101 TFEU is not applicable to concession agreements (for funeral services vested on regional authorities by law) between a commune and a private undertaking, as there was no agreement *between undertakings* when the communes act 'in their capacity as public authorities' and carry out a regulatory function, thus not engaging in economic activities.[57]

States (or State bodies) do not act as an undertaking when they are exercising their imperium, which could be regulating the market and affecting competition; in doing so, however, they are not completely free because of their duty to 'facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives'[58] and failing to respect Union's objective of creating internal market without distorted competition could result in infringement proceedings under Article 258 TFEU, or the application of free movement rules, but not competition rules.[59] It follows that, Member States should not adopt measures that requires or favors 'the adoption of agreements, decisions or concerted practices contrary to Article [101 TFEU] or reinforces their effects or deprives its own legislation of its official character by delegating to private traders responsibility for taking decisions affecting the economic sphere.'[60]

In order to determine whether an activity is regulatory, instead of an exclusively functional approach, institutional factors, such as the level of State's involvement, the obligations to operate in the public interest, consultation before action have all been taken into account.[61]

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[56] Case C-5/79 *Procureur général v Hans Buys* EU:C:1979:238, paras 31-32. See also Odudu, *The Boundaries of EC Competition Law* (n 2) 30-34.
[57] Case 30/87 *Bodson v SA Pompes funèbres des régions libérées* EU:C:1988:225, para 18. Having said that, CJ found that when the Bar of the Netherlands adopts regulations, it acts as the regulatory body of a profession, which constitutes an economic activity and the fact that it is regulated by public law is immaterial, in *Wouters* (n 38), paras 58-65, but this case concerned association of undertakings which will not be discussed further. For a critical analysis of the case, see Alison Jones, 'Regulating the Legal Profession: Article 81, the Public Interest and the ECJ's Judgment in Wouters' (2008) 19(6) EBLR 1079.
[58] Art. 4(3) TEU.
[59] Odudu, *The Boundaries of EC Competition Law* (n 2) 31: 'the competition rules are simply an inappropriate lens through which to view regulation... regulatory activity is subject to *appropriate* [Union] law.'
[60] *Albany* (n 9), para 65.
[61] Odudu, *The Boundaries of EC Competition Law* (n 2) 33.

2.2.2 Public Powers

Activities within the exercise of public powers, which produce public goods and services have two features: first, an infinite number of people can enjoy the good without increasing the production cost or lessen the enjoyment by other consumers, and second, it is not possible to exclude some people from enjoying it; resulting in making a profit from the activity impossible, and thus making it non-economic.[62] AG Jacobs notes that 'it seems to follow from paragraph 22 of the judgment in *Höfner* that the competition rules do not apply if the activity in question has always been and is necessarily carried out by public entities.'[63] An undertaking would not have an incentive to provide these goods and services in the market place, since it cannot even refuse to provide them to non-payers and therefore cannot make profit.

Similar to States, International Organizations have been puzzling in determining whether they are subject to competition law. In *Eurocontrol,*[64] the Court found an international organization for air navigation safety not an undertaking. It held that 'Eurocontrol's activities, by their nature, their aim and the rules to which they are subject, are connected with the exercise of powers relating to the control and supervision of air space which are *typically those of a public authority.* They are not of an economic nature justifying the application of the Treaty rules of competition.'[65] The Court also considered that the task of collecting route charges could not be separated from Eurocontrol's activities in the public interest and that it did not decide itself on the rate to be charged, but the States did, for their own air space, therefore it was regarded as a public authority acting in exercise of its powers.[66] Air traffic control is a non-excludable service provided for the community as a whole but remunerated from the airline companies, and the provision of which is not dependent whether they are paid for or not; consequently, in order to ensure that they are paid, state compulsion is necessary.[67]

In *Diego Calì,* SEPG (a private limited company) was found not to be an undertaking, since it carried out services 'in the public interest which forms part of the *essential functions of the State* as regards protection of the environment in maritime areas.'[68] SEPG's services (antipollution surveillance), which were entrusted to it by the national port authority, cannot be carried out within a competitive system since that would jeopardize the effectiveness of the system.[69] The maritime

[62] ibid, 42. See also Case C-138/11 *Compass-Datenbank GmbH v Republik Österreich* EU:C:2012:449, para 36.
[63] *Albany* (n 9), Opinion of AG Jacobs, para 314.
[64] Case C-364/92 *SAT Fluggesellschaft mbH v Eurocontrol* EU:C:1994:7.
[65] ibid, para 30 (emphasis added). See also *Diego Calì* (n 34), para 23 (for a similar reasoning regarding anti-pollution surveillance activities).
[66] *Eurocontrol* (n 64), paras 23-28.
[67] Odudu, *The Boundaries of EC Competition Law* (n 2) 43.
[68] *Diego Calì* (n 34), para 22 (emphasis added).
[69] *Diego Calì* (n 34) EU:C:1996:482, Opinion of AG Cosmas, para 49.

zone is seen as public asset, and is being protected not only in the interest of the users but of the State and citizens.[70]

The CJ held in *Compass-Datenbank* that, the activity of collecting data from undertakings which are under statutory obligation to disclose their data, powers of enforcement related to that activity and making available to the public of the collected data falls within the exercise of *public powers* which is not an economic activity.[71] Even though making the data available to the interested persons is charged, it does not affect the nature of the activity, because the fees are not set by the entity that collects the data, but provided for by law.[72]

2.2.3 Solidarity

The third line of cases deal with health, pension, and other insurance schemes. In these cases, the Court has drawn a distinction between entities fulfilling *an exclusively social function*, by carrying out activities based on *the principle of solidarity* and consequently not engaging in economic activity (not undertakings); and entities which operate in the same way as other companies (undertakings even if they follow a social objective[73]).[74] Solidarity is the key concept for an activity to be classified as exclusively social, and it is different from non-profit-making and social purposes.[75]

The Court stated that, 'Solidarity entails the redistribution of income between those who are better off and those who, in view of their resources and state of health, would be deprived of the necessary social cover.'[76] '[R]edistribution can occur between the rich and the poor, the healthy and the sick, the young and the old, low risk and high risk, or active workers and retired workers'.[77] According to AG Jacobs, they cannot possibly be carried out in the same manner by private undertakings as the element of redistribution in the interest of solidarity opposes with any private interest, and therefore they do not constitute an economic activity.[78]

The cases that emerged in this subject are very fact-specific and mainly decide whether the degree of solidarity precludes economic activity.[79] Nevertheless, activities involved in managing social security schemes that are based on principle of solidarity seem to have several common

[70] ibid, para 46.
[71] *Compass-Datenbank* (n 62) paras 40-41.
[72] ibid, para 42.
[73] Because, the social objective of an activity does not by itself, preclude an activity to be classified as economic, INAIL (n 15) EU:C:2002:36, para 37.
[74] Jones and Sufrin (n 19) 120. See also *AOK* (n 16) EU:C:2004:150, para 47.
[75] Odudu, *The Boundaries of EC Competition Law* (n 2) 37.
[76] *Poucet and Pistre* (n 29) EU:C:1993:63, para 10. Case C-70/*95 Sodemare SA v Regione Lombardia* EU:C:1997:55, Opinion of AG Fennelly, para 29 defines solidarity as 'inherently uncommercial act of involuntary subsidization of one social group by another.'
[77] Odudu, *The Boundaries of EC Competition Law* (n 2) 37.
[78] *AOK* (n 16), Opinion of AG Jacobs, para 32. See also his opinion in *Albany* (n 9), para 338.
[79] Wish and Bailey (n 4) 88.

features that have become known in the case law.[80] Compulsory affiliation to the schemes;[81] the element of redistribution (there was no direct link between the contributions paid and the benefits received[82]); and state supervision over the entities and over the level contributions and benefits,[83] entailed exclusively social function. Regarding the state supervision, however, when the funds are given some freedom to determine the basis for calculating the contributions and the benefits, that cannot change the nature of that activity, if the boundaries of that freedom is clear and established by law.[84] Also, if there are more than one body running the schemes, some competition between themselves for the sake of encouraging sound management does not make the activity economic.[85]

Accordingly, when a supplementary scheme does not have compulsory affiliation but optional membership, which operates under the principle of capitalization, and there is a link between the contributions and benefits, the provision of the insurance is considered economic activity even though it is managed by a non-profit organization.[86] In *Albany*, the Court found a pension fund running a supplementary pension scheme to be an undertaking, even though it was based on the principle of solidarity and affiliation was compulsory; on the grounds that the fund was able to determine the amount of the contributions and the benefits by itself and operated in accordance with the principle of capitalization.[87]

One view is that redistribution is the hallmark of solidarity principle and '[i]t is self-evidently impossible to profit from redistribution, which involves unilateral transfer as opposed to exchange, and which requires the limits of altruism to be overcome by compulsion.'[88] According to AG Jacobs, without the State interference, nobody would participate in a pension scheme and pay for others without a guarantee that the next generation would do the same, and no private operator would offer such scheme.[89] As such, exclusively social activities cannot have economic nature.

Another view is that the Court has added an exception to the competition rules in politically sensitive areas; has treated them as not economic in order to save them from the competition rules.[90]

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[80] *Poucet and Pistre* (n 29) regarding sickness and maternity insurance; *INAIL* (n 15) insurance for accidents at work and occupational diseases; *AOK* (n 16) sickness funds; Case C-350/07 *Kattner Stahlbau GmbH v Maschinenbau-und Metall-Berufsgenossenschaft* EU:C:2009:127 insurance against accident at work and occupational diseases.
[81] *Poucet and Pistre* (n 29) para 13; *INAIL* (n 15) para 44; *AOK* (n 16) para 50; *Sodemare* (n 76), AG Fennelly, para 24; *Kattner* (n 80), para 38.
[82] *Poucet and Pistre* (n 29), para 11; *INAIL* (n 15) paras 39-42, *AOK* (n 16) para 52; *Kattner* (n 80) paras 44-59.
[83] *Poucet and Pistre* (n 29), para 14; *INAIL* (n 15) para 43; *Kattner* (n 80) para 64.
[84] *Kattner* (n 80) paras 60-62.
[85] *AOK* (n 16) paras 53-56.
[86] *FFSA* (n 48), paras 17-22.
[87] *Albany* (n 9), paras 71-85.
[88] Odudu, *The Boundaries of EC Competition Law* (n 2) 38.
[89] *Albany* (n 9), Opinion of AG Jacobs, para 338.
[90] *FENIN* (n 22), Opinion of AG Maduro, para 26: 'In seeking to determine whether an activity carried on by the State or a State entity is of an economic nature, the Court is entering dangerous territory, since it must find a balance between the need to protect undistorted competition on the common market and respect for the powers of the Member States.'

In this way, the Court has departed from, or made an exception to the functional approach: Instead of assessing the nature of these services, which are 'undoubtedly economic', and then reviewing whether their privileges are justified under Article 106(2) TFEU, the Court rather excludes them completely from the competition law.[91]

2.3 Conclusions

As discussed, the Court has adopted a functional approach in determining the addressees of Competition law, focusing on the nature of the activity which must be economic, rather than the type of the bodies formed under national laws. The functional approach serves to distinguish between State functions from the private. It can be used as a dynamic tool that allows the Court to carry out a thorough case-by-case review and thereby not having to exempt a whole field of activity from the application of competition rules.

Odudu argues that the reason why the Court has adopted a functional approach instead of an institutional approach is because there is a public/private divide in the Treaties, in that there are rules applicable to private bodies (competition rules) and rules to Member States (free movement rules).[92] The different treatment between the State and private persons is justified by the different roles that play; the private actors are self-interested, whereas the State is engaged in activities that can only be performed through special powers given by representative democracy to enforce those tasks in public interest; and if there would be an institutional approach, the distinction would get blurred, since it is possible for a public function (non-economic activity) to be carried out by private entities or States to carry economic activities.[93]

This is because, when exercising its imperium, the power of the State derives from the democratic legitimacy it has been granted.

[91] Winterstein (n 30) 327.

[92] Odudu, *The Boundaries of EC Competition Law* (n 2) 46-54.

[93] ibid 46-48.

3. THE BOUNDARIES OF UNDERTAKING: SINGLE ECONOMIC ENTITY DOCTRINE

3.1 The Definition

As the addressee of EU Competition rules, an undertaking is not necessarily identical with the natural or legal personality under national laws;[94] it is an 'economic concept rather than a formal legal one' and it can be composed of several legal entities.[95] The Court has held that the concept of undertaking must be understood as *designating an economic unit*;[96] which 'consist of a unitary organization of *personal, tangible and intangible elements* which pursues a specific economic aim on a long-term basis and can contribute to the commission of an infringement…'[97] Therefore, for the purposes of EU competition law, the *unified conduct* of separate legal entities takes precedence over the formal legal separation between those entities due to the single economic unit doctrine.[98]

When a company does not determine independently its own conduct on the market, but carries out, in all material respects, the instructions given to it by another company, they form an economic unit, hence a single undertaking within the meaning of Articles 101 and 102 TFEU.[99] In other words, where an entity controls the conduct of another, they constitute a single economic entity.[100] It follows that an undertaking could simply be a natural person,[101] a legal person, two or more companies within a corporate group (eg, principal-agent[102], parent-subsidiary[103]), or a group of persons (made up of natural and legal persons[104]).

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[94] *Pre-Insulated Pipe Cartel* (n 8).
[95] Jonathan Faull and Ali Nikpay, *The EU Law of Competition* (3rd edn, OUP 2014) 8.515.
[96] Case C-170/83 *Hydrotherm Gerätebau GmbH v Compact del Dott. Ing. Mario Andreoli & C. Sas* EU:C:1984:271, para 11: 'the term "undertaking" must be understood as designating an economic unit *for the purpose of the subject-matter of the agreement* in question even if in law that economic unit consists of several persons, natural or legal.' (emphasis added) (Alison Jones, 'The Boundaries of an Undertaking in EU Competition Law' (2012) 8 ECJ 301, 302 suggests that the single economic unit doctrine is a context-specific concept and that an entity might be considered as acting unilaterally or jointly depending on the nature of the agreement).
[97] Case T-11/89 *Shell International Chemical Company Ltd v Commission* EU:T:1992:33, para 311 (emphasis added).
[98] Case T-102/92 *Viho Europe BV v Commission* EU:T:1995:3, para 50.
[99] Case 48/69 *Imperial Chemical Industries Ltd. (ICI) v Commission* EU:C:1972:70, paras 132-135 (Dyestuffs); Case T-203/01 *Manufacture française des pneumatiques Michelin v Commission* EU:T:2003:250, para 290.
[100] Carsten Koenig, 'An Economic Analysis of the Single Economic Entity Doctrine in EU Competition Law' (2017) 13(2) JCL&E 281, 4.
[101] *Wouters* (n 38), paras 48-49.
[102] *Joined Cases 40-48, 50, 54-56, 111, 113-114/73 Suiker Unie v Commission EU:C:1975:174,* para 539.
[103] Case C-73/95 P *Viho* EU:C:1996:405, para 16.
[104] *Hydrotherm* (n 96), para 10-12.

3.2 The Need for the Concept of Single Economic Entity

The reasons why the notion of undertaking must be understood as an economic unit, can be explained by the purposes it serves.

Firstly, the concept of single economic entity ensures that the focus of competition law is on the relations between separate, independent entities that matter for competition.[105] Separate legal entities may not necessarily be competitors and interactions between those entities do not have any competitive significance, thus the concept of single economic unit classifies those interactions as the internal arrangements within an undertaking.[106] Otherwise, it would create a heavy burden on the part of the competition enforcers if they had to scrutinize all the arrangements.

The concept of competition requires each economic operator to have the freedom to determine its own policy and to act independently on the market,[107] and the clash between those independent policies *is* competition.[108] The organization of an economic entity, which is the combination of personal, tangible and intangible elements (that can be several legal persons), is the minimum necessary for them to be able to insert a competitive force on the market, therefore competition between those elements is impossible; this *impossibility of competition* is the criterion used to determine whether separate legal entities are to be treated as a single economic entity.[109] The impossibility of competition is determined based on the contractual, structural or economic links between two separate persons (most common example is the ownership).[110] In situations where one entity is capable of influencing the commercial policy of the other entity (exercising decisive influence), competition between them is accepted as being impossible.[111]

Secondly, opting for economic units, rather than legal, as the addressee of competition rules, said to be ensuring the effective protection of competition and consumers, since it prevents group of companies acting opportunistically and shielding themselves from liability purely on the basis of creating a legal separation and externalising the risks; or because they are part of the State.[112]

And finally, a unified definition of undertaking eliminates the risk of inconsistencies which might be caused by different national classifications and formulations of legal personality.[113] An

[105] Okeoghene Odudu and David Bailey, 'The Single Economic Entity Doctrine in EU Competition Law' (2014) 51(6) CML Rev 1721, 1725.
[106] ibid.
[107] *Suiker Unie* (n 102), para 173.
[108] Odudu and Bailey (n 105) 1726-1727.
[109] ibid.
[110] ibid.
[111] Raimundas Moisejevas and Danielius Urbonas, 'Problems Related to Determining of a Single Economic Entity under Competition Law' (2017) 16 YARS 107, 110.
[112] Andriani Kalintiri, 'Revisiting parental liability in EU competition law' (2018) 43(2) EL Rev 145, 156.
[113] ibid.

EU wide definition of undertaking has become even more significant after the modernization and decentralization of antitrust (Article 101 and 102 TFEU) enforcement.[114]

3.3 Consequences

The single economic entity doctrine has several consequences: First, it affects *the substantive reach of Article 101 TFEU,*[115] that is, it determines which of the competition rules are to be applied. When two or more legally separate entities form a single economic entity, the agreements between them cannot infringe Article 101, since at least two independent undertakings must be parties to an agreement.[116] For instance, where a parent and its subsidiary forming the same economic unit (within which the subsidiary has no real freedom to determine its course of action on the market) is a single undertaking, the agreements between them will be regarded as an internal allocation of task within a corporate group and fall outside the scope of Article 101.[117] This consequence is beneficial for the undertakings, as their arrangements escape the Article 101; but their unified action as a unilateral conduct may still be subject to Article 102 TFEU.

Second, it is relevant for *attribution of liability for infringements of Article 101 (and 102) TFEU*.[118] The doctrine has been applied in allowing fines to be levied not only on a legal entity that has actually infringed the competition rules, but also on its parent, without having to establish the personal involvement of the latter in the infringement.[119] This results in the maximum fines for the infringement to be calculated on the basis of the total turnover of all the companies forming the single economic entity, not just the companies which have committed the infringement.[120]

Third, it has implications in private litigation in national courts. Competition law infringements result in fines imposed by the Commission against undertakings, but also damage claims brought by injured parties in *private litigation*.[121] The Court's case-law on attribution of liability to parent companies based on the single economic entity doctrine had been adopted by several national jurisdictions as well, for instance, in the UK.[122] CJ also recently confirmed that the

[114] Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1; Commission Regulation (EC) 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty [2004] OJ L123/18. Merger control and state aid are still centralized in the hands of Commission, but state aid has a limited scope of decentralization, see Wolf Sauter, *Coherence in EU Competition Law* (OUP 2016) 196ff.
[115] Jones and Sufrin (n 19) 126-128; Bellamy & Child (n 19) 2.026-2.037; Wish and Bailey (n 4) 93-100.
[116] Faull and Nikpay (n 95) 3.49.
[117] ibid. See also Case 15/74 *Centrafarm BV et Adriaan de Peijper v Sterling Drug Inc* EU:C:1974:114, para 41.
[118] Bellamy & Child (n 19) 2.003.
[119] Jones and Sufrin (n 19)129.
[120] Regulation 1/2003, Art 23(2); and see 5.1.4.3.
[121] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L349/1, Art 1(1).
[122] *Sainsbury's Supermarkets Ltd v Mastercard Incorporated* [2016] CAT 11, 1241/5/7/15 (T), para 364.

liable entity for damages caused by competition infringements should be understood as 'undertaking (economic unit)' within the meaning of Article 101 TFEU.[123] The civil liability of undertakings should be determined as a matter of EU law rather than national, and the principles for liability (principle of economic continuity was at issue) should apply to damage claims the same way it applies for fines.[124]

Fourth, it also affects how competition rules will apply: EUMR (in calculating market shares, turnover, and whether there is a concentration[125]); some block exemptions; Commission's Notices,[126] use the single economic entity doctrine.

And finally, CJ has also resorted to the doctrine to determine the extraterritorial reach of the EU jurisdiction.

3.4 Is There, and Should There Be, a Common Concept?

It is generally thought that the singe economic entity doctrine is applied and understood the same in all the abovesaid situations.[127] Wils argues that, for the sake of consistency between Articles 101, 102 TFEU and EUMR, there needs to be a common notion of 'undertaking' (which designates a single economic entity, therefore a single concept of economic entity).[128] The notion of undertaking helps to determine whether there is a unilateral or coordinated conduct. The distinction between Article 101 and 102 is that; Article 101 aims to catch coordinated activity between several, independent undertakings, while Article 102 scrutinizes unilateral conduct of dominant undertakings, this means that Article 101 should be inapplicable where entities are part of the same undertaking whose conduct is unilateral and governed by Article 102. Similarly, merger control seeks to investigate changes in the market by undertakings in relation to conduct that could be governed by Article 102.[129] Although, these are distinct areas, there is a relationship between them because of the concept of undertaking.

According to AG Kokott, 'the concept of an undertaking and the imputation of responsibility under competition law are two sides of the same coin'; that is to say, the

[123] Case C-724/17 *Vantaan kaupunki v Skanska Industrial Solutions Oy* EU:C:2019:204, paras 28-37.
[124] Aidan Robertson, 'Skanska Industrial Solutions: what does the Court of Justice's landmark judgment mean for cartel damages litigation?' (2019) 40(8) ECLR 347, the direct implication of the case is that entities that acquire new companies now carry with them not only the potential risk of fines but also liability for damages, 349. This consequence will not be further discussed due to space limitations.
[125] Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings [2008] OJ C95/1 (Jurisdictional Notice), para 175.
[126] See eg, Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) [2014] OJ C291/1.
[127] Odudu and Bailey (n 105) n 3.
[128] Wils, 'The undertaking as subject of EC competition law' (n 7), 106.
[129] ibid, he further advocates that single economic unit under Art.101 should be understood as provided in EUMR, with the possibility of control being sufficient.

consequences of single economic unit within the meaning of Article 101 TFEU are twofold, first, the internal arrangements benefit from group privilege and second, the external relations with other undertakings must be answered by the undertaking as a whole.[130]

For coherence and harmony within competition law provisions, a single concept is desired, and it can be said that there *should* be one. The Court's case-law suggests that it supports the same concept of undertaking both within the meanings of Articles 101 and 102;[131] and within the substantive reach and attribution of liability cases.[132] The problem with different interpretation of single economic entity in different areas of law is that, the concept of undertaking has several, inconsistent meanings.

However, it will be seen that the implementation and interpretation of the single economic doctrine has many inconsistencies and controversies. It has been, and will be, argued that the doctrine has different implications for different consequences described above, especially that there are different types of principles applied for the substantive reach and attribution of liability cases (and for the application of EUMR), and claimed that it 'cannot be used (and is not used) by the Court of Justice to address the range of issues commonly ascribed to the doctrine'.[133]

Jones argues that the attribution of liability cases tend to expand the concept to a wider limit without taking into account the different objectives pursued in separate strands of cases.[134] The purpose of the substantive reach cases is to remove from the application of Article 101 the arrangements within a group of companies, as they do not have competitive significance. The attribution of liability cases is intended to prevent (deter) conduct contrary to the competition rules and repetition of such conduct, while striking a balance between deterrence and general principles of EU law (presumption of innocence, principle of personal responsibility, legal certainty, right of defence).[135] The objective of merger control on the other hand, is to monitor changes in the market structure.

As a result of these different policies and the conflicts and controversies both within the same line of cases and between different lines, it is extremely difficult to say that there is a single concept. It will be seen not only that the single economic entity doctrine has been applied differently, but also that it is problematic and an inappropriate tool to be used in some areas

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[130] Case C-440/11 P *Commission v Stichting Administratiekantoor Portielje* EU:C:2012:76, Opinion of AG Kokott, paras 31-32.
[131] *Società Italiano* (n 7), para 358.
[132] Dyestuffs (n 99) paras 132-136. And there has been some, though limited cross-reference between these two lines of cases, See Jones, 'The Boundaries of an Undertaking' (n 96) 316-318.
[133] Odudu and Bailey (n 105) 1723. See also Bernardo Cortese, 'Piercing the Corporate Veil in EU Competition Law: The Parent Subsidiary Relationships and Antitrust Liability' in Bernardo Cortese (ed), *EU Competition Law Between Public and Private Enforcement* (International Competition Law Series, Kluwer Law International 2014).
[134] Jones, 'The Boundaries of an Undertaking' (n 96) 318-319.
[135] Case C-521/09 P *Elf Aquitaine SA v Commission* EU:C:2011:620, para 59 (it is interesting to note that the Court does not include lifting the corporate veil in the balance).

(establishing jurisdiction and attributing liability). It will be shown that in establishing jurisdiction, the doctrine currently lost its significance, de facto abandoned. Perhaps this would be the best solution for the attribution of liability cases as well. Although it may not be possible to abandon the precedents that has been set in large number of cases over many years, the current application could be altered in a way that would allow for a different reading of the cases. The application of the doctrine in different consequences will be explained below.

4. SUBSTANTIVE REACH OF ARTICLE 101 TFEU

The single economic entity doctrine excludes from the application of Article 101 TFEU the agreements within a group of companies who pursue a common commercial strategy. Two or more separate legal entities belonging to a single economic entity form a single undertaking, therefore there cannot be an agreement *between* undertakings.[136] The rationale behind this is that Article 101 applies to relations between 'entities which are *capable of competing with one another,* and does not cover agreements…between undertakings belonging to the same group if the undertakings form an economic unit'.[137] Although having separate legal personalities, entities forming the same economic unit cannot be expected to compete with each other.[138] Thus, Article 101 is inapplicable 'because there is no competition between the group companies which needs to be protected'[139] and the agreements are regarded as internal arrangements within a group.[140]

4.1 Parent/Subsidiary Relationships

Separate legal entities forming the same economic unit as parent and subsidiary can enter into legally binding agreements, but not within the meaning of Article 101 TFEU,[141] because they are regarded as one undertaking and therefore there could not be an *agreement between undertakings* within the meaning of Article 101 TFEU. In *Viho,*[142] this point was confirmed. Parker's distribution agreements with its wholly-owned subsidiaries required every subsidiary to sell products only to their local costumers and thereby included an export ban. Therefore, a request made by Viho (a Netherlands company) to Parker's German subsidiary was referred to its Netherlands subsidiary.[143] The Commission rejected Viho's complaints that Parker's distribution agreements breached Article 101 TFEU.[144]

In upholding Commission's decision, the Court held that, Article 101 TFEU can only be applicable to relations between entities that are able to compete with each other, and 'does not

[136] Wish and Bailey (n 4) 93-94.
[137] *Viho* (T-102/92) (n 98) para 47 (emphasis added). (See also *Hydrotherm* (n 96), para 12, it could be that the Court is using the terminology wrong or suggests that an undertaking can be composed of several independent undertakings, Jones and Sufrin (n 19) 128)
[138] Bellamy & Child (n 19) 2.027.
[139] *Viho* (C-73/95 P) (n 103) EU:C:1996:164, Opinion of AG Lenz, para 67 ('in such a case the parent company could achieve the same result by issuing instructions or by the exercise of other means of control.'). Odudu and Bailey (n 105) argue that the Court focused on the impossibility of an agreement between separate legal entities for the inapplicability of Art.101, rather than on the impossibility of competition (which is used to determine the existence of a single economic entity), 1798-1739.
[140] Joined Cases 56&58/64 *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission* EU:C:1966:41, para 340.
[141] This was first expressed in Dyestuffs (n 99), para 134, though it concerned attributing liability to a non-EU parent.
[142] T-102/92 (n 98), upheld by the CJ, paras 13-18.
[143] ibid, para 9.
[144] ibid paras 7, 10.

cover agreements or concerted practices between undertakings belonging to the same group if [they] form an economic unit' and that Parker and its wholly owned subsidiaries formed such unit 'within which the subsidiaries *do not enjoy real autonomy in determining their course of action in the market*, but carry out the instructions issued to them by the parent company controlling them'.[145] The subsidiaries did not enjoy a real autonomy due to the fact that Parker owned 100% of their shares and that the sales and marketing activities of the subsidiaries were controlled by an area team of directors appointed by the parent.[146] The GC emphasized *the unity of conduct* performed by parent and its subsidiaries as an element of economic unit.[147] In this respect, it is irrelevant whether the agreements within a group affects the position of third parties, but, as unilateral conduct of a single entity Article 102 TFEU may be applicable.[148]

Since *Viho*, the possibility to exercise decisive influence over the conduct of subsidiary, so that the subsidiary does not enjoy real autonomy in determining its course of action in the market is the criteria for regarding separate legal entities as the same undertaking.[149] If the subsidiary is sold to a third party, or if a third party participates in the agreement with the parent-subsidiary, Article 101 TFEU would then be applicable to the agreement between them as it does not regulate internal relationships anymore.[150]

A similar approach for the parent and its wholly owned subsidiary has been adopted in the US, which explains that they 'have a complete unity of interest' and their corporate actions are guided not by separate corporate consciousness, but by one; even without an agreement the subsidiary acts for the benefit of the parent, and when there is an agreement there is no sudden joining of economic resources that had previously served different interests, therefore there is no justification for the application of Section 1 of Sherman Act.[151] The interpretation of the US Supreme Court and CJEU corresponds in the context of agreements between a parent and a wholly-owned subsidiary.[152]

Once again, Article 101 TFEU is inapplicable to the relationship between a parent and wholly owned subsidiary which forms a single economic unit, within which the subsidiary does

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[145] ibid, paras 47-49 (emphasis added).
[146] ibid, para 48.
[147] ibid, para 54. On the other hand, the agreements between Parker and its *independent* distributors were found to infringe Article 101 TFEU on the grounds of imposing an export ban in Case T-66/92 *Herlitz AG v Commission* EU:T:1994:84; Case T-77/92 *Parker Pen Ltd v Commission* EU:T:1994:85.
[148] See eg, Case 66/86 *Ahmed Saeed Flugreisen v Zentrale zur Bekämpfung unlauteren Wettbewerbs* EU:C:1989:140, para 35.
[149] Communication from the Commission - Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] OJ C11/1 ('Horizontal co-operation guidelines').
[150] *Viho* (C-73/95 P) (n 103), Opinion of AG Lenz, para 69 ('the special treatment of groups of undertakings is of only limited scope').
[151] *Copperweld v. Independence Tube*, 467 US 771 (1984).
[152] Moisejevas and Urbonas (n 111) 113.

not enjoy a real autonomy to determine its course of action in the market.[153] 'This should logically imply that Article [101] never applies to agreements between companies under the same control.'[154] However, in a line of cases, CJ seems to add a further condition for the inapplicability of Article 101 TFEU, which is that the agreements or concerted practices should be 'concerned merely with the internal allocation of tasks between the undertakings.'[155] As AG Lenz stated, the decisions of the Court presents an inconsistent picture in this regard,[156] in later cases, for example in *Ahmed Saeed Flugreisen,*[157] that condition is not mentioned, neither in *Viho*. Therefore, it is not clear whether Article 101 TFEU is completely inapplicable to every agreement between a parent and subsidiary or only to those that are concerned with internal organization of the parent. AG Lenz argues that this condition in question, as a separate one, must be fulfilled so that there could be a possibility to apply Article 101 TFEU to agreements within a group of companies.[158] Although an agreement between a parent and a subsidiary usually does concern the internal allocation of tasks,[159] it needs further clarification whether this is a separate requirement. Why are parent and subsidiary not considered to be a single economic entity when an arrangement between them goes beyond the internal allocation of tasks? The content of their agreement is a separate issue than the question of independence or the possibility of competition.

It is not clear exactly when a subsidiary has sufficient independence to prevent the doctrine from being applied to agreements within a group of companies, and this question has not been focus of many cases.[160] In a case where a subsidiary had two parent companies, each holding 50% ownership and *equal control* over (equal voting rights, same among of board members etc), and that subsidiary entered into an agreement with one of its parent, it was considered as an agreement within the meaning of Article 101, because the subsidiary was an independent undertaking from the parent which was not in a position to control the commercial activity of the subsidiary alone.[161]

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[153] Dyestuffs (n 99); *Bodson* (n 57); *Ahmed Saeed Flugreisen* (n 148); *Centrafarm* (n 117).
[154] Wils, 'The undertaking as subject of EC competition law' (n 7) 107-108, this does not require an actual exercise of decisive influence.
[155] *Centrafarm* (n 117) para 41; *Bodson* (n 57) para 19.
[156] *Viho* (C-73/95 P) (n 103), Opinion of AG Lenz, para 48. See also Wils, 'The undertaking as subject of EC competition law' (n 7) 107-108 (he suggests that the Court has abandoned this condition after *Viho*, and supports this because according to him, this would bring the actual exercise of control as a condition for internal agreements and draw an inconsistent picture with EUMR.)
[157] (n 148), para 35.
[158] *Viho* (C-73/95 P) (n 103), Opinion of AG Lenz, paras 50-59.
[159] Moisejevas and Urbonas (n 111) 111.
[160] Jones, 'The Boundaries of an Undertaking' (n 96) 308.
[161] *Gosme/Martell-DMP* (Case IV/32186) 91/335/EEC [1991] OJ L185/23, para 30. Similarly, in *IJsselcentrale* (IV/32.732) 91/50/EEC [1991] OJ L 28/32, paras 22-24 the argument that a JV and its four parents formed a single economic unit was rejected based on the grounds that they *all had separate legal personality* (which is an inappropriate reasoning I think), were not controlled by the same person, and each of them determined its own conduct independently. According to Jones, 'The Boundaries of an Undertaking' (n 96) 323-325, this reflects a cautious approach to prevent JVs from escaping automatically from Art.101, but it is different in attributing liability, eg *Case T-77/08 The Dow Chemical Company v Commission EU:T:2012:47*.

4.2 Sister Companies

'Sister companies' is a term used to refer companies that have the same owner. The question is, do sister companies constitute a single unit, that is to say, can they compete with each other and enter into agreements within the meaning of Article 101 TFEU? The case law of the CJEU in this matter is ambiguous and few. However, according to the Commission, sister companies are not considered to be competitors even if they are both active on the same relevant product and geographic market, so they form a single economic entity.[162]

In *Hydrotherm,* the Court considered whether Mr Andreoli and two companies he owned and had a 'complete control' over (Compact and Officine Sant'Andrea) constituted a single economic unit (one undertaking) for the purposes of the application of a block exemption regulation (Regulation no 67/67).[163] The Court held that an undertaking can be made up of several natural and legal persons 'having *identical interests and controlled by the same* natural person, who also participates in the agreement. For in those circumstances *competition between the persons participating together,* as a single party, in the agreement in question *is impossible*.'[164] The ruling concerned the impossibility of competition between the owner and the companies he owned, not particularly between the sister companies.[165]

However, when sister companies enter into agreement between themselves (without the owner), their identity of interest and common control should still prevent them to compete with each other. As far as the substantive reach of Article 101 TFEU is concerned, hierarchical relationship is not important, in that, the single economic doctrine can exclude both agreements between sisters and those between a parent and a subsidiary.[166]

4.3 Employees

The characteristic feature of an employment relationship is that, for a certain period of time a person performs services for under the direction of another person in return of a remuneration.[167] As mentioned before, employees do not fulfill the function of an undertaking, not bearing the financial risks of transactions makes it impossible for the employee to compete separately on the market.[168] Employees are classified as *an auxiliary organ forming an integral part* of the employer's undertaking bound to carry out instructions, and together they form a single economic

[162] Horizontal co-operation guidelines , para 11.
[163] (n 96), paras 2,10.
[164] ibid, para 11 (emphasis added).
[165] Odudu and Bailey (n 105) 1731.
[166] Jones, 'The Boundaries of an Undertaking' (n 96) 320.
[167] Case 66/85 *Lawrie-Blum v Baden-Württemberg* EU:C:1986:284, para 17.
[168] *Albany* (n 9), Opinion of AG Jacobs, para 215

unit.[169] An employee is integrated into the *unitary organization* of personal, tangible and intangible elements of the employer's undertaking.[170]

The lack of independence of the employees means that they do not constitute undertakings, just as they form a single unit with their employers.[171] The distinctive characteristic of an undertaking is the existence of authority or power to control over people and physical assets, which are usually provided from the employment relationship or ownership of assets; consequently, an unincorporated division of an undertaking, such as an employee, could never be regarded as a separate undertaking because he/she does not possess such assets and authority.[172] Working under the authority of the employer is exactly the opposite of the distinctive characteristic of an undertaking.[173] But instead, they are part of the organization of the entity that they form a single economic unit.

The employees, *for the duration of employment relationship*, are incorporated into the employer's undertaking and thus form a single economic unit.[174] On that note, Odudu and Bailey suggest that an agreement between an employer and an employee may have significance under Article 101 TFEU where the latter acts in his/her own right; for example when an employee negotiates his/her contractual arrangements, he/she is acting independently on the market for the provision of labour.[175] It should be noted that this occurs outside the employment relationship when the employee has not incorporated into the employers undertaking yet, and the employee would not enter into the agreements on behalf (or for the benefit) of the employer.[176]

4.4 Vertical Agreements and Principal/Agent Relationships

Agreements between two or more undertakings at different levels of the production or distribution chain are called vertical agreements.[177]

A general assumption that Article 101 TFEU would not be applicable to vertical agreements because the parties are not competitors (and because Article 101 TFEU does not apply when the parties are not rivals) has been long ago refused by the Court:

[169] *Suiker Unie* (n 102), para 539; *Becu* (n 46) EU:C:1998:133, Opinion of AG Colomer, paras 53-54.
[170] *Shell International* (n 97) , para 311.
[171] Nihoul (n 45), 411; *Becu* (n 46) AG Opinion, para 47.
[172] Wils, 'The undertaking as subject of EC competition law' (n 7) 101-104.
[173] ibid.
[174] *Becu* (n 46), para 26.
[175] Odudu and Bailey (n 105) 1741.
[176] Nihoul (n 45), 414.
[177] Commission Regulation (EU) 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [2010] OJ L102/1, Art 1(a).

> Article [101] refers in a general way to all agreements which distort competition within the [internal market] and does not lay down any distinction between those agreements based on whether they are made between competitors operating at the same level in the economic process or between non-competing persons operating at different levels. In principle, no distinction can be made where the Treaty does not make any distinction.[178]

The fact that they are not competitors does not necessarily mean that competition between them is impossible.

Agency agreements take a special place in vertical relationships.[179] Commercial agents are self-employed intermediaries who can negotiate and conclude the sale or purchase of goods on behalf of or in the name of the principal.[180]

AG Kokott distinguishes the activities of an agent between 'the market on which the agent offers his agency services to potential principals, and on the other the market on which he offers his principal's goods or services to potential customers.'[181] Regarding the agency services, it is considered as an independent undertaking and, in this connection, the exclusive agency provisions or non-compete provisions in the agency agreements can be subject to Article 101 TFEU (or the Block Exemption Regulation) because the parties are separate undertakings.[182] Here, they follow different interests and the agent is in a position to be capable of disagreeing with the principal.[183]

However, an agency agreement, in so far as concerning the position of the agent in the market for his principal's products, can fall outside the scope of Article 101 TFEU when the agent is not an independent undertaking, but *an auxiliary organ forming an integral part* of the principle's undertaking (like an employee) who must carry out its principal's instructions,[184] and if the agent bears *no commercial and financial risks* of the contracts negotiated and entered into on behalf of the principal.[185] In this relationship, the agent and principal have a unity of conduct on the market, and form a single economic unit.

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[178] *Consten* (n 140), para 339.
[179] Guidelines on Vertical Restraints [2010] OJ C130/1, paras 12-21.
[180] Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents [1986] OJ L382/17, Art 1(2).
[181] *Case C-217/05 Confederación Española de Empresarios de Estaciones de Servicio v Compañía Española de Petróleos SA (CEPSA)* EU:C:2006:473, Opinion of AG Kokott, para 43 (in line with the functional approach taken for the concept of undertaking).
[182] ibid, paras 44-45; the judgment EU:C:2006:784, paras 37-38. See also Guidelines on Vertical Restraints, para 19.
[183] Odudu and Bailey (n 105) 1741-2.
[184] *Suiker Unie* (n 102), para 480 (which makes the agent incapable of competing with its principal).
[185] *CEPSA* (n 181), paras 41-44; Opinion of AG, para 48, the situation is regarded as genuine agent which is in the same position as an employee, or assistant, or a subsidiary of the principle. See also Guidelines on Vertical Restraints, para 13.

If the agents are assuming the commercial risk, even in part, and they, for example, provide services connected to sales on their own name and account, they are treated as independent traders and separate undertakings, and therefore they will not constitute a single economic entity, the agreement can be scrutinized under Article 101 TFEU.[186] Further, there could be competition between the agent and the principle when the agent acts on behalf of more than one principal or acts partly for the principal and partly on his own account, and any restriction on the agent's independent activities remains subject to Article 101 TFEU.[187]

[186] Case C-266/93 *Bundeskartellamt v Volkswagen AG* EU:C:1995:345, paras 19-20. AG Kokott defines these as non-genuine agencies which are similar to independent brokers, in her opinion in *CEPSA* (n 181), para 49.
[187] W. David Braun and Lennart Ritter, *European Competition Law: A Practitioner's Guide* (3rd edn, Kluwer Law International 2004) 272.

5. ATTRIBUTION OF LIABILITY

According to the Court, the Treaties chose to use the concept of an undertaking to designate the perpetrator of an infringement of competition law, which is identified in relation to economic units and may involve several natural or legal persons.[188] The question of attribution of liability arises because the addressees of competition rules and the addressees of decisions finding infringements are not necessarily the same.[189] Although competition law analyses and applies to the behaviour of undertakings as economic units, for a decision to be enforceable,[190] it must be addressed to a *legal person* (or persons) on whom fines may be imposed.[191] This brings the question of which natural or legal persons are the addressees, ie responsible for the infringement committed by the undertaking, and on which grounds. The Commission has to identify and address its decisions to those persons.[192]

According to the principle of limited liability of shareholders (and separate legal personality[193]), which is a fundamental principle common to Member States' company law, shareholders are, in principle, not liable for the obligations of the corporation of which they have ownership.[194] Since they have separate legal personality, the personal assets of the shareholders or managers are distinct from that of the company.[195] This principles protect the shareholders from the company's creditors, and vice versa.[196] However, in EU competition law, instead of liability based on formal separation of legal personalities, the single economic unit doctrine has also been interpreted as allowing a fine to be levied not only on the legal person who infringed the competition rules but also on another company, by being held jointly and severally liable for the said infringement:[197] '[A] legal person who is not the perpetrator of an infringement of the competition rules may nevertheless be penalised for the unlawful conduct of another legal person, if both those persons form part of the same economic entity…'[198]

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[188] Joined Cases C-231-233/11 P *Commission v Siemens Österreich* EU:C:2014:256, paras 42-43.
[189] Case C-280/06 *Autorità Garante della Concorrenza e del Mercato v Ente tabacchi italiani* EU:C:2007:404, Opinion of AG Kokott, para 68.
[190] Article 299 TFEU provides that Commission decisions imposing fines to persons must be enforceable and that the enforcement is governed by the civil procedure of the Member State in which it is carried out.
[191] Case C-97/08 P *Akzo Nobel NV v Commission* EU:C:2009:536, para 57; Faull and Nikpay (n 95) 8.516, classifies this concept as 'principle of legal personality'.
[192] Case T-349/08 *Uralita SA v Commission* EU:T:2011:622, para 36.
[193] A universal principle according to which a company who is recognized by law has its own rights and obligations, which are not attributed to another person, see Carsten Gerner-Beuerle and Michael Schillig, *Comparative Company Law* (OUP 2019) 29-37.
[194] ibid 40; Paul Davies and Sarah Worthington, *Gower's Principles of Modern Company Law* (10th edn, Sweet&Maxwell 2016) 8.1ff.
[195] Paul Davies, *Introduction to Company Law* (3rd edn, OUP 2020), 'Since each group company is a separate legal entity, the doctrines of limited liability and separate legal personality apply to each company within the group.' 6-9.
[196] ibid 6-24.
[197] *Uralita* (n 192), para 37: 'the essential element is whether or not there is unity in their conduct on the market'; Jones and Sufrin (n 19) 129.
[198] *Siemens* (n 188), para 45.

In this sense, the primary basis for attribution of liability to another entity in an economic unit is the **direct involvement** in the infringing behaviour.[199] Direct involvement can be established by proving the personnel of the parent entity has taken part in illegal meetings or established contact in other ways;[200] or were aware of the illegal behaviour but did not do anything to stop it.[201] This basis is quite straightforward and is not contested against. The second, and a distinct basis for holding a legal entity liable is what usually referred as '**parental liability**'.[202] On this basis, a legal entity can be held liable for an infringement *without directly involving in it,* if it has exercised decisive influence over the infringing entity which it forms a single economic unit.[203] This liability framework has been described as 'a system of guilt by association'.[204]

The Commission explains that for competition matters, business reality is more important than legal form; and that the consequences of the single economic unit can be favourable (with regards to internal agreements) as well unfavourable (the attribution of liability) for the undertakings.[205] The majority of the principles on attribution of liability have been developed in the context of cartel investigations. It can be observed that attribution of a conduct to a single or more undertakings is usually not as crucial within Article 102 TFEU, since it applies to 'individual as well as collective dominant position'.[206]

5.1 Parent/Subsidiary

A parent company is jointly and severally liable for its subsidiary's anti-competitive conduct if they form an economic unit within the meaning of Article 101 TFEU and thus a single undertaking, which enables the Commission to address a decision imposing fines to the parent, without the need to establish the personal involvement of the latter in the infringement.[207]

A subsidiary's conduct can be imputed to its parent (who is not the perpetrator of the infringement) in particular, 'where the subsidiary, although having separate legal personality, *does*

[199] Faull and Nikpay (n 95) 8.522.
[200] *Copper Plumbing Tubes* (Case COMP/E-1/38.069) Commission Decision [2004], paras 577-8.
[201] Case T-309/94 *Koninklijke KNP BT v Commission* EU:T:1998:91, paras 48-9.
[202] Faull and Nikpay (n 95) n 1342; Case T-237/07 *Koninklijke Grolsch NV v Commission* EU:T:2011:476.
[203] Faull and Nikpay (n 95) 8.523.
[204] Karl Hofstetter and Melanie Ludescher, 'Fines against Parent Companies in EU Antitrust Law: Setting Incentives for 'Best Practice Compliance'' (2010) 33(1) World Competition Law and Economics Review 55, 56.
[205] Dyestuffs (n 99), 632.
[206] Cortese (n 133) 77. However, there are important cases where parents held liable for their subsidiary's abuse of dominance, in eg Case C-6/72 *Europemballage and Continental Can v Commission* EU:C:1973:22; Case T-301/04 *Clearstream Banking v Commission* EU:T:2009:31, paras 198-204; Bellamy & Child (n 19) 10.006.
[207] *Akzo* (C-97/08 P) (n 191), para 59; *Portielje* (n 130), Opinion of AG Kokott, para 32; judgment EU:C:2013:514, paras 30, 36-46; Case T-517/09 *Alstom v Commission* EU:T:2014:999, para 53.

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.'[208]

In this regard, Commission cannot only find that the parent ***'was able to'*** exercise decisive influence over the policy of the subsidiary, but it should also establish that the parent ***'in fact used this power'***. [209] It follows that, there are two cumulative requirements that the Commission has to prove before imputing liability to a parent company: the potential to control and the actual exercise of that control.[210]

The decisive influence does not need to be exercised strictly in the specific area in which the infringement occurred, but in the commercial behaviour of the company in general.[211] In order to establish whether a company decides its conduct on the market independently, account must be taken of all the aspects of the business policy of the subsidiary that can be influenced by the parent; which are, inter alia, pricing policy, production and distribution activities, sales objectives, gross margins, sales costs, cash flow, stock and marketing; as well as all the relevant factors relating to the economic, organisational and legal links which exist between it and the parent.[212]

5.1.1 The Presumption

Initially, the Court suggested that, holding all or virtually all the shares in a subsidiary is insufficient, in itself, to establish the liability of the shareholder, and that there needs to be series of elements to establish that the control was exercised.[213] However, it is clear that this is not the case after the *Akzo* judgment.[214]

In its seminal *Akzo* judgment, the Court has established that, when a parent company holds 100% of the capital (or almost all of the capital[215]) in a subsidiary who infringed competition rules, the first condition regarding the ability of the parent to exercise decisive influence is fulfilled and further, there is a ***rebuttable presumption*** that the second requirement is fulfilled, that the parent has in fact exercised that power over the subsidiary (so-called 'Akzo Presumption' or 'the

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[208] Dyestuffs (n 99), paras 132-137 (emphasis added) (the first instance where a parent was held liable for its subsidiary's anticompetitive conduct, although in this case the parent's direct participation was established, see Cortese (n 133) 76); Case C-90/09 P *General Química SA v Commission* EU:C:2011:21, para 37.

[209] Dyestuffs (n 99) para 137; Case T-314/01 *Coöperatieve Verkoop- en Productievereniging van Aardappelmeel en Derivaten Avebe v Commission* EU:T:2006:266, para 136.

[210] Hofstetter and Ludescher (n 204) 58 .

[211] Case T-138/07 *Schindler Holding Ltd v Commission* EU:T:2011:362, paras 82-85.

[212] Case T-112/05 *Akzo Nobel v Commission* EU:T:2007:381, para 64, upheld by the CJ (n 191), para 74-77.

[213] Joined Cases C-189, 202, 205, 208, 213/02 P *Dansk Rørindustri A/S v Commission* EU:C:2005:408, paras 118-120. It was still not that difficult to establish, since an evidence in the form of indicia was sufficient. For example, the fact the parent did not dispute that it could exert decisive influence over the subsidiary, or provide evidence against, was sufficient for a finding that the parent was responsible, see Case C-286/98 *P Stora Kopparbergs Bergslags AB v Commission* EU:C:2000:630, para 28.

[214] *Akzo* (C-97/08 P) (n 191), para 62. For the historical analysis of, and changes in, parental liability in EU Competition law in two distinct phases (pre- and post-Akzo), see Kalintiri (n 112).

[215] Case C-508/11 P *Eni SpA v Commission* EU:C:2013:289, para 47 (the parent held %99.97 of the capital).

shareholding presumption'); therefore, the conduct of the subsidiary may be imputed to the parent because they constitute a single undertaking within the meaning of Article 101 TFEU.[216]

In these circumstances, the Commission only needs to prove that the subsidiary is wholly (or almost wholly) owned by the parent, then it can regard the parent jointly and severally liable with the subsidiary in a decision imposing a fine (which will be calculated on the basis of their total turnover).[217] The presumption has been extended in several occasions.

First, in *General Química,*[218] the Court has extended the Akzo presumption in the context of indirect ownership in group companies (holdings).[219] The company on the head of the group, RYPF, its wholly owned its subsidiary RQ, and RQ's wholly owned subsidiary GQ formed a single economic unit.[220] The head company RYPF was *presumed* to exercise decisive influence over GQ, *indirectly* via the interposed company RQ.[221] And therefore, RYPF and RQ were held jointly and severally liable for an infringement committed by GQ, unless it could rebut the presumption by showing that either RQ or GQ acted independently on the market.[222]

Further, the presumption was extended to holding 98% of the share capital, based on the fact that the applicant did not dispute to the application of the presumption.[223] There is not a clear the line between all and 'almost all' of the capital, it is an ambiguous use of word threating legal certainty.

And recently, the GC held that the presumption can be applied to an investment company which is an indirect parent, during the period where the parent held 84-91% of the share capital (the subsidiary was going under public offering, so the shares the parent held decreased gradually), but controlled all the voting rights.[224] GC held that in such a case the parent is in a similar situation to that of a sole owner, since it is able to determine the economic and commercial strategy of the subsidiary controlled.[225]

The GC had even held that when two parent companies each holds 50% of shares in the joint management of a JV, the situation is analogous to that in which a single parent owns all of the

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[216] *Akzo* (T-112/05) (n 212), para 60; *Akzo* (C-97/08 P) (n 191), para 60. For this reason, *Choline Chloride* (Case COMP/E-2/37.533) Commission Decision [2004], holding Akzo Nobel NV, the parent company, responsible together with its subsidiaries' cartel participation was upheld by the CJEU.
[217] *Akzo* (C-97/08 P) (n 191), para 61.
[218] (n 208)
[219] 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) 2(3) JECL&Pract 231, 233.
[220] *General Química* (n 208), paras 84, 87.
[221] ibid, paras 86-88.
[222] ibid, para 89.
[223] Case C-520/09 P *Arkema SA v Commission* EU:C:2011:619, para 42.
[224] Case T-419/14 *The Goldman Sachs Group v Commission* EU:T:2018:445, paras 47-49.
[225] ibid. See also Dimitris Vallindas and Ciara Barcu-O'Connor, 'T-419/14 Goldman Sachs: Expanding the Application of Parental Liability in EU Competition Law to Investment Firms' (2018) 2(4) European Competition and Regulatory Law Review 303, 307: 'it is becoming increasingly difficult, even for investment firms, to avoid liability for competition infringements committed by subsidiaries.'

shares of its subsidiary for the purpose of establishing the presumption of actually exercising decisive influence.[226]

5.1.2 Rebutting the Presumption

As mentioned, it is sufficient for the Commission to only prove that the subsidiary is wholly owned by the parent company to regard the parent and the subsidiary jointly and severally liable; the burden is then on the parent company to rebut the presumption, with sufficient evidence, by showing that *the subsidiary acted independently* on the market.[227]

Subsidiary's independence is said to be deduced from its failure to comply with the parent's instructions.[228] This is in line with the finding of single economic entity, where the subsidiary carries out instructions the parent issues. However, later, the Court held that not complying with the instructions should be the norm.[229] Further, according to the Court, where there are no instructions from the parent, it does not mean that they do not constitute single economic entity, as instructions are only one of indication of decisive influence.[230] And when there is no instruction, it can prove the subsidiary's autonomy through 'any evidence relating to the organisational, economic and legal links between its subsidiary and itself which are apt to demonstrate that they do not constitute a single economic entity.'[231]

The case-law of the Court and the decisional practice of the Commission are far from shedding light into the requirements for a rebuttal, and very controversial.[232] As many agrees, rebutting the presumption is only in theory, but impossible in practice.[233]

Although the independence of the subsidiary can be shown by not complying with the instructions which the parent has issued, subsidiary's incompliance with the antitrust compliance programmes issued by the parent company are not accepted as a sufficient evidence; because, the Commission explains that, in the reality, the infringement did happened despite those programmes,

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[226] *Avebe* (n 209), para 138 (and held parents jointly liable with the JV), although the JV in question did not have a legal personality in this case, para 137.
[227] *Akzo* (C-97/08 P) (n 191), para 61. Or in GC's words in *Akzo* (T-112/05) (n 212), para 65: the parent should 'demonstrate that they do not constitute a single economic entity'.
[228] *Akzo* (T-112/05) (n 212), para 62.
[229] Joined Cases C-293- 294/13 P *Fresh Del Monte Produce Inc v Commission* EU:C:2015:416, para 96-97 (meaning that if the subsidiary acted against the parent's instructions only a few times, the presumption is not rebutted).
[230] *Dow* (n 161), para 77: 'autonomy of the subsidiary cannot necessarily be inferred from their absence.'
[231] *Akzo* (C-97/08 P) (n 191), para 65.
[232] For the purposes of clarity, I believe it is more suitable to address some of the criticism regarding the rebuttal of presumption here, whereas the remaining of the criticism will be discussed below section 5.1.4.
[233] *Elf* (n 135), para 65 (where the applicant argued that it is a *probatio diabolica*, ie impossible proof); eg. Erik H Pijnacker Hordijk and Simone J H Evans, 'The Akzo Case: Up a Corporate Tree for Parental Liability for Competition Law Infringements' (2010) 1(2) JECL & Pract 126, 128 ('appears near to impossible'); Hofstetter and Ludescher (n 204) 60: 'De facto impossibility of proving that no decisive influence was exerted'; Winckler (n 219) 233 ('at best exceptional, if not completely elusive.'); Bettina Leupold, 'Effective enforcement of EU competition law gone too far? Recent case law on the presumption of parental liability' (2013) 34(11) ECLR 570.

so the group needs to be sanctioned.[234] On the contrary, the fact that the parent has established a compliance programme, shows that it did in fact influenced the commercial policy of its subsidiaries.[235] Moreover, acting contrary to its own compliance programme has been found as an aggravating circumstance.[236] So a parent company cannot invoke its subsidiary's incompliance with the compliance programmes, which instruct them not to breach competition law, but if that parent acts contrary to that programme, it can be subject to even higher fines. This arbitrarily makes the use of compliance programmes as evidence in favour of the Commission. On a similar vein, it has also been found as insufficient to rebut the presumption where the parent company explicitly instructs its subsidiary not to engage in anti-competitive conduct, but the latter does anyway. [237]

Further, the reasoning for the rebuttal followed by the Court in *Akzo* is untenable. GC held that to rebut the presumption, the parent company has to adduce evidence that its subsidiary was independent, in other words, prove that they are not an economic entity;[238] the existence of a single economic entity depends on 'whether the parent was *able* to influence' its subsidiary's business policy which include, inter alia, pricing policy, production and distribution activities, sales objectives, gross margins, sales costs, cash flow, stocks and marketing.[239] CJ confirmed this and added that all the relevant factors relating to economic, organisational and legal links, should be taken into account when ascertaining whether the subsidiary determines its conduct on the market independently and that these factors cannot be set out in an exhaustive list.[240] As mentioned above, there is two cumulative requirements in order for two separate legal entities to be regarded as a single economic entity: first, the parent company has the *ability* to exercise decisive influence and second, it has in fact *exercised* that influence (and the Akzo presumption concerns the second requirement). As a matter of logic, demonstrating that the decisive influence has not been exercised should be sufficient to rebut the presumption (even if there is still a power to do so), but this is not the view of the Court.[241] The refence to the *ability* of the parent in influencing the subsidiary's business policy (which concerns the first condition), in order to rebut the presumption that the parent has exercised that influence does not make sense, but makes the condition of 'actual exercise' meaningless.[242]

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[234] *PO/Elevators and Escalators* (Case COMP/E-1/38.823) Commission Decision C (2007) 512 final, paras 631, 688 and 754.
[235] Case C-501/11 P *Schindler Holding Ltd v Commission* EU:C:2013:522, paras 113-114.
[236] *British Sugar plc* (Case IV/F-3/33.708) Commission Decision 1999/210/EC [1998] OJ L76/1, para 208.
[237] Case C-155/14 P *Evonik Degussa GmbH v Commission* EU:C:2016:446, paras 15-16, 41.
[238] *Akzo* (T-112/05) (n 212), para 58-60.
[239] ibid , para 64.
[240] *Akzo* (C-97/08 P) (n 191), para 74.
[241] 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) 3(1) JECL & Pract 11, 19.
[242] ibid, 19; Leupold (n 233) 574-575 (the same approach has been followed in later cases).

Setting aside this paradox, another consequence flowing from the fact that any form of business influence over the subsidiary is enough to establish the ability of decisive influence, the subsidiary's autonomy should be established '**not only at operational level but also at the financial level',**[243] so the fact that the parent is a 'non-operational holding company' is insufficient to rebut the presumption.[244]

Proving that the it did not exert *any management influence* within the context of company law was even found insufficient, namely, the fact that the parent did not adopt any formal management decision during the period of infringement (for instance, the absence of any shareholders' meeting during the infringement period), or that the board of directors of the subsidiary has not been changed after the acquisition, has been found insufficient for rebuttal.[245]

In this regard, AG Kokott has given some very specific examples in her opinion: when the parent company proves that it '(a)…is an investment company and behaves like a pure financial investor, (b)…holds 100% of the shares in the subsidiary only temporarily and for a short period, (c)…is prevented for legal reasons from fully exercising its 100% control over the subsidiary'[246] the rebuttal could be possible. The Court seems to accept the first example, but to a limited extend, where the pure financial investor, such as insurance companies or pension funds, holds shares in a company to make profit, but *refrains from any involvement* in the management and control.[247]

The fact that the court has restricted refrainment from exercising control only for pure financial holdings, restricts the rebuttal to a great extent. The presumption presupposes that a decisive influence has been exercised, this follows that non-action or abstaining from an action should result in non-application of the presumption, or at least the rebuttal of it.[248] In situations where the parent does not fall within the limited cases of *pure* financial investor but refrains from

[243] *Eni* (n 215), para 64-68 (being technical/financial coordinator or providing financial and investment assistance was sufficient that it has exercised decisive influence; even if it did not operate in the same sector as the subsidiary, or if there was no overlap between managements, or if it did not have any information on strategic and commercial plans and was not involved in the decision-making process).
[244] *Arkema* (n 223) 48; Case T-38/07 *Shell Petroleum v Commission* EU:T:2011:355, para 70. See Bellamy & Child (n 19) 14.094 for the list of factors that were rejected for rebuttal.
[245] *Portielje* (n 130) 66-69 (decisive influence was inferred from personal links, from overlapping board members, albeit appointed before the acquisition). See also Mantas Stanevičius, 'Portielje: Bar Remains High for Rebutting Parental Liability Presumption' (2014) 5(1) JECL & Pract 24.
[246] *Akzo* (C-97/08 P) (n 191) EU:C:2009:262, n 67; as Hordijk and Evans (n 233) 129 state they are 'very limited in scope and do not provide any real room for manoeuvre.'
[247] Case T-392/09 1 *Garantovaná v Commission* EU:T:2012:674, paras 50-52; rebuttal was also failed in *Goldman Sachs* (n 224), paras 69-78. The second example became more irrelevant after Case T-399/09 *HSE v Commission* EU:T:2013:647 paras 41-52 (where the intention to keep the shares for a short period was found irrelevant, as well as the reasons for acquiring them).
[248] Nils Wahl, 'Parent Company Liability – A Question of Facts or Presumption?' (2013) 19th St.Gallen International Competition Law Forum ICF < https://ssrn.com/abstract=2206323 > 7; *Elf* (n 135) EU:C:2011:89, Opinion of AG Mengozzi, para 62.

exercising control, such as *Portielje*, the presumption becomes effectively irrebuttable, approximates the situation of the parent to the employer.[249]

The Commission is obliged to consider the arguments for a rebuttal and the evidence put for it in each case and explain the reasons why they do not suffice to rebut, otherwise its decision will be annulled for breaching its obligation to state reasons.[250] Similarly, the GC is required to take account of and conduct a concrete examination of the factors which are raised by the appellants to rebut the presumption.[251] Thereby the Court refuses the concept of automatic liability for the parent's responsibility. In practice, however, a rebuttal has never been successful.[252] Taking all the analysis and the practice into consideration, rebutting the presumption is indeed impossible in practical terms.

5.1.3 Without the Presumption

Where the parent company does not hold 100% shareholding, the Commission must demonstrate both the ability to and the actual exercise of decisive influence over the market conduct of its subsidiary 'on the basis of factual evidence, including in particular, any management power', in order to hold the parent responsible for its subsidiary's infringement.[253] In these situations, 'account must be taken of all the relevant factors relating to the economic, organisational and legal links which tie the subsidiary to the parent company, and therefore the economic reality'.[254]

The actual exercise may be inferred from a body of consistent evidence, even if some of that evidence would be insufficient by itself to establish the existence of the influence.[255] The size of the shareholding is usually an indicative, but not decisive in this regard.[256] For example, where the parent company holds a majority interest in the subsidiary's share capital;[257] or a minority interest which allies rights greater than those normally granted to minority shareholders;[258] negative control over a JV (veto rights),[259] can be considered as indicia. Additional factors include personal links such as the composition of the board of directors; the participation of the parent in the

[249] Wahl (n 248) 7.
[250] See, eg, *Alstom* (n 207), paras 97-119.
[251] *General Química* (n 208), paras 78-80.
[252] Mark Leddy and Athina Van Melkebeke, 'Parental liability in EU competition law' (2019) 40(9) ECLR 407, 409. Only on one instance where the GC found that the presumption was rebutted (Joined Cases T-208-209/08 *Gosselin Group NV v Commission* EU:T:2011:287), CJ set aside the judgment and dismissed the action for annulment (*Portielje* (n 130), paras 58-122).
[253] *Avebe* (n 209), para 136.
[254] *Fresh Del Monte* (n 229), para 76.
[255] ibid, para 77.
[256] Kalintiri (n 112) 153.
[257] Case T-132/07 *Fuji Electric v Commission* EU:T:2011:344, para 182.
[258] ibid, para 183.
[259] *Dow* (n 161) (the fact that the JV is a 'full-function' within the meaning of Art.3(4) EUMR, or that it has its own legal personality are irrelevant) paras 92-94, upheld on appeal in Case C-179/12 P EU:C:2013:605.

subsidiary's policy decisions, business plans, corporate strategy, investment, human resources; the parent issuing instructions (which do not need to be legally binding), having mechanism for monitoring the commercial conduct of the subsidiary.[260]

The principles for attributing liability to a parent company discussed in here, are also applicable to State-owned entities, in such a way that 'the Commission's decisional practice in cases of concentrations involving public companies is…irrelevant' for determining the single unit for the purposes of attributing liability to the parent company.[261]

5.1.4 Assessment

The commentators have been sharply criticizing the role ascribed to single economic unit doctrine and its far-reaching consequences, and many parent companies have been challenging the Commission decisions before the CJEU with no success. It has been described as a 'shadowy area' in EU law; although its critical importance due to high amount of fines, the underlying principles are obscure and confused.[262] Furthermore, holding a parent a subsidiary liable for the infringement of the latter is accused of conflicting with the general principles of corporate law and fundamental rights. The Court answers all the criticism briefly, instead of thoroughly explaining the theoretical and logical reasons why parent companies are responsible for their subsidiaries, its 'adherence to earlier judicial statements have had an unfortunate straitjacket effect, resulting in the creation of a convoluted web of precedents from which it is nearly impossible to escape.'[263]

The Court's response to all the challenges have usually been centred around two arguments. First, a parent can be held liable for its subsidiary's competition law infringement simply for constituting a single economic unit;[264] and second, the Akzo presumption is rebuttable, albeit difficult, thus remains within the acceptable limits.[265] Nevertheless, the single economic entity doctrine does not justify attributing liability to a parent company.

5.1.4.1 The Fallacious Application of the Single Economic Entity Doctrine

There are *logical inconsistencies* in the application of the doctrine, as well as the problems in considering 'a corporate group as *one* undertaking in the economic sense to suffice as a *legal* justification' for imputing liability on the members of the group.[266] From the logical perspective,

[260] Bellamy & Child (n 19) 14.091. See also n 211-212 and text.
[261] *HSE* (n 247), paras 41-49. See also section 6.2 below.
[262] John D Briggs and Sarah Jordan, 'Presumed Guilty: Shareholder Liability for a Subsidiary's Infringements of Article 81 EC Treaty' (2007) 8(1) BLI 1,1.
[263] Kalintiri (n 112) 146.
[264] *Akzo* (T-112/05) (n 212), para 58.
[265] *Elf* (n 135) para 62**.**
[266] Thomas (n 241) 12.

the economic entity theory is based on two premises: first, A (subsidiary) has infringed competition rules, second, A and B (parent) are part of the same economic entity, and as a consequence the economic entity is responsible for the infringement and so is B; which does not make sense, because even if the premises can be uncontested, they do not explain the conclusion.[267] The theory falls short to further explain why a parent company should be liable for the conduct of its subsidiary despite any personal involvement, so does the Court in a cogent way.[268]

If the single economic unit doctrine would actually be the only condition used to attribution of liability cases, it would result in:

- the employer being liable for infringements committed by the employees, and vice versa;
- a principal being liable for infringements committed by its agent and vice versa;
- a parent being liable for infringements committed by the subsidiary, the subsidiary being liable for infringements committed by other subsidiaries, and the subsidiary being liable for infringements committed by the parent. [269]

However, liability is clearly not attributed in this way comprising all of the entities, but usually in a vertical and one-way manner, only to the employer, the principal, or to the parent. Despite the Court's contention that attribution of responsibility in this way is a 'limitation… of a purely practical nature',[270] the single economic unit theory is insufficient in itself to clarify the selection process, thus fails to justify parental liability.[271]

Additionally, there seems to be no agreement on the basis of parental liability, and the Court's contradictory statements does not shed light on the question either. According to Jones, in addition to being single economic entity (for which the parent's ability to exercise control over the subsidiary is sufficient), the 'actual exercise' of the decisive influence appears to have added a further condition, that is, some fault or responsibility on the part of the parent.[272]

On the one hand, the Court declared that the responsibility for competition infringements is *personal* in nature.[273] Further, the parent company is held responsible because the parent itself is

[267] ibid 14.
[268] ibid.
[269] Odudu and Bailey (n 105) 1746-7. This indeed shows that the principles to determine the addressee of a decision are different than finding a single economic entity.
[270] *Siemens* (n 188), para 55.
[271] Kalintiri (n 112) 156: 'the ascription of liability is in reality informed by additional considerations.' In this regard, parental liability neither properly falls within personal liability nor vicarious.
[272] Jones, 'The Boundaries of an Undertaking' (n 96) 320.
[273] Case C-49/92 P *Commission v Anic Partecipazioni* EU:C:1999:356,para 78.

'*deemed to have committed* the infringement',[274] thereby the Court is rejecting vicarious liability and suggesting primary and personal liability.[275] However, since the decisive influence does not need to be exercised linked to the infringement, there is no need for a connection between the parent company and the anticompetitive conduct.[276] In other words, there is no requirement of direct or indirect participation in the infringement on the part of the parent, therefore it does not fit within personal responsibility.[277] On the other hand, the fact that a parent and its subsidiary form a single undertaking allows subsidiary's conduct to be *imputed* on the parent company '*without having to establish the personal involvement* of the latter in the infringement.'[278] This resembles vicarious liability, however, without a policy argument similar to that of product liability or employer's liability.[279] Since there is no need for a direct or indirect participation, or awareness of the infringement, 'the one thing that appears to be settled for the Court is that the liability is *strict*, that is not based on fault.'[280]

5.1.4.2 Fundamental Rights

Although there has been a longstanding discussion on whether the competition law fines, and pecuniary penalties are administerial, criminal, quasi-criminal, [281] or non-criminal,[282] in nature, it is accepted that principles developed in the context of criminal law applies to competition law. In short, Article 48 of the Charter of Fundamental Rights of the European Union provides that 'Everyone who has been charged shall be presumed innocent until proved guilty according to law'[283], which does not refer to any criminal character of the offence that is charged and therefore it unequivocally covers EU public enforcement procedures, including the imposition of fines and penalties.[284] In accordance with Article 52(3) Charter, the procedure is covered within the meaning of Article 6(1) ECHR.[285] Further, the fining policy of the Commission explicitly pursues

[274] Case C-50/12 P *Kendrion NV v Commission* EU:C:2013:771, para 55 (emphasis added).
[275] Kalintiri (n 112) 157-158; Koenig, 'An Economic Analysis of the Single Economic Entity' (n 100), 4-5.
[276] Kalintiri (n 112) 156-157.
[277] ibid.
[278] *Akzo* (C-97/08 P) (n 191), para 59 (emphasis added)
[279] Kalintiri (n 112) 156-157.
[280] Koenig, 'An Economic Analysis of the Single Economic Entity' (n 100) 5.
[281] Case C-352/09 P *ThyssenKrupp Nirosta GmbH v Commission* EU:C:2010:635, Opinion of AG Bot, para 49: 'While this procedure is not stricto sensu a criminal matter, it is none the less quasi-criminal in nature. The fines referred to in Article 23 of Regulation No 1/2003 are comparable in nature and size to criminal penalties and the Commission's role, given its investigatory, examination and decision-making functions, is primarily one typical of criminal proceedings against undertakings.'
[282] Art.23(5) Reg 1/2003 provides that Commission's decisions imposing fines are not in criminal law nature.
[283] [2012] OJ C326/391 (Charter).
[284] Hanns Peter Nehl, 'Presumption of Innocence and Right of Defence (Administrative Law)' in Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward, *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014), 48.09A.
[285] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols No 11 and 14, 1950, ETS 5.

punishment for the infringement.[286] The Court also applies (or in the opinion that it applies) the core principles of criminal law to the competition cases, such as the principle of personal liability,[287] the presumption of innocence;[288] principle of proportionality.[289] However, the imposition of fines to the parent company essentially conflicts with these principles.[290]

Given the nature of the infringements and the nature and degree of severity of the ensuing penalties, **the presumption of innocence (*in dubio pro reo*),**[291] is applied to any natural or legal person (Article 48(1) Charter: 'everyone'), charged under any formal proceedings (administrative or judicial) and liable to be held responsible for an infringement of EU competition law that may result in imposition of fines or periodic penalty payments.[292]

The presumption of innocence is mainly related to the burden and standard of proof, which are distinguished; while the former determines who should prove the facts and adduce the relevant evidence, the latter of which determines the weight of proof that is required in order to consider a fact as proved.[293] The burden of proving an alleged infringement of Article 101/102 TFEU, and to adduce evidence to demonstrate the existence of such infringement to the requisite legal standard is borne by the Commission (or the national authority).[294] The standard of proof requires that the evidence must establish the infringement 'beyond reasonable doubt', and any doubt should benefit the accused.[295]As well as determining who should prove a particular fact and show evidence (subjective or evidential burden[296]), the burden of proof also determines who bears the risk of facts remaining unresolved or allegations unproven (objective or material burden).[297] A fact or a conclusion may be presumed in order to assist a decision-maker because experience shows it is self-evident, or for public policy reasons or procedural convenience.[298] An evidential presumption is, which the Akzo presumption is, when a party proves a set of facts from which another fact may

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[286] See n 310 and text.
[287] *Akzo* (C-97/08 P) (n 191), paras 56, 77.
[288] First time recognized explicitly in Case C-199/92 P *Hüls AG v Commission* EU:C:1999:358, para 150.
[289] Hans Gilliams, 'Proportionality of EU Competition Fines: Proposal for a Principled Discussion' (2014) 37(4) World Competition Law and Economics Review 435.
[290] Cortese (n 133) 87.
[291] A fundamental principle common to the legal traditions of the Member States and a general principle of EU law.
[292] *Hüls* (n 288), para 150; Nehl (n 284) 48.14-15A.
[293] Fernando Castillo de la Torre, 'Evidence, Proof and Judicial Review in Cartel Cases' (2009) 32(4) World Competition Law and Economics Review 505, (although they are distinct, there is a functional link between the two, 515-516).
[294] Regulation 1/2003, recital 5 and Article 2, and the undertaking who claims the benefit of Article 101(3) TFEU carries the burden to prove that the conditions have met; *Anic* (n 273), para 86.
[295] Joined Cases T-44, 54, 56, 60, 61/02 OP *Dresdner Bank AG v Commission* EU:T:2006:271, paras 60, 144; David Bailey, 'Presumptions in EU competition law' (2010) 31(9) ECLR 362, 363.
[296] Bailey (n 295) 362 ('he or she who asserts a fact must prove it'). See also Case C-413/08 P *Lafarge SA v Commission* EU:C:2010:346, paras 29-33.
[297] Case C-8/08 *T-Mobile Netherlands BV v Raad van bestuur van de Nederlandse Mededingingsautoriteit* EU:C:2009:110, Opinion of AG Kokott, n 60.
[298] Bailey (n 295) 363 (presumptions can be 1-evidential, 2-substantive both of which should be rebuttable, or 3-procedural, which can be rebuttable or conclusive).

be inferred, and thereby shifting the evidential burden on to the other party to prove the contrary.[299] Evidential burden can shift between the parties prior to the consideration of the objective burden, and that is why, according to the Opinion of AG Kokott, the presumption does not entail any reversal of the burden of proof.[300]

The Court had the opportunity to rule on whether the Akzo presumption is in conflict with the presumption of innocence in *ThyssenKrupp Liften Ascenseurs NV v Commission*,[301] where it referred to the case-law of ECtHR that presumption of innocence 'does not preclude presumptions of fact or law', subject to the requirement that they are 'confined within reasonable limits which take into account the importance of what is at stake and maintain *the rights of defence'*, and as such the Court is of the opinion that in competition proceedings certain conclusions can be drawn from common experience provided that the undertakings are given the chance to refute those conclusions, and since the Akzo presumption was considered rebuttable, it rejected the argument that the presumption of innocence was infringed.[302]

The compatibility of the Akzo presumption with the presumption of innocence and the right of defence has been criticized by AG Bot:

> I do not think that [100% ownership] can in itself presume the actual exercise of a power to issue instructions constituting connivance in the commission of the infringement… it is necessary for the Commission to produce further evidence capable of showing that the subsidiary had no autonomy, in order to preserve the fundamental rights recognised to undertakings.[303]

A presumption can only be within the reasonable limits, and the right of defence be observed if a presumption can ***be effectively rebuttable,*** whereas the Akzo presumption, as discussed above, is 'effectively unrebuttable'.[304] This is because of the requirements that need to be fulfilled for a rebuttal are substantially unclear and there still has not been a case where a rebuttal succeeded. Consequently, the Akzo presumption stops the possibility of the evidential burden to

[299] ibid.
[300] *Portielje* (n 130), para 53. See also *Fresh Del Monte* (n 229), para 139.
[301] Joined Cases T-144, 147-150, 154/07 EU:T:2011:364.
[302] ibid**,** paras 114-117, citing eg, *Salabiaku v. France* (1988) Series A no 141, para 28 (emphasis added); *Elf* (n 135), para 62: 'even where it is difficult rebut' still remains within acceptable limits.
[303] Joined Cases C-201&216/09 P *ArcelorMittal Luxembourg SA v Commission* EU:C:2010:634, Opinion of AG Bot, para 204.
[304] ibid, paras 204-213; Thomas (n 241), 18-20 'All in all, the rebuttal of the economic entity presumption is in fact something like the Yeti of EU antitrust law: much has been written about it; nobody has seen it in real life'. See n 233.

shift back to the Commission. Without a legal basis, unrebuttable presumptions create strict liability and breach the right of defence.[305]

The principle of personal responsibility (*nulla poena sine culpa)* is a fundamental principle of EU law, including competition law, 'given the nature of the infringements in question and the nature and degree of severity of the ensuing penalties.'[306] The Court contends that the economic entity doctrine respects the principle of personal responsibility. Accordingly, the subject of this principle in competition law is the *undertaking*, the economic unit; and when such an entity infringes the competition rules, it falls to that entity to answer for that infringement; hence, if the parent forms part of that economic unit, it is responsible for the infringement even if it did not participate directly.[307]

This reasoning is implausible. The subject of the fundamental right is each legal (or natural) person individually, not the economic entity. Therefore, the parent company as a legal person, have the fundamental right to not to face liability unless it did something wrong.[308] It is correctly argued that, while laying a legal obligation on the single legal person (parent), the reasoning of the Court deprives it of its fundamental right of *nulla poena sine culpa* by according the principle only on the economic unit but not on the individual legal persons forming part of that unit.[309] According to Article 6 TEU, the Charter has the same legal value as the Treaties, therefore it is hard to understand why the Court is disregarding these principles.

5.1.4.3 Deterrence

One of the central objectives followed by antitrust enforcement is to prevent the occurrence of violations, which can be achieved through deterrence and sanctioning.[310] Public punishment aims to reduce incentives to commit a competition violation through creating a credible threat of being subject to punishment, to the extent that making participation in a cartel (or other violation) unprofitable and also through reinforcing moral commitments to the law.[311] A fine has two dimension, first it has punitive effect in relation to the infringement committed, and second, deterrence effect which is related to future conduct; to achieve both of these effects it can

[305] Marco Bronckers and Anne Vallery, 'No Longer Presumed Guilty? The Impact of Fundamental Rights on Certain Dogmas of EU Competition Law' (2011) 34(4) World Competition Law and Economics Review 535.
[306] *Anic* (n 273), para 78. See also Art 49 Charter.
[307] *Akzo* (C-97/08 P) (n 191), para 56, 77.
[308] Koenig, 'An Economic Analysis of the Single Economic Entity' (n 100), 6 (no-fault strict criminal liability is incompatible with principle of personal responsibility and the presumption of innocence.)
[309] See, eg, ibid; Thomas (n 241); Kalintiri (n 112) 158-159.; Leupold (n 233) 579-580.
[310] Wils, 'Optimal Antitrust Fines: Theory and Practise' (2006) 29(2) World Competition Law and Economics Review 183, 185.
[311] In the context of cartels, leniency programmes also create deterrence, in that they fracture trust within the cartel: ibid 186-191 & 201-204.

substantially exceed all the expected benefit of the cartel.[312] The Commission has incorporated deterrent aim to its fining policy**,** whereby it sends a clear warning to the individual undertaking (specific deterrence), and also to the business community in general (general deterrence).[313]

The Commission can impose a fine for antitrust infringements up to 10% of the infringing *undertaking's* total turnover in the preceding business year.[314] Where a parent and its subsidiary (or subsidiaries) form a single economic unit, the 10% turnover is calculated on the basis of the total turnover of all the companies forming the single economic unit acting as one undertaking, not just of the subsidiary that committed the infringement.[315] This considerably increases the maximum cap of fines,[316] but it is justified as a policy to maximize the deterrence effect.[317]

It was argued that parental liability based on control can be justified on grounds of efficiency and effective deterrence, as only the parent company can induce subsidiary to comply with competition laws.[318] However, the objective of pursuing a deterrence effect through the single economic unit doctrine can be called into question. The deterrence aim of cartel fines is to create incentives for undertakings to take all appropriate steps to remove and avoid all cartel behaviour from their corporate group.[319] However, as mentioned above, whether the parent company has taken all necessary measures to prevent anticompetitive conduct through compliance programmes, or whether it has explicitly instructed to avoid any anticompetitive conduct, is usually irrelevant or insufficient, and they are still held liable.[320]

The question is then, which type of conduct the parent company is aimed to be deterred, even if it has taken all the measures necessary, and properly implemented the compliance programmes? As such, the single economic entity doctrine equates a company that has directly participated in a cartel to a parent who was not involved in, and was not aware of it and also tried to prevent anticompetitive conduct from its group; and thereby completely turn the principle of personal responsibility upside down.[321] Parental liability also reduces specific deterrence for subsidiaries, as it is less likely that subsidiary will pay for the entire fine when it is jointly liable with the parent.[322]

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[312] Joined Cases T- 56, 73/09 *Saint-Gobain Glass France SA v Commission* EU:T:2014:160, para 390.
[313] Communication from the Commission, Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 [2006] OJ C210/2, para 4 ('Guidelines on fines').
[314] Regulation 1/2003, Art 23(2).
[315] *Akzo* (T-112/05) (n 212), para 90.
[316] It further makes the finding of recidivism easier, in the case of which the Commission can increase the fine up to 100%, Guidelines on fines, para 28.
[317] Jones and Sufrin (n 19) 129; Guidelines on fines, paras 30-31.
[318] Koenig, 'An Economic Analysis of the Single Economic Entity Doctrine' (n 100).
[319] Faull and Nikpay (n 95) 8.519.
[320] See n 234 and text.
[321] Thomas (n 241) 17.
[322] Carsten Koenig, 'Comparing Parent Company Liability in EU and US Competition Law' (2018) 41(1) World Competition 69, 92.

It is not claimed that the parent companies should never be held liable for their subsidiaries' infringement. The general objection is that single economic unit theory is a wrong justification for parental liability, and it contradicts many principles. And a few alternative grounds for liability have been suggested.[323] According to the so-called 'failure to exercise vigilance theory', a parent company, especially of a large corporate group,[324] should exercise due care, in order not to breach competition rules by negligence,[325] by taking all the proper organizational measures to ensure compliance with competition rules, to discover and prevent anticompetitive behaviour; and when all appropriate measures have been taken, it must be accepted that its responsibility has shifted off to its subsidiary because it has done everything possible.[326] Where the parent does not exercise due care or comply with the programme, the sanctions can be justified. This approach would respect the principle of personal responsibility as the parent would be liable for its own conduct of failure of cautiousness; it explains why only the parent company in the group is held liable; and further it would have a proper deterrence effect so as to make parent companies to be more prudent.[327]

However, while the EU judicature also consider control and responsibility, the problem is control is established very easily and does not reflect the reality (due to the presumption and the difficulty to rebut the presumption) and the Commission does not attach the proper importance to the compliance efforts taken by the parent companies. When the parent company accomplishes to adopt a robust compliance programme, it is fair to reward it, as long as it can be distinguished from one that is only for show.[328] Despite all the genuine efforts by the parent, if the subsidiary disregards them and breaches competition rules, holding the parent liable because they are regarded as a single unit is unreasonable; and therefore the economic entity theory constitutes a base for which 'in real terms amounts to risk liability for the parent company over all of its subsidiaries'.[329]

5.1.4.4 Company Law Perspective

Although antitrust is about markets and regulates the relations between firms, and corporate law is about firms and governs relations within firms; there has never been a clear-cut distinction

[323] One of which is the 'mastermind' theory, developed in the early jurisprudence before Akzo, see Briggs and Jordan (n 262). See also Kalintiri (n 112) suggests two alternatives: the 'failure to exercise vigilance' and 'enterprise liability'.
[324] That can act beyond a regular shareholder and exercise control over the subsidiary's market conduct, since the power of control and responsibility should go hand in hand.
[325] According to Art 23(2) Regulation 1/2003, infringement can be committed either intentionally, or negligently.
[326] Hofstetter and Ludescher (n 204) 64-71 (They also argue, similar to the European Parliament resolution of 14 February 2017 on the annual report on EU competition policy 2016/2100(INI) [2018] C252/78, para 60, when the management of the company has proven its due diligence but an infringement still took place, the responsibility should be on the employee(s) who initiated it).
[327] Kalintiri (n 112)160-161.
[328] Damien Geradin, 'Antitrust compliance programmes and optimal antitrust enforcement: a reply to Wouter Wils' (2013) 1(2) JAE 325.
[329] Hordijk and Evans (n 233), 128.

but an evolving interaction between two fields.[330] Unlike competition law, corporate law remains mainly with each Member State to legislate.[331] As mentioned above, principles of limited liability and separate legal personality are fundamental to company law. Two important point should be made. First, the importance of the limited liability can be understood better when the shareholders are natural persons; in the absence of limited liability, their personal bank accounts, houses, other investments will be available for the company's creditors.[332] Second, the absolute application of the principle would create an abusive use of the corporate form by the shareholders or engaging in excessively risky businesses; thus it is common to balance with the doctrine of 'lifting the corporate veil' *exception*.[333]

The approach of the Court in making systematic use of the exceptional liability regime of company law, has been proved very controversial.[334]

> While, therefore, [piercing the corporate veil] is universally known and the (theoretical) possibility of " the unity of the group " is well recognised, it is equally clearly accepted that the conclusion depends on the circumstances of each case and cannot be reached except by *the most elaborate, detailed and painstaking investigation of the facts proved in evidence*.[335]

The parent companies (as shareholders) have been arguing that the application of single economic entity doctrine for parental liability contravenes the principle of limited liability of shareholders and inappropriately pierces corporate veil. However, these arguments are very quickly dismissed by the EU judicature on the ground that it is a principle of civil liability and that 'In assessing an undertaking's *responsibility under antitrust law*…the crucial factor cannot be whether there is a "*corporate veil*" between the parent company and the subsidiary. What is important is economic reality…'[336]

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[330] Edward B. Rock, 'Corporate Law through an Antitrust Lens' (1992) 92(3) CLR 497.
[331] Although there has been some harmonization through Directives to facilitate the freedom of establishment (Art.50 TFEU); and four forms of incorporation are provided by the EU (eg, European Economic Interest Grouping, European Company) albeit their unpopularity, see Davies and Worthington (n 194) 1.37-47, 6.9-14.
[332] ibid, 8.1-2, within group of companies, limited liability applies both between the parent and its shareholder and within the group (between the parent and its subsidiaries).
[333] ibid, 8.7-17&9.21 (piercing the corporate veil only on grounds of single economic entity doctrine has not been practiced in English company law); Gerner-Beuerle and Schillig (n 193) 814-884 (generally, it requires a wrongful act); Bronckers and Vallery (n 305) 551 (after an analysis of the laws of Belgium, France, Germany, UK and US, conclude that although there are different approaches, it is proved to be an exception).
[334] Florence Thépot, *The Interaction Between Competition Law and Corporate Governance* (Cambridge University Press 2019), ch 4; Bronckers and Vallery (n 305) 551-552 (the exception is also respected in torts, bankruptcy law, human rights protection, but the Court does not explain why competition law is so different from them).
[335] FA Mann, 'The Dyestuffs Case in the Court of Justice of the European Communities' (1973) 22(1) ICLQ 33, 48 (emphasis added).
[336] *Schindler* (n 235) EU:C:2013:248, Opinion of AG Kokott, paras 65-66; supported by CJ in para 101.

5.1.4.5 US Practice

As mentioned earlier, in *Copperweld,* the US Supreme Court has accepted a similar concept to the single economic entity doctrine in the context of agreements between a parent and its wholly owned subsidiary.[337] Nevertheless, a system of parental liability for antitrust infringements of subsidiaries based on the single economic entity doctrine does not exist in US antitrust law;[338] rather, liability is fault-based, either there needs to be direct involvement in the infringement, or the requirements for piercing the corporate veil must be met, but the US Courts respect the principle of limited shareholder liability and seldom pierce the corporate veil.[339] And there is no special doctrine to pierce the corporate veil for antitrust infringements, the doctrine as it was developed in corporate law applies.[340] The conditions to pierce the veil differs from state to state, but it should be noted that exercising control by the sole owner is not in itself sufficient to pierce it.[341]

But also in the US, both public and private enforcement plays a significant role, providing fines and imprisonment, as well as treble damages; whereas in the EU, the private enforcement is still developing.[342]

5.2 Sister Companies

It was mentioned that sister companies are considered to be a single economic entity and therefore they cannot enter into agreements within the meaning of Article 101 TFEU. Although they form a single economic unit, the Commission has never imputed liability to a company for conduct of its sister company (or of its parent); instead, liability is attributed upwards to an entity which controls or exercises decisive influence over the infringing company, and the element of control is absent between sisters.[343] This question of whether sister companies can be liable from each other's conduct is now yet to be answered before the CJ.[344]

According to the case-law on parental liability, it is the economic entity that infringes competition rules and is personally responsible for that infringement.[345] Further, parent and subsidiaries under its decisive influence are collectively a single undertaking for the purposes of

[337] n 151, at 767, but it was explicitly restricted to this context.
[338] The control-based liability has been rejected by the Supreme Court in *United States v. Bestfoods*, 24 U.S. 51 (1998), see Koenig, 'Comparing Parent Company Liability in EU and US Competition Law' (n 322) 80-82.
[339] Koenig, 'Comparing Parent Company Liability in EU and US Competition Law' (n 322) 70&76. (on the other hand, it is strict liability under EU law).
[340] ibid 76.
[341] ibid 77.
[342] ibid 82-86 (Managers and employees who conducted the infringement are individually liable and subject to imprisonment in the US).
[343] Jones, 'The Boundaries of an Undertaking' (n 96) 320.
[344] Case C-882/19 *Sumal v Mercedes Benz Trucks España* (2020) OJ C 87/7 (and also whether subsidiaries are liable for the parent company's antitrust infringements).
[345] *Akzo* (C-97/08 P) (n 191), para 56.

competition law.[346] Finally, it is not because of the relationship between the parent and its subsidiary in instigating the infringement but because they constitute a single undertaking that the Commission can impose fines.[347] This follows that, the group liability is based on the fact that several legal entities have a unity of conduct on the market and collectively form a single economic unit, in other words 'joint action triggers joint liability'; therefore the single economic doctrine allows imputation of liability on the innocent company for the infringement of its sister company (or of its parent).[348]

The complete reading of the single economic entity doctrine easily allows to conclude that, 'if an infringement is committed…by an economic unit, the economic unit must be liable in its entirety'[349] including the innocent sister companies, which would be even worse than the Akzo presumption. This shows, again, that the single economic entity doctrine is an improper basis for justification of group liability.

5.3 Employees

As mentioned above, employees are incorporated into the single economic unit comprised by the undertaking they work for. Can an employee be held jointly and severally liable for a breach of competition rules with the entity forming part of the same economic unit, or be held personally liable if they engage in anti-competitive behaviour? *Under the EU competition rules*, the answer to each possibility is negative.

The competition rules, and Commission decisions imposing fines are addressed to undertakings; and employees are not undertakings.[350] When an employee engages in anti-competitive behavior on the part of the undertaking he/she belongs to, it is attributed to that undertaking and, it is the undertaking who is responsible from its employees conduct.[351]

In an employment relationship, employer's possibility of exercising control is sufficient to hold it responsible.[352] In other words, the undertakings are under strict liability for their employees' anti-competitive behavior, it is irrelevant whether the management were aware of the infringement, whether they have authorized the employee or whether the employee was acting contrary to the

[346] ibid, Opinion of AG Lenz, para 97.
[347] *Akzo* (T-112/05) (n 212), para 58.
[348] Christian Kersting, 'Liability of sister companies and subsidiaries in European competition law' (2020) 41(3) ECLR 125, 128.
[349] ibid (Further, it can allow more damages actions where the siblings are incorporated in different countries).
[350] Joined cases C-100-103/80 *SA Musique Diffusion française v Commission* EU:C:1983:158, para 97. The Commission does not have the power to impose any penalties on individuals (who do not act as an undertaking).
[351] Case C-542/14 *SIA 'VM Remonts' v Konkurences padome* EU:C:2016:578, para 24.
[352] Wahl (n 248) 8, which leads to conclude that single firm liability should be different from parental liability, but because the Akzo presumption is irrebuttable, the parental liability is similar to employer's liability. The difference is, subsidiaries are held jointly and severally liable for their infringements, whereas employees do not.

instructions of management not.[353] Strict liability of the employer is endorsed as it has efficient deterrence effect and prompt the employer to choose and supervise its employees, because it has the power (the possibility) and the means available to prevent anti-competitive conduct away from its business.[354]

On the contrast, it was suggested that if the management was not aware of the infringement and the undertaking has implement all the appropriate measures to prevent and discover the anti-competitive behavior, it should not be held liable for the employees, rather the employees should be sanctioned, which is not provided for in EU law at the moment.[355]

An alternative suggestion is that Member States should be allowed to impose 'follow-on' sanctions on responsible employees/managers.[356] Member States are allowed to impose sanctions in the form of fines and/or imprisonment on the responsible employees who infringe EU and national competition laws.[357] However, NCAs have only fined individuals when they conduct an investigation themselves, but not after a decision by the Commission, which results in an uneven enforcement, causing individuals to escape from liabilities in more severe cases where the Commission invokes its jurisdiction (usually where the anticompetitive conduct affects cross-border markets covering more than three Member States[358]).[359]

5.4 Agents and Other Vertical Relations

An agent is usually an independent economic operator on the market for its agency services, and acts as a separate undertaking, especially where it acts on behalf of multiple principles.[360] However, where the agent acts on behalf of the principal and does not determine its own commercial strategy or bear the commercial and financial risks of the activities it is entrusted, they will be regarded as a single economic unit and its conduct regarding those activities can be imputed to the principal.[361]

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[353] Case C-68/12 *Protimonopolný úrad Slovenskej republiky v Slovenská sporiteľňa as* EU:C:2013:71, paras 22-28 'action by a person who is authorised to act on behalf of the undertaking suffices'.
[354] Wils, 'The undertaking as subject of EC competition law' (n 7) 110-111.
[355] Hofstetter and Ludescher (n 204) 63-64. The European Parliament is also of the opinion that those employees responsible for actually leading their company to commit a violation of competition rules should be sanctioned (pecuniary), n 326.
[356] Carsten Koenig, 'The Imposition of "Follow-on Penalties" on Managers and Employees' (2018) 13(2) CompLRev 139 available at: <https://ssrn.com/abstract=2922143> , 140: defines follow-on penalty as a 'penalty that is imposed by an NCA or criminal law enforcer on a natural person following a prohibition decision (and, potentially, the imposition of fines) against one or more undertaking(s) with regard to the same agreement or practice on the same relevant market at the same time.'
[357] Art.5 Reg 1/2003. And many of them do provide such sanctions, ibid 142-143.
[358] Commission Notice on cooperation within the Network of Competition Authorities [2004] OJ C101/43, para 14.
[359] Koenig, 'The Imposition of "Follow-on Penalties"' (n 356) 140-142 (in accordance with the Art.4(3) TEU and the principle of equivalence, he suggests that the Member States *should* penalize individuals for infringing Article 101/102 TFEU based on the Commission decisions).
[360] Bellamy & Child (n19) 2.034, 14.100.
[361] ibid.

Until *VM Remonts*, a principle could be held liable for its agent's (or other commercial representatives') anticompetitive behavior under strict conditions.[362] That is, when the agent is in fact acting under the direction or control of the principal, having only little or no autonomy or flexibility with regard to the way in which the activity concerned was carried out, like an employee, so they can be perceived as a single undertaking by the third parties.[363] In *VM Remonts*, the Court held that when a service provider is genuinely independent, its anticompetitive conduct can still be attributed to the undertaking using its services in two *alternative* situations: First, when 'the undertaking was *aware* of the anti-competitive objectives pursued by its competitors and the service provider and *intended* to contribute to them by its own conduct.'[364] Second, when the undertaking 'could reasonably have foreseen' that the service provider would engage in such anti-competitive conduct and 'was prepared to accept the risk which that entailed.'[365]

So an undertaking may be held liable for competition law infringements of its independent service providers that act on behalf it, such as outside contractor, service provider, independent consultant, agent and also their sub-contractors which, in principle, not comparable to an employee and *constitute a separate undertaking*.[366] The concept of reasonably foreseen is a relatively low threshold to attribute liability for a third-tier sub-contractor which could turn into another 'rebuttable' presumption of liability, furthermore, it is suggested that because of the extensive approach of antitrust liability, companies should secure competition compliance and confidentiality clauses as part of contracts when they are outsourcing services [367]

[362] Faull and Nikpay (n 95) 8.523. See also Case T-66/99 *Minoan Lines SA v Commission* EU:T:2003:337, paras 125-129.
[363] *VM Remonts* (n 351), para 27.
[364] ibid, para 28-30 (for example if it tacitly or explicitly consented the provider to disclose commercially sensitive information to its competitors) (emphasis added).
[365] ibid, para 31.
[366] Christopher Thomas, Gianni De Stefano, and Dina Jubrail, 'Liability for anticompetitive behaviour by your employees and outside contractors: when you are off the hook and when you are not' (Kluwer Competition Law Blog 2016) < http://competitionlawblog.kluwercompetitionlaw.com/2016/08/04/liability-anti-competitive-behaviour-employees-outside-contractors-off-hook-not/?doing_wp_cron=1588289781.4699730873107910156250>; ibid, paras 5, 25-6.
[367] Thomas and Others (n 366).

6. CONCEPT OF UNDERTAKING IN MERGERS

6.1 Introduction

The objective of merger control is to monitor the changes in the market structure and prohibit those mergers which have a lasting adverse impact on competition that any potential benefits are offset.[368] European merger control prevents mergers *between independent undertakings* that result in significant impediment to effective competition in the internal market, in particular by creating a dominant position. The merger control takes place *ex ante*, based on prior notification including a standstill obligation, meaning that a merger that has a EU dimension may not be implemented prior to a clearance by the Commission.[369]

The application of single economic entity doctrine in merger control, especially within the context of state-owned enterprises will be examined after a brief introduction to relevant merger control rules.[370]

6.1.1 Concentration

EUMR only applies to transactions giving rise to a '*concentration',* that change the control of the undertakings concerned on a lasting basis (and therefore the structure of the market[371]), resulting from: (a) a merger between previously independent undertaking, (b) acquisition of control; or (c) creation of a 'full-function JV'. [372]

The concept of (sole or joint) control within the meaning of a concentration relates to the *possibility of exercising decisive influence*, which is suggested to be 'equally relevant' to the concept of control within the meaning of Article 101 TFEU.[373] Decisive influence relates to the power to determine the strategic commercial decisions of the other undertaking or to the ability to veto strategic decisions (negative control).[374] Here, it is the possibility of ('effectively') exercising decisive influence, not the actual exercise, that determines the concept of control.[375] In this way, it

[368] Jones and Sufrin (n 19) 1085.
[369] Sauter (n 114) 196.
[370] See, Michael Rosenthal and Stefan Thomas, *European Merger Control* (Beck/Hart 2010) 21-83.
[371] Rec 20 EUMR.
[372] Art 3(1), (4) EUMR; for JV see Jurisdictional Notice 91-109.
[373] Art 3(2) EUMR ('in particular by: (a) ownership or the right to use all or part of the assets of an undertaking; (b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking); Bellamy & Child (n19) 8.026. See also Wils, 'The undertaking as subject of EC competition law' (n 7) suggests that, the acquisition of sole control should be sufficient to regard the entities as a single undertaking within the meaning of Art 101 TFEU.
[374] Jurisdictional Notice, para 54.
[375] Bellamy & Child (n 19) 8.027.

is different from attributing liability, therefore the concept of control within the context of mergers is broader.[376]

6.1.2 Allocation of Jurisdiction

EUMR applies to concentrations with an *EU dimension*, based on the *one-stop-shop principle*.[377] The EU dimension is established if certain turnover thresholds are met.[378] The one-stop-shop principle provides that concentrations with an EU dimension fall within the exclusive jurisdiction of the Commission, and NCAs may not apply their nation legislations (or EUMR); whereas those concentrations *without* an EU dimension are to be investigated by the NCAs in accordance with their national merger control rules.[379] The exception to one-stop-shop principle is case referrals.[380]

When an 'undertaking concerned'[381] belongs to a group, the turnover is to be calculated by reference not only to that undertaking concerned but also to those entities which it has links (that it controls or is controlled by) as provided in Article 5(4) EUMR. Such control is established by having (directly or indirectly) more than half the of capital/voting rights, or rights to appoint more than half the board members, or to manage the undertaking's affairs.

For the purposes of turnover, EUMR does not define the concept of group in an abstract manner but provides certain rights or powers which directly or indirectly link the undertaking concerned with other entities. [382] The concept of control here is based on the existence of a formal control.[383]

6.2 State-Owned Enterprises

SOEs are defined as, 'any corporate entity recognised by national law as an enterprise, and in which the state exercises ownership.'[384] In recent years, SOEs have become important global

[376] Jones, 'The Boundaries of an Undertaking' (n 96) 311-315. Although within the context of attribution of liability, the decisive influence is interpreted broader than it should.
[377] Art 21(2)-(3), Rec 8 & 11 EUMR.
[378] Art 1(2)-(3) EUMR.
[379] Equally, transactions that are not 'concentrations' within the meaning of EUMR, may still be reviewed under national merger rules which provide broader definition, Rosenthal and Thomas (n 370) 23. Sauter (n 114) 196: 'at national level, merger control is wholly governed by applicable national law, although sometimes based on the EU rules as a result of spontaneous harmonization.'
[380] Arts 4(4)-(5), 9, 22 EUMR; Commission Notice on Case Referral in respect of concentrations [2005] OJ C56/2; and an intervention by Member States outside referral is possible under Art 21(4) EUMR.
[381] Those participate directly in the transaction, see Jurisdictional Notice, paras 129-153.
[382] Jurisdictional Notice, para 176. However, the concept of control provided in Art 3(2) is broader, see Jones and Sufrin (n 19) 1107.
[383] According to Moisejevas and Urbonas (n 111) the group of companies used in EUMR for turnover is different than the concept of single economic entity for which formal control is not sufficient in itself, but the nature of the control is important.
[384] OECD, 'OECD Guidelines on Corporate Governance of State-Owned Enterprises' (2015 edn OECD Publishing) <https://doi.org/10.1787/9789264244160-en> 14.

players, operating in important economic sectors, competing with private entities and involving in cross-border mergers.[385]

EU observes neutrality between public/private ownership; also expressed in EUMR as a principle of non-discrimination between public and private sectors.[386] *Competitive neutrality* requires that all enterprises, public or private, domestic or foreign should be subject to the same rules.[387] However, due to their distinctive nature, some special considerations need to be taken into account and some challenges occur especially in applying merger rules involving SOEs.[388]

Owing to their special corporate governance, defining an SOE's corporate group, that is to say whether they are independent from, or controlled by, the State and also whether they are independent from each other is a first important step for merger assessment. In situations where both undertakings to a transaction are owned *by the same State* (or the same public body or municipality), it needs to be assessed whether they were part of the same economic unit prior to the transaction or not.[389] Where the undertakings were part of different economic units having independent power of decision, the transaction can constitute a concentration and not an internal restructuring (an internal restructuring within a group of companies does not constitute a concentration[390]), unless they continue to have independent power of decisions after the transaction.[391] Defining the limits of SOE's corporate group (also where only one undertaking to a transaction is an SOE) has other important consequences as well, namely, the calculation of turnover thresholds for establishing jurisdiction and moreover, for substantial assessment of the transaction, it is relevant for determining the market position of the undertakings and their competitors (for example, another SOE belonging in the same group might be operating in the market that is relevant for the assessment).[392]

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[385] Even in most developed countries that undertook privatization, domestic SOEs still exist which operate in key strategic sectors having high value, Carolina Abate, 'Competition Law and State-Owned Enterprises - Background note by the Secretariat' (DAF/COMP/GF(2018)10, OECD) <https://one.oecd.org/document/DAF/COMP/GF(2018)10/en/pdf> 5-8.

[386] Art 345 TFEU, rec 22 EUMR; but subject to some exceptions such as Article 106(2) TFEU.

[387] Mona Chammas, 'Competitive Neutrality in Competition Policy- Issues paper by the Secretariat' (DAF/COMP(2015)5, OECD) <http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP(2015)5&docLanguage=En>, 4.

[388] Abate (n 385), there are also challenges regarding antitrust enforcement (36-84), these challenges mean that 'a risk of under enforcement is always present' which is even higher regarding foreign SOEs, 88, 116.

[389] Jurisdictional Notice, para 52.

[390] ibid, para 51.

[391] ibid, para 52; *NESTE/IVO* (Case IV/M.931) [1998] OJ C218/4, paras 2-8.

[392] Abate (n 385) 68-69.

6.2.1 The Independence of the Undertakings

Due to abovementioned consequences, determining the limits of the economic unit is crucial for the merger assessment in several aspects, as it is not always the case that an SOE forms a single economic unit with the State, or other SOEs. Regarding private undertakings, Article 5(4) EUMR provides that an entity that owns more than half the capital, or the voting right etc. in the undertaking concerned (or vice versa), is sufficient to designate them as a single unit for the purposes of turnover. However, for SOEs, satisfying the conditions of Article 5(4) is not sufficient to consider the State as a single unit with the SOEs, the calculation of the turnover should take account of only undertakings making up single economic unit with an independent power of decision.[393] The reason why there is no specific description of group for SOEs in EUMR, is I think due to the many different ways in which a State could structure the governance system, resulting in not exercising decisive influence over the SOEs, which is not possible to list exhaustively in advance. Jurisdictional Notice provides further that where several SOEs are under the same independent centre of commercial decision-making, their total turnover should be considered; but where the SOE is not in coordination with other SOEs it should be treated as independent and only its turnover should be considered for the calculation of turnover.[394]

6.2.2 EU-SOEs

The assessment of whether SOEs can be considered as independent from the State and from each other, has been based on a body of evidence and indicia available, whilst there are three categories of elements that have been considered the most in the past decisions, it is not required to prove all, which also means that the absence of one does not automatically establish the lack of independence; and these are:[395]

a- the involvement of the State in, or its ability to influence,[396] decisions regarding commercial activities, directly or indirectly (business plans, budgets etc);[397]

[393] Rec 22 EUMR; Jurisdictional Notice, para 193.
[394] Para 194.
[395] Geneviève Lallemand-Kirche, Caroline Tixier, and Henri Piffaut, 'The Treatment of State-owned Enterprises in EU Competition Law: New Developments and Future Challenges' (2017) 8(5) JECL&Prac 295, 297-299; *Texaco/Norsk Hydro* (Case IV/M.511)(1995) OJ C23/3, para 26 (all three criteria were considered in order to assess whether Norsk Hydro was independent from the Norway and Statoil, another SOE owned by Norway, which operated in the relevant market).
[396] *SFPI/DEXIA* (Case COMP/M.6812)(2013), concerns a private company acquired by the State and the absence of any holding arrangements, special provisions or other safeguards indicate that the company will constitute an economic unit with the State, para 14.
[397] *NESTE/IVO* (n 391), para 8 (regarding whether there was a concentration between two Finnish SOEs; since they could implement their own commercial conduct/policy by independent operative management and the State exercised its ownership only as to be a shareholder, they were independent and there was a concentration).

b- the presence of formal or informal relations between SOEs (through interlocking directorships);[398]

c- the existence of coordination of the SOEs' activities in the past.[399]

Also, for the purposes of EU dimension, if the turnover of the undertaking concerned suffices to meet the thresholds itself, the Commission does not identify the entire group and leave the question of who the ultimate controlling entity is open.[400]

6.2.3 Non-EU SOEs

The decisional practice of the Commission was mainly developed concerning SOEs established in EEA, nonetheless foreign SOEs (particularly Chinese) have been more involved in cross-border mergers since 2011, creating additional challenges because of the difficulty to gather evidence on governance and control, to verify the information and interpret foreign law.[401] The control and influence of the State can be different in every country, subject to the political choices and the rules on governance, nonetheless, a consistent approach has been developed regarding the definition of economic unit within the context of merger control.[402]

Despite the abovementioned difficulties, the question of whether the principles applied to EU-SOEs in order to determine their economic unit can be equally applied to non-EU SOEs has been responded positively by the Commission.[403] However, the question of independence of the SOE from the State was usually left open; except a few cases, in which similar principles were considered, namely, whether they had independent power to decide their own strategy, business plan, and budgets, whether the state was able to coordinate SOEs' commercial conduct, and/or the existence of interlocking directorship.[404] It should be noted that, the question of independence does not depend upon the actual exercise of such powers, but the ability of the State authority to exercise decisive influence suffices.[405]

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[398] *EDF/SEGEBEL* (Case COMP/M.5549)(2009), para 96 (regarding independence of EDF and another French SOE from each other in order to assess coordinated affects).
[399] *NESTE/IVO* (n 391), para 8.
[400] *SFPI/DEXIA* (Case COMP/M.6812)(2013), paras 16-21.
[401] Lallemand-Kirche and others (n 395) 300.
[402] ibid 300-301, 308.
[403] Joaquín Almunia, 'Recent developments and future priorities in EU competition policy' (8 April 2011, SPEECH/11/243) <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_11_243>: 'In the cases that we have examined [involving Chinese SOEs], we have used the same criteria we adopt to assess mergers involving companies controlled by the Member States.'
[404] *ROSNEFT/TNK-BP*(Case COMP/M.6801)(2013), (concerning acquisition of a private EU company by a Russian SOE), para 7; *EDF/CGN/NNB Group of Companies* (Case No COMP/M.7850)(2016), paras 30-32&37-50 (the lack of interlocking directorship was not in itself sufficient to establish independence, but considering a body of evidence State influence was found).
[405] Indeed, when the parent has not exercised its power, it means only approval of the subsidiary's conduct, not the independence of the latter, Wils, 'The undertaking as subject of EC competition law' (n 7) 107-108.

Further, the question of the limits of the economic unit has been generally left open. This was possible because, first, the undertakings concerned have met the turnover thresholds alone; second, the competitive assessment considered several possibilities including the 'worst-case scenario', where all SOEs operating in the relevant market are deemed to constitute one single economic unit, but still no competition concerns have arisen.[406] In *EDF/CGN/NNB*, CGN's (a Chinese SOE) EU-wide turnover did not meet the threshold alone, therefore the scope of the group was partially determined; it was found that the Central SASAC,[407] could impose or facilitate coordination between CGN and other SOEs in the same sector (energy), but adding one other SOE from that sector was sufficient to meet the thresholds.[408] It can be said that Commission assessed just enough to establish the jurisdiction and did not go any further.

6.3 Assessment

The Commission's general practice in leaving the question of independence and the exact scope of SOE's group open was advocated as did not create strict precedents which would tie itself in subsequent cases, so that it can undertake a case-by-case analysis;[409] notwithstanding some legal uncertainties for the parties, who might have difficulties to assess whether the transaction is notifiable or not, and to which authorities, or to assess the anticompetitive risks and to offer appropriate remedies.[410]

However, it was argued that the concept of undertaking and single economic entity does not correspond to the 'worst-case scenario' approach and does not fit to the realities of SOEs.[411] The conclusion that several or all Chinese SOEs are part of the same economic unit would increase their turnover just enough to bring a transaction between an SOE and a private undertaking under the jurisdiction of the Commission, but this could also lead to an over-enforcement in mergers.[412] The same conclusion would further render impossible for the Commission to examine a merger between

[406] *ROSNEFT* (n 404), paras 6-8; *PetroChina/Ineos/JV* (Case COMP/M.6151)(2011), para 31; *China National Agrochemical Corp/Koor Industries/Makhteshim Agan Industries* (Case COMP/M.6141) (2011), paras 7&48.
[407] Chinese SOEs are mainly controlled through the central/regional State-Owned Assets Supervision and Administration Commission ('SASAC'), see Kyriakos Fountoukakos and Camille Puech-Baron, 'The EU merger regulation and transactions involving states or state-owned enterprises: Applying rules designed for the EU to the people's republic of China' (2012) 1 Concurrences 44, 50.
[408] (n 404) paras 48-51 (it was not necessary whether the local SASAC which owned 10% shares in CGN was part of the same economic unit). Also, whether SOEs outside the same sector form a single unit is left open, but see Alan Riley, 'Nuking misconceptions: Hinkley Point, Chinese SOEs and EU merger law' (2016) 37(8) ECLR 301, 315-319 (suggests all Chinese SOEs controlled by a SASAC should be defined as a single unit).
[409] Abate (n 385) 104-105.
[410] Fountoukakos and Puech-Baron (n 407) 51-53; Riley (n 408) 322-323 (argues that where a Chinese SOE does not meet the thresholds alone there will be uncertainties for the undertakings to define the group both regarding EU and other jurisdictions); Vaclav Smejkal, 'Chinese State-Owned Enterprises and the Concept of Undertaking under EU Competition Law' (2019) 6 Journal for International and European Law, Economics and Market Integration 31, 37.
[411] Smejkal (n 410).
[412] Abate (n 385), or under-enforcement concerning anti-competitive agreements, 104-105.

those SOEs belonging to the same unit, since it would have to be considered as internal restructuring.[413] It is not clear whether the Commission will be able to escape making definite conclusions regarding the independence of SOEs and maintain a case-by-case approach, especially after the *EDF/CGN/NNB* decision and the ever-growing Chinese investment in EEA.[414] In future cases, where similar situations to *EDF/CGN/NNB* occur, it is possible that the Commission finds other SOEs in the same group as well, which might eventually lead to 'worst-case scenario' becoming the reality. And if it does, the Commission will be unable to review mergers or agreements between SOEs under the control of the same State authority.[415]

To date, defining the scope of the economic unit has not been necessary for **the substantive assessment**, as it was settled with the worst-case scenario. However, similar to the jurisdictional issue, the boundaries of the economic unit might have to be set. The market position of the SOE can be completely different depending on whether it is independent or not.[416] If it is considered as forming a single economic unit with other SOEs operating either at the same or different sector, it could affect the market definition and their market power. A remedy could be needed which might not have been necessary had the undertaking were regarded to be independent, and in a case of divestment the question would arise as to whether other SOEs owned by the same State could acquire the divested business or not.[417]

All in all, the application of the competition rules to foreign SOEs is a new subject with many important questions awaiting. It is to be seen for how long the Commission will be able to follow the same approach and escape from defining the boundaries of the economic unit in merger assessments (notably after *EDF/CNG/NNB*). There would also be more clarity when the Commission opposes to a merger and the decision would be appealed to the Court.[418]

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[413] Extending jurisdiction using the single economic entity doctrine 'would be a *double-edged sword'*, Lallemand-Kirche and others (n 395) 308. The current reform in China, including consolidation of SOEs might bring cases before the Commission in the near future, Jochem de Kok, 'Chinese SOEs under EU Competition Law' (2017) 40(4) World Competition 583, 606-609.

[414] Kok (n 413) 584-608 (it is not clear to see the Commission's view on the appropriate size of the economic unit).

[415] Smejkal (n 410) 38-49, he suggests that the EU judicature should adopt a different interpretation of the concept of single economic unit for SOEs than for private undertakings.

[416] Lallemand-Kirche and others (n 395) 305.

[417] ibid.

[418] Piet Jan Slot, 'The application of the EU merger control rules to state owned enterprises' (2015) ECLR 36(11) 484.

7. EXTRA-TERRITORIAL JURISDICTION

7.1 Introduction

In today's global economy, anti-competitive behaviors of, or mergers between, multinational corporations can affect markets other than where they originate. Consequently, the limits of the competence of the competition authorities to undertake extraterritorial investigations have raised problems.[419] Extraterritoriality is a complex issue in international law, only a limited part of which is the question of jurisdiction in competition law, which should comply with its principles.[420]

It is not the purpose of this chapter to analyze the challenges of public enforcement over other jurisdictions, however it should be noted that there is considerable amount of international cooperation in this area.[421] Here, the doctrines applied in EU Competition law in order to establish jurisdiction will be analyzed and compared with the US practice. The focus will however be on the single economic unit doctrine, which has also been interpreted in order to establish the extraterritorial application of EU antitrust rules.

7.2 US

The question of extraterritorial jurisdiction has been raised in the US before the EU. The US developed the *'effects doctrine'*, whereby it was 'settled law that any State may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders which has consequences within its borders which the state reprehends'[422] The US antitrust laws are applicable to foreign conduct that has a substantial and intended effect in the US, and the Sherman Act, as amended by the Foreign Trade Antitrust Improvement Act, is considered inapplicable to foreign conduct, unless it has a direct, substantial and reasonably foreseeable effect in the US commerce.[423]

The effects doctrine is able to bring many conduct under the US jurisdiction which caused a lot of controversy, however, the application of it is balanced with the international comity principle in order to respect other jurisdictions' interests.[424]

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[419] Jones and Sufrin (n 19) ch 16; Wish and Bailey (n 4) ch 12.
[420] Jones and Sufrin (n 19) 1208-1209. See also James Crawford, *Brownlie's Principles of Public International Law* (8th ed, OUP 2018).
[421] eg, The International Competition Network (ICN), The Organisation for Economic Co-operation and Development (OECD), World Trade Organization (WTO), and many bilateral and multilateral international cooperation agreements, see Wish and Bailey (n 4) 514-519.
[422] *United States v Aluminum Co of America*, 148 F.2d 416 (2d Cir. 1945), 444.
[423] Department of Justice and Federal Trade Commission, 'Antitrust Guidelines for International Enforcement and Cooperation' (2017) <https://www.justice.gov/atr/guidelines-and-policy-statements-0/antitrust-guidelines-international-enforcement-and-cooperation-2017> 16-18.
[424] *Timberlane Lumber Co v Bank of America*, 549 F.2d 597 (9th Cir. 1976), 613; ibid 27-29.

The example of the application of the effects doctrine can be the *Nippon Paper* case,[425] where a Japanese company was prosecuted for cartel activities in the US (for fixing the paper price in US), although all the participants were Japanese, and activities took place in Japan.[426]

Another significant aspect to be discussed here is that private litigation for damages in the US is particularly attractive for claimants because of the advantages they enjoy (eg broad discovery rules, class actions, treble damages, no need to pay defendant's costs in case of dismissal).[427] However, for foreign plaintiffs to recover damages in US Courts for harm suffered outside US borders, such damages should be inseparable from the effect of the cartel in the US.[428]

7.3 EU Antitrust Law

There are three ('independently sufficient'[429]) ways in which Articles 101/102 TFEU may be applied extraterritorially, namely, the single economic entity doctrine, the implementation doctrine, and the qualified effects doctrine.

7.3.1 The Single Economic Entity Doctrine

The extraterritorial application of EU antitrust rules has been first resolved in the *Dyestuffs* case,[430] which is the backbone of the single economic entity doctrine. In that case, the Commission has fined ICI (a non-EU parent) who participated in cartel activities that have been put into effect in the internal market, by giving instructions to its EU-subsidiary.[431] ICI appealed, inter alia, on the jurisdiction that the conduct should only be imputed to its subsidiary.[432] Both the Commission and the AG had in fact relied on the effects doctrine to justify extraterritorial jurisdiction.[433] However, while the CJ neither approved nor rejected the effects doctrine, it found that the Commission had jurisdiction to fine ICI based on the fact that it formed a single economic unit with its EU-subsidiary, within which its subsidiary, although having a separate legal personality, does not decide independently upon its own conduct on the market, but carries out the instructions given to it by the parent (to raise the prices).[434] Since the parent is able to, and in fact did exert decisive influence over the subsidiary, they had a unity of conduct and act as one undertaking, who distorted competition in the internal market.

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[425] *United States v Nippon Paper Industries Co*, 109 F.3d 1 (1st Cir. 1997)
[426] Jones and Sufrin (n 19) 1213.
[427] ibid, 1215.
[428] *Motorola Mobility LLC v AU Optronics Corp* 773 F.3d 826 (7th Cir. 2015).
[429] Wish and Bailey (n 4) 502.
[430] (n 99)
[431] ibid, paras 125-129.
[432] ibid, para 131.
[433] ibid EU:C:1972:32, Opinion of AG Mayras, 697-696.
[434] Dyestuffs (n 99), paras 133-142.

There were no additional conditions for establishing extraterritorial jurisdiction other than forming a single economic unit, established in the context of attribution of liability. This case has been criticized both in regard to attribution of liability to the parent through piercing the veil, and to jurisdictional matters.[435]

The economic entity doctrine does not seem to be an appropriate tool to establish jurisdiction, but the Court perhaps took an easy way out. Instead of relying on the single economic unit doctrine, it could perhaps analyze the effects doctrine as the AG's assertions or, since the facts of the case allowed, it could upheld jurisdiction based on the territorial doctrine (since in the case, the acts had initiated abroad but completed in the internal market).[436] Although the doctrine is unfortunately still valid for establishing jurisdiction, the unsuitability can also be deduced from the development of two other doctrines after that.

7.3.2 The Implementation and Qualified Effect Doctrines

Later, CJ has affirmed both the territoriality and the qualified effects doctrines of public international law, in *Wood Pulp I,*[437] and *Intel,*[438] respectively.[439] In *Wood Pulp I,* it distinguished between the *formation* of the agreement, decision or concerted practice and the *implementation* thereof.[440] Even if the anti-competitive conduct (price fixing) adopted outside the Union, the decisive element is that it is implemented within the internal market; and it was irrelevant whether they had subsidiaries, agencies etc. in the Union.[441]

And then CJ has recognized the qualified effects doctrine for Intel's abusive conduct that affected internal market: 'the qualified effects test allows the application of EU competition law to be justified under public international law when it is *foreseeable* that the conduct in question will have an *immediate* and *substantial* effect in the European Union.' [442] The doctrine has been long-

[435] Mann (n 335); Antonia Acevedo, 'The EEC Dyestuffs Case: Territorial Jurisdiction' (1973) 36(3) MLR 317; Pieter Huizing, 'The ECJ finally accepts the qualified effects test: now was that so hard?'(2018) 39(1) ECLR 24, 27.
[436] Acevedo (n 435) 318, although he mentions that the Court based the decision on territoriality, it has been understood as it 'should have', since most of the literature now interprets the decision based on the single economic entity doctrine, see n 419.
[437] Cases 89, 104, 114, 116, 117, 125-129/85 *A Ahlström Oy v Commission* EU:C:1988:447 (Wood Pulp I), paras11-23.
[438] Case C-413/14 P *Intel v Commission* EU:C:2017:632. In the context of EUMR, jurisdiction is established based on the turnover thresholds (ie on sales), notwithstanding where they are domiciled and the GC held the (qualified) effects doctrine in merger control to justify the application of EUMR to foreign concentrations, in Case T-102/96 *Gencor Ltd v Commission* EU:T:1999:65, paras 89-111; Rosenthal and Thomas (n 370) (but this does not mean every foreign transaction that meets the thresholds necessarily fulfils the effects doctrine) 11 .
[439] These are alternative, and not cumulative approaches to establish jurisdiction, see T-286/09 *Intel v Commission* EU:T:2014:547, para 236 (upheld on appeal).
[440] Wood Pulp I (n 437), para 16.
[441] ibid, paras 15-18. This means that direct sales to EU purchasers is sufficient for implementation: Jones and Sufrin (n 19) 1224.
[442] *Intel* (C-413/14 P) (n 438), paras 45-49 (emphasis added).

awaited and welcomed in the EU law, with the main criticism against the CJ was the compendiousness of the judgment on jurisdiction.[443]

7.4 Comments

CJ has finally affirmed the (qualified) effects doctrine for EU competition rules which is also a recognized principle for jurisdiction in international public law, and with better, greater qualifications than the US Courts.[444] However, the single economic entity doctrine to establish jurisdiction is also still a good law. Although the GC in *Intel* said that the principle of territoriality and doctrine of qualified effects were the two principles on which jurisdiction has been established,[445] the *Dyestuffs* case-law has not in any way been overturned. As mentioned before, the single economic entity doctrine is an unsuitable tool to establish extraterritorial jurisdiction and further, it is not even recognized as an instrument in public international law.[446] The jurisdiction should be asserted before the application of single economic entity doctrine (although still controversial in attribution of liability).

[443] Luca Prete, 'On Implementation and Effects: The Recent Case-law on the Territorial (or Extraterritorial?) Application of EU Competition Rules' (2018) 9(8) JECL&Pract 487; Huizing(n 435) 29: 'Commissioner Vestager stated that on the point of jurisdiction the *Intel* ruling was "a very clear win for the Commission".'
[444] Crawford (n 420) 447.
[445] (n 439), paras 231-233.
[446] Crawford (n 420) 440-469.

8. CONCLUSIONS

The concept of undertaking within the meaning of Articles 101 and 102 TFEU, EUMR and jurisdiction has been analysed, with an aim to assess whether the concept and underlying principles has been applied the same in these areas of competition law. For the most coherent application and understanding of competition rules, the answer to the question of 'what constitutes an undertaking?' should be the same in all these areas.

Undertakings are defined as any entity engaged in economic activity, regardless of the legal status and the way in which it is financed. A functional approach is adopted in order to distinguish entities acting as undertakings from those that are not. Further, it has been established that the concept of undertaking designates an economic unit, which can include several natural or legal persons. In other words, several persons comprising of a single economic unit form a single undertaking for the application of competition rules.

The single economic entity doctrine ensures that the focus of competition enforcement is on the arrangements that has a competitive significance. Such significance does not arise where the entities are not independent from each other. It follows that, agreements between entities making up a single economic entity are regarded as internal arrangement and escape from the scrutiny of Article 101 TFEU, and within the merger control context, SOEs that are not independent from each other constitute a single economic entity, thus, transactions between themselves are regarded as internal restructuring within a group of companies which does not constitute a concentration. In order to assess whether there is a concentration, the EUMR explicitly requires the existence of the *possibility* to exercise decisive influence, in particular by ownership of assets or voting rights. And for calculating turnover, it provides certain rights or powers which directly or indirectly link the undertakings. However, the boundaries of the group of SOEs has been determined much more cautiously, it has been assessed whether they had independent power to decide their own strategy, business plan, and budgets, whether the State was able to coordinate SOEs commercial conduct, and/or the existence of interlocking directorships between SOEs.

The impossibility of competition is the criterion that determines a single economic entity. The absence of rivalry is not related to whether separate entities are operating in different levels of supply chain, but it arises because of such economic, organisational, and legal links that tie two (or more) separate legal entities. In circumstances where one entity is capable to influence the commercial policy of another entity (the ability to exercise decisive influence/control), the competition between these entities is considered to be impossible, consequently they form a single economic entity. Although the concept of control is a common criterion used to determine single economic entity in various areas, it answers different problems and addresses different objectives, and its nature and the weight changes depending on the question it applies.

Other purposes of considering undertakings as economic units rather than legal units, serve for eliminating the risk of inconsistencies arising from different national classifications of legal personality, and preventing companies from shielding themselves from antitrust responsibility based on purely institutional separations.

However, implementation and interpretation of the single economic entity doctrine has many inconsistencies and controversies, both within the same line of cases and between different lines, and as a result, it is extremely difficult to say that there is a single concept. It was seen not only that the single economic entity doctrine has been applied differently, but also that it is problematic and an inappropriate instrument to be used in some areas (establishing jurisdiction and attributing liability). It is used as a tool to solve various problems where it is not an adequate and sufficient answer in itself and so the application goes beyond the underlying purpose it serves. It was shown that in establishing jurisdiction, the doctrine currently lost its significance, de facto abandoned. Perhaps such rigid application of the doctrine would lessen in the attribution of liability cases, if the Commission is given the power to fine the responsible employees, or alternatively, the national authorities enforce their national laws against responsible individuals, after the decisions of the Commission.

In the cases relating to the substantive scope of Article 101 TFEU, it has been established that separate legal entities belonging to a single economic entity cannot enter into agreements within the meaning of Article 101 because they form a single undertaking, and therefore there is no agreement between undertakings. The rationale laid down by the Court is the impossibility of competition between entities belonging to a single economic unit, as they follow a common market strategy and have unilateral conduct. A parent and its subsidiaries (when there are several subsidiaries, they are together called sister companies) form such unit where the parent is able to exercise decisive influence over the conduct of its subsidiaries, so that they do not enjoy real autonomy in determining their course of action in the market.

However, the case-law is inconsistent because it is not clear in these cases whether the ability to exercise control over the subsidiary's market conduct is sufficient for the existence of the single economic entity or whether there is an additional condition that the agreement should concern merely with the internal allocation of tasks between the parties. If it is accepted that there is such an additional requirement, it could imply that there needs to be an 'actual' exercise of decisive influence, which would make the concept consistent with the attribution of liability cases but inconsistent with the concept within the merger control. However, this does not answer the question, why are the parent and its subsidiaries not considered to be a single economic entity, is competition between them possible in this situation?

On the contrast, if it can be said that this is not an additional condition, but merely an explanation of the single unit parent and subsidiary constitutes, and every agreement between them would inevitably relate to their internal allocation of tasks, then the single economic entity concept could be said to be similar to the concept in merger context, with the ability of control being necessary and sufficient, but in controversy with the attribution of liability context. Again, the case-law is very ambiguous and inconsistent in this regard.

Although the concept of undertaking is unrelated to the legal personality, for a decision to be enforceable, it must be addressed to an entity with legal personality on whom fines may be imposed. In choosing that entity, the single economic entity doctrine is used in its most controversial context, by completely disregarding the principles of limited liability and separate legal personality, it allowed a fine to be imposed on a parent company who did not directly involved in an infringement committed by its subsidiary. According to the Court's own words, this is merely on grounds that they form a single economic entity, which is where the parent company is able to exercise decisive influence over the commercial conduct of its subsidiary, and in fact exercised such control. Further, the decisive influence is presumed to be exercised when the parent directly or indirectly owns, or when two parent companies equally owns, all or almost all of the share capital (or the voting rights) of the subsidiary. Thereby, the Court adds a further condition in order to constitute a single economic entity (and then renders it meaningless in situations where the presumption applies).

In order to rebut *the presumption that it has exercised* control over the subsidiary, the parent company has to prove that *it was not able to* exercise any influence, or in other words, that they are not a single economic unit. It is insufficient to prove that it did not exercise decisive influence in connection to the field where the infringement occurred, or that it did not in fact exercise any control, or it took measures to prevent any infringement but the subsidiary acted against those instructions (unless this a norm), or that the parent is a non-operational holding company. There has never been a successful rebuttal and in practical terms, the rebuttal is impossible.

The implementation of the single economic entity doctrine in attribution of liability cases is completely dissatisfactory. The application is in inconsequential with the doctrine's underlying premise: the impossibility of competition between separate entities. This premise cannot lead to a justification for a strict parental liability. It is also in conflict with fundamental rights of personal responsibility and presumption of innocence, and it is inadequate to achieve the deterrence purpose of the fines because the parent companies are punished even where they do not have any wrongdoing. Therefore, which type of conduct parents are supposed to be deterred is unclear.

In order to solve these problems, one solution could be to re-examine and reinterpret the current case-law for holding a parent liable for its subsidiary's competition law infringement, by

requiring a parent and its subsidiary to form a single economic entity (the condition of ability of control) and in addition to that, an actual exercise of control over subsidiary in relation to the infringement. This would create an effective deterrence effect on the parent to compel its subsidiaries to comply with competition rules, failing that would be the fault of the parent. And if the liability is based on a fault, then the parent company has a personal misconduct which would make the liability consistent with the principle of personal liability.

However, in order for the Akzo presumption to be consistent with the presumption of innocence, it should simply be effectively rebuttable. Unfortunately, the strict application of the presumption has created strong precedents by refusing many attempts for rebuttal. The presumption assumes an exercise of control, the absence of such exercise should be sufficient. Alternatively, in a fault-based liability, proving that the parent has done everything it could to prevent and stop the infringement should be enough.

An employee does not fulfil the function of an undertaking as it does not bear the financial risks, but it is an auxiliary organ forming an integral part of the employer's undertaking bound to carry instructions. Similarly, an agent is usually regarded as an independent operator, but it is regarded as incorporated into the undertaking with the principle where it does not bear any financial risks of the transactions and does not determine the commercial strategy. Although in these relationships, employer and employee, or principal and agent, constitute a single undertaking, the liability is not similar to the parental liability based on the doctrine, but it is the vicarious liability of the employer.

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