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The boundaries of an undertaking in EU Competition Law

Alison Jones*

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A. INTRODUCTION

The concept of an undertaking is central both to the question of whether the EU competition law rules apply to the conduct of an entity and, if so, which of those rules apply. Article 101 of the Treaty on the Functioning of the European Union (“TFEU”) deals with the joint conduct of two or more undertakings - agreements and concerted practices between undertakings and decisions by associations of undertakings¹ which have as their object or effect the prevention, restriction or distortion of competition, Article 102 focuses on single-firm conduct² - prohibiting an undertaking which holds a dominant position in the EU or a substantial part of it from committing an abuse of that dominant position, whilst the EU Merger Regulation (“EUMR”)³ deals with changes to the structure of competition resulting from corporate reorganisations

* Alison Jones is a Professor of Law at King’s College London. The author would like to thank Joanna Goyder and Brenda Sufrin for their comments on a previous draft of this article. This article is based on a chapter, “Drawing the boundary between joint and unilateral conduct: Parent-Subsidiary Relationships and Joint Ventures”, published in A Ezrachi (ed) *International Research Handbook of Competition Law* (Edward Elgar, 2012) and permission has been granted to quote from this chapter.

¹ The expressions are interpreted distinctly and expansively “to catch forms of collusion having the same nature which are distinguishable from each other only by their intensity and the forms in which they manifest themselves”, Case C-8/08, *T-Mobile Netherlands BV v Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-4529, para 23. Although its provisions are interpreted broadly to prevent avoidance of the rules, it is not designed to extend to wholly unilateral conduct of a single undertaking.

² The rules may, however, reach situations where a dominant firm incorporates exclusionary contractual restraints in its contracts with third parties.

³ Regulation 139/2004 [2004] OJ L 24/1. This article does not deal with the related question of whether the concept of undertaking used in Arts 101, 102 and the EUMR is the same as the concept used in the state aid provisions or, more broadly, in other areas of the TFEU.

between undertakings. Like many other competition law systems, Articles 101 and 102 thus draw a fundamental distinction between concerted and independent action, treating concerted, or coordinated, conduct between undertakings⁴ more sceptically, and viewing it as more “inherently fraught with antitrust risk”,⁵ than unilateral conduct. In contrast, fewer constraints are imposed on the internal business decisions of a single firm⁶ - Article 102 applies only to the unilateral conduct of an undertaking if it is dominant and if that conduct is “abusive”.

Despite the centrality of the concept of an “undertaking” to the scope of, and relationship between, the EU competition law provisions the term is not defined in the Treaty. Rather the meaning of the term has been left for elucidation in the case-law. It is now trite law that a functional approach is taken to the concept of an undertaking⁷ and that it encompasses any entity (including individuals, legal persons such as companies and partnerships, State and public bodies) engaged in economic activity,⁸ regardless of its legal personality or status or the way in which it is financed.⁹ Further, it has also been long accepted that the term undertaking is not necessarily synonymous with natural or legal personality¹⁰ but denotes “an economic unit for the purpose of the subject-matter of the agreement in question even if in law that

⁴ *Copperweld Corporation v Independence Tube Corporation* 467 US 752, 769 (1984) (“In any conspiracy, two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit ... Of course, such merging of resources may well lead to efficiencies that benefit consumers, but their anticompetitive potential is sufficient to warrant scrutiny even in the absence of incipient monopoly”).

⁵ *ibid* 768.

⁶ *American Needle, Inc v National Football League* 130 SCt 2201, 2209 fn 2 (2010) (“if every unilateral action that restrained trade were subject to antitrust scrutiny, the courts would be forced to judge almost every internal business decision). Overregulation of unilateral conduct might threaten the competitive enthusiasm that the antitrust laws seek to promote”).

⁷ See e.g., Case C-475/99, *Firma Ambulanz Glöckner v Landkreis Südwestpfalz* [2001] ECR I-8089, Jacobs AG, para 72 and Case C-49/07, *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio* [2008] ECR I-4863, para 25.

⁸ Consisting of the offering of goods and services on a given market.

⁹ Case C-41/90, *Höfnér and Elser v Macrotron GmbH* [1991] ECR I-1979, para 21; Case T-513/93, *Consiglio Nazionale degli Spedizionieri Doganali v Commission* [2000] ECR II-1807, para 36. Undertakings are thus the economic actors to which Articles 101 and Article 102 apply.

¹⁰ *Pre-insulated Pipe Cartel* [1999] OJ L24/1, para 154 (“The subject of the competition rules in the Treaty is the ‘undertaking’, a concept not necessarily identical with the notion of corporate legal personality in national commercial company or fiscal law”).

economic unit consists of several persons, natural or legal.”¹¹ It is therefore a “complex concept involving human and physical components joined in the pursuit of a single economic activity ...”.¹²

These definitions and characteristics immediately indicate that it may not always be easy to identify an undertaking and its boundaries and, consequently, whether one, or more, undertakings exist and whether they are acting unilaterally or jointly for the purposes of the competition law rules.¹³ For example, a company or partnership may be made up of individuals capable of competing with one another, a principal and an agent or members of the same corporate group (a parent and its subsidiaries) may constitute separate legal entities but the question of whether they each constitute distinct undertakings or form part of the same economic unit is critical to the issue of whether or not Article 101 applies to agreements between them. Similarly a joint venture (“JV”),¹⁴ created structurally as a separate entity to its parents, could be viewed as a single economic unit together with its parents or as a separate undertaking which operates in collaboration with its parents.¹⁵ If the JV and its parents are viewed as a single economic actor its unilateral actions will infringe EU competition law only if it is dominant and it commits an abuse. Further, arrangements

¹¹ Case 170/83, *Hydrotherm Gerätebau GmbH v Compact del Dott Ing Mario Andreoli & C Sas* [1984] ECR 2999, para 11; Case C-97/08 P, *Akzo Nobel v Commission* [2009] ECR I-8237, para 55. This suggests that the assessment must be made in the context of the specific agreement concluded so that the same entity might be considered to be acting unilaterally or jointly depending on the nature of the agreement. See also Case C-217/05, *Confederación Española de Empresarios de Estaciones de Servicio v Compañía Española de Petróleos SA* [2006] ECR I-11987 and nn 26, 86 and accompanying text.

¹² Case T-6/89, *Enichem v Commission* [1991] ECR II-1623, paras 233-235.

¹³ The relationship between the “economic activity” and “economic unit” requirements is also not clear. In particular, it is unclear whether an entity engaged in economic activity is the critical factor to determining the scope of the economic unit (see e.g., the discussion of employment and agency relationships below) or whether an entity engaged in economic activity may not constitute an undertaking if it forms part of a larger economic unit.

¹⁴ The term JV can be used to describe a wide spectrum of commercial arrangements between firms. In competition law, it is frequently used to describe an entity which (i) constitutes a separate business entity, and (ii) is jointly controlled by at least two parents.

¹⁵ The JV may be viewed *both* as “an economic actor in its own right and a collaboration of its participants”, G Werden, “Antitrust Analysis of Joint ventures: An Overview” (1998) 66 *Antitrust LJ* 701. See also A Devlin and M Jacobs, ‘Joint-Venture Analysis After American Needle’ (2011) 7(3) *J Competition L & Economics* 543, 545 (this point may be particularly acute in the context of a sports league or sports association, for example, where each team forming part of the league or association may be autonomous and compete with each other both on and off the field, but which may by itself be a meaningless entity “a person without a purpose” and dependent “for its existence and profitability ... upon the success of the league”).

between the JV and its parents may constitute intra-undertaking agreements falling outside the scope of Article 101(1). If, in contrast, the JV is viewed as a collaboration of its parents, much of its conduct, including its purchasing, pricing and output decisions (as well as its contractual arrangements with its parents (and between the parents)), will be open to examination and analysed rigorously as joint conduct under Article 101.

An important challenge for the EU competition law system is, therefore, to ensure that the parameters of an undertaking are clearly defined so that an unequivocal line can be drawn between concerted conduct falling within the scope of Article 101 and unilateral conduct falling outside of it. In drawing such boundaries it is critical that sight is not lost of this important consequence – that joint conduct of entities within the economic unit is treated as unilateral and so is per se legal under Article 101. The doctrine thus needs to be realistically and carefully confined so as to ensure that potentially anti-competitive arrangements between firms do not escape scrutiny under the competition law rules. The discussion in this paper indicates that, despite its significance, the question of how broadly the boundaries of an economic unit and a single undertaking extend is not clearly resolved in EU competition law. Rather, the interpretation given to the concept has been developed incrementally in two main strands of jurisprudence which are arguably underpinned by different policy objectives - one dealing with the “substantive reach” of Article 101 and the question of whether the conduct of two or more entities is characterized as joint or unilateral and the other dealing with the question of whether liability for a competition law infringement committed by one entity can be imposed on, or attributed to, another entity within the corporate group/economic unit (“attribution of liability” cases). Not only may this fact have led to the interpretation of the concept being developed in one line of cases without full regard being taken for the consequences in the other, but it may have resulted in an over-expansive interpretation being adopted and some inconsistencies and conflicts arising, making a coherent answer to the question of what is an undertaking?, hard to discern.

Although a number of commentators have recently been railing against the economic unit being used as a broad mechanism for attributing liability for

infringements by one entity to another within the same undertaking,¹⁶ only a few have sought to analyse the question of what constitutes an economic unit, and its relevance to all the EU competition law rules, more generally.¹⁷ This article also seeks to determine the boundaries of an undertaking in EU competition law more broadly, taking account of some important recent developments in the case-law.

It commences in Part B by examining some of the core cases which establish how the notion of an undertaking is applied to natural persons, legal persons, and groups of persons (such as principal and agent, parent and subsidiaries and parents and JV) and seeks to clarify the principles and policy underpinning and influencing them. In Part C the implications of the case-law are assessed and it is considered both whether the cases support the view that there is a single concept of an undertaking which applies throughout EU competition law and/or whether such an approach is desirable. In the light of this and, in particular the policy objectives underpinning the economic unit doctrine, Part D discusses whether there is a need for a more holistic approach to be taken to the concept of an undertaking, requiring some reconsideration of, and retrenchment in, the case-law.

B. IDENTIFYING AN ECONOMIC UNIT AND ITS BOUNDARIES

1. Natural persons, legal persons and groups of persons

It is well-established that an undertaking may range from a single individual to two or more companies within a corporate group, i.e., it may comprise natural persons, legal

¹⁶ See e.g., J Joshua, Y Botteman and L Atlee, “‘You Can’t Beat the Percentage’- The Parental Liability Presumption in EU Cartel Enforcement” in Global Competition Review, ‘The European Antitrust Review 2012’ 3, S 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] *Journal of European Competition Law & Practice* 11, K Hofstetter and M Ludescher, “Fines against Parent Companies in EU Antitrust Law: Setting Incentives for ‘Best Practice Compliance’” *World Competition* 33 (2010) 55 and M Bronckers and A Vallery, “No Longer Presumed Guilty? The Impact of Fundamental Rights on Certain Dogmas of EU Competition Law” *World Competition* 34 (2011) 535.

¹⁷ See especially, WPJ Wils, “The Undertaking as Subject of E.C. Competition Law and the Imputation of Infringements to Natural or Legal Persons” (2000) 25 *ELRev* 99 and C Townley, “The Concept of an ‘Undertaking’: The Boundaries of the Corporation – a discussion of agency, employees and subsidiaries”, in Amato, G., and Ehlermann, C-D. (eds.), *EC Competition Law: a critical assessment*, (Hart Publishing 2007). There is, however, a huge body of literature dealing with the limits of the similar single economic entity doctrine in the US, see e.g., H Hovenkamp, “American Needle and the Boundaries of the Firm in Antitrust Law (August 15, 2010), available at SSRN:<http://ssrn.com/abstract=1616625>, Hovenkamp and CR Leslie (n 22), Devlin and Jacobs (n 15) and E Reddick, “Joint Ventures And Other Competitor Collaborations As Single Entity— “Undertakings” Under US Law” [2012] 8(2) *European Competition Journal* 333.

persons (made up of individuals) and groups of persons (made up of natural or legal persons). The concept of an undertaking is aimed at economic units “which consist of a unitary organization of personal, tangible and intangible elements which pursues a specific economic aim on a long-term basis and can contribute to the commission of an infringement”.¹⁸

Individuals, such as a member of the bar or another sole trader, (natural persons) may constitute an undertaking when operating as independent economic actors on a market for goods or services.¹⁹ In *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten*²⁰ for example, the CJ held that members of the Dutch bar which offered, for a fee, legal services and which bore the financial risks attaching to the performance of those activities carried on economic activities and so constituted undertakings. Further, legal persons, such as companies and partnerships,²¹ although made up of a collection of individual persons, may also be undertakings. The cases do not seem to look behind the legal personality but treat individuals working within the legal person, and not accepting individual risk, as constituent elements of it.²² Thus in *Becu* the CJ held that dock workers, performing

¹⁸ Case T-11/89, *Shell International Chemical Company v Commission* [1992] ECR II-757, para 311.

¹⁹ See e.g., Case C-309/99, *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten*, [2002] ECR I-1577, paras 46–9, 64, *RAI/UNITEL* [1978] OJ L157/39, *French Beef* [2003] OJ L209/12, *aff’d* (but fines reduced) in Cases T-217 & 245/03, *FNSEA v Commission* [2004] ECR II-271, Cases C-101 & 110/07, *Coop de France bétail et viande v Commission* [2008] ECR I-10193, Case 42/84, *Remia BV and others v Commission* [1985] ECR 2545 and Case C-189/02P, *Dansk Rørindustri A/S v Commission* (“[a] natural person ...cannot, in his sole capacity as a member or shareholder, be classified as an undertaking”).

²⁰ Case C-309/99 (n 19).

²¹ See e.g., Case 258/78, *Nungesser v Commission* [1982] ECR 2015 and *Breeders’ rights: roses* [1985] OJ L369/9. See also sporting bodies (*Distribution of Package Tours During the 1990 World Cup* [1992] OJ L326/31, paras 43–58), trade associations (Case 96/82, *NV IAZ International Belgium v Commission* [1983] ECR 3369) and agricultural cooperatives (Case C-250/92, *Gøttrup-Klim e.a. Grovwareforeninger v Dansk Landbrugs Grovvaeselskab AmbA* [1994] ECR I-5641). See also n 22.

²² There is thus a difficult line to be drawn between legal entities, economic units and cartels. Firms such as companies and partnerships inevitably eliminate competition, and result in price fixing and market sharing competition, between individuals within them. Characterisation of a partnership as an undertaking renders such arrangements per se legal under Article 101. In contrast an agreement between independent competing undertakings to fix prices and share markets is almost invariably illegal under Article 101, see e.g., RH Bork, *The Antitrust Paradox: A Policy at War with Itself* (Basic Books, 1978, reprinted with a new Introduction and Epilogue, 1993), 264-265 and H Hovenkamp and CR Leslie, “The Firm as Cartel Manager” (2011) 64(3) *Vanderbilt Law Review* 813, 818 (“[t]he lines between firms, cartels and joint ventures are notoriously indistinct”). In the

work for and under the direction of their employers, were to be viewed as being incorporated into the undertaking concerned and forming part of the “economic unit”.²³

Although a decision to equate the term undertaking with natural or legal personality under national law would have provided some legal certainty and made the identification of an undertaking in EU competition law relatively simple, it has been seen that this is not the approach which has been adopted. On the contrary, it is clear that one or more legal persons designating an economic unit can constitute a single undertaking. For example, the close economic links which exist in many relationships between principal and agent have led the Court of Justice (“CJ”) to recognise that an independently owned agent may lose its character as an independent trader and operate as an auxiliary organ “forming an integral part of the principal’s undertaking”²⁴ where the agent does not take on any (or only a negligible portion of) financial and commercial risk linked to sales of goods to third parties on behalf of the principal (even it seems if the agent acts for more than one principal).²⁵ Like the employee, therefore, the agent who does not accept the risk of the principal’s business, seems to be viewed not as an entity engaged in economic activity but as incorporated within the undertaking, providing services for and at the direction of the principal. Reflecting the functional approach taken to the concept of undertaking, however, the CJ had held that it only with regard to the market on which the agent

US, for example, partners, officers and employees of partnerships are also treated as constituent elements of a whole, see e.g. *Devlin and Jacobs* (n 15).

²³ Case C-22/98, *Criminal Proceedings against Becu* [1999] ECR I-5665, para 26. For the view that employees are not undertakings as they do not engage in economic activity (work and labour is distinct from the provision of goods and services), see e.g., *Jacobs AG in Case 67/96, Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1996] ECR I-05457. See also e.g., *CNSD* [1993] OJ L203/27, Cases C-180-184/98, *Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten* [2000] ECR I-6451 and *Townley* (n 17).

²⁴ Case C-266/93, *Bundeskartellamt v Volkswagen and VAG Leasing GmbH* [1995] ECR I-3477, paras 18-19. See also Case C-279/06, *CEPSA* [2008] ECR I-6681, para 35 relying on Case C-217/05, *CEES* [2006] ECR I-11987, para 38. Contrast, Cases 46&58/64, *Consten and Grundig* [1966] ECR 299 (where the CJ rejected the argument that a vertical agreement did not constitute an agreement between undertakings as the supplier and distributor were not on an equal footing and were not competitors and distinguished this situation from that in which a producer includes within his undertaking the distribution of his own products by some means, e.g., through a commercial representative, “These situations are distinct in law and, moreover, need to be assessed differently, since two marketing organisations, one of which is integrated into the manufacturer’s undertaking while the other is not, may not necessarily have the same efficiency”, 340).

²⁵ *CEPSA* (n 24), para 36 relying on *CEES* (n 24), para 46.

offers its principal's goods or services to potential customers that the agent is regarded as an auxiliary part of the principal's business. In contrast, the agent is normally regarded as an independent operator and undertaking with regard to the market on which it offers its agency services to potential principals.²⁶

The CJ has also held that, in the context of parent-subsidiary relationships, entities will constitute a single economic unit if a subsidiary "enjoys no economic independence"²⁷ or if the entities "form an economic unit within which the subsidiary has no real freedom to determine its course of action on the market"²⁸ but carries out the instructions issued by the parent company controlling them. Consequently, agreements and concerted practices between the parent and subsidiary forming part of the same economic unit, and concerned merely with the internal allocation of tasks between the entities,²⁹ fall outside of Article 101 as there is no agreement between economically independent entities. In *Viho*,³⁰ for example, the CJ confirmed that the Commission had been correct to reject a complaint that Parker's distribution agreements concluded with its 100% owned subsidiaries infringed Article 101. Parker controlled the sales, advertising and marketing policy of its subsidiaries which had no real autonomy to determine their course of action and thus formed a "single economic entity" with them. In *Hydrotherm Gerätebau GmbH v Compact del Dott Ing Mario Andreoli & C Sas*,³¹ the CJ also confirmed that a natural person, a limited partnership and another firm constituted (and so counted as) a single economic unit when they were all controlled by the same natural person.³²

²⁶ *CEPSA* (n 24), para 41; *CEES* (n 24), paras 62–3.

²⁷ Case 22/71, *Béguelin Import v GL Import-Export* [1971] ECR 949, para 8.

²⁸ Case 15/74, *Centrafarm BV and Adnaan De Peijper v Sterling Drug Inc* [1974] ECR 1183, para 41. See also Case 170/83, *Hydrotherm* (n 11), para 11; Case T-11/89, *Shell v Commission* [1992] ECR II-884, para 311; *Wils* (n 17).

²⁹ Case 15/74, *Centrafarm BV* (n 28 above), para 41 (the Commission had submitted that Art 101 was not applicable to agreements where their sole object was the allocation of tasks within the same economic unit but that it would apply to agreements having a wider scope, see also *Trabucchi AG*) and Case 30/87 *Bodson v Pompes Funèbres* [1988] ECR 2479, para 19.

³⁰ Case C-73/95 P, *Viho Europe BV v Commission* [1996] ECR I-5457.

³¹ Case 170/83 (n 11).

³² See also n 11 and accompanying text. The terminology used in this case is rather confusing however as the judgment also refers to the partnership and the firm as undertakings and so concludes that the block exemption regulation can be applied "even if several legally independent undertakings participate in the agreement as one contracting party provided that those undertakings constitute an economic unit for the purposes of the agreement", para 12. This seems to suggest that

Although the rationale underpinning these judgments has not been made explicit, in *Hydrotherm* the CJ stated that where entities form part of the same economic unit, competition between the parties is impossible.³³ The Court thus seems to consider that the arrangements between such entities resemble the internal workings of the firm and that the unity of purpose that they pursue renders meaningless the application of Article 101 to agreements between them (there is no competition to be protected³⁴). If the subsidiary's strategy is determined by the parent, the parent and subsidiary will pursue a common course irrespective of the existence of any agreement between them: "the unified conduct on the market of the parent company and its subsidiaries takes precedence over the formal separation between those companies as a result of their separate legal personalities".³⁵ A similar point was made by the US Supreme Court in *Copperweld Corporation v Independence Tube Corporation* when it held that a parent and its wholly-owned subsidiary were incapable of conspiring with one another for the purposes of section 1 Sherman Act:

"With or without a formal 'agreement' the subsidiary acts for the benefit of the parent, its sole shareholder. ... If a parent and a wholly owned subsidiary do 'agree' to a course of action, there is no sudden joining of economic resources that had previously served different interests, and there is no justification for §1 scrutiny. ... They share a common purpose whether or not the parent keeps a tight rein over the subsidiary; the parent may assert full control at any moment if the subsidiary fails to act in the parent's best interests".³⁶

2. The breadth of the economic unit

a. Elucidating the meaning of an undertaking in attribution of liability cases

The cases establish that agreements between legally distinct entities may be treated as the independent action of a single economic unit but do not indicate how broadly the

the undertaking as an economic unit can be comprised of a number of undertakings, which are natural or legal persons, see also Case 15/74, *Centrafarm BV* (n 28), para 32 and Case T-102/92, *Viho Europe BV v Commission* [1995] ECR II-1117, paras 47-53, see C.3.a below.

³³ Case 170/83 (n 11), para 11, but see also n 24.

³⁴ For an interesting discussion of the cases dealing with this issue and the principles underpinning them see *Lenz AG* in Case C-73/95 P, *Viho* (n 30), paras 31-73, especially para 67.

³⁵ Case T-102/92, *Viho* (n 32), para 50.

³⁶ 467 US 752, 769, 767- 772 (1984).

doctrine applies and, in particular, exactly when a subsidiary has sufficient independence to prevent the doctrine from applying: ie precisely when it excludes from the scope of Article 101 arrangements between a parent company and a subsidiary (whether wholly, partially or jointly owned) and/or between two subsidiaries wholly, or partially, owned by the same parent company (“sister corporations”).

Although there is relatively little case-law which deals with the question of when an agreement falls outside the ambit of Article 101 on the basis of the single economic unit principle (and so when the concept of an undertaking affects the substantive reach of Article 101), the doctrine has been utilized in other scenarios³⁷ and, importantly, in attribution of liability cases, as a mechanism for imposing liability and responsibility for an infringement of the competition law rules committed by a subsidiary on its parent company. The rationale relied on for such an application is this: a subsidiary commits a breach of Article 101 or 102; the subsidiary forms part of the same undertaking/economic unit as the parent if it does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company; the Articles 101 and 102 prohibitions are directed at “undertakings”; decisions penalising breaches of competition rules must be addressed to, and fines imposed on, persons, natural or legal; the economic unit doctrine allows³⁸ the conduct of a subsidiary to be imputed to the parent which forms part of the same undertaking. Indeed, it is clear that the

³⁷ E.g.: (i) when determining how many parties there are to an agreement, see *Hydrotherm* (n 31) (in this case the application of the block exemption was dependent upon there only being two undertakings party to the agreement. The agreement was concluded between Mr Andreoli and the two firms he controlled and Hydrotherm. The CJ confirmed that Mr Andreoli and the firms he controlled formed an economic unit and consequently counted as only one undertaking so the block exemption could apply); (ii) for calculating market shares in substantive analysis; and (iii) for determining the maximum level of the fine that can be imposed for breaching the competition law rules (which can be up to 10% of the undertakings total turnover in the previous year of business, Reg 1/2003 [2003] OJ L1/1, art 23(2)), see also C.3.a below. It may also be possible that damages actions can be filed against a member of the economic unit where another member of that unit has committed a violation, see e.g., *Cooper Tire & Rubber v. Shell Chemicals* [2009] EWHC 2609 (Comm), *Provimi v Aventis* [2003] EWHC 961 and Cases A3/2011/2816, *Toshiba Carrier UK Ltd v KME* and C3/2011/1658(A) *Emerson Electric Co & Ors v Morgan Crucible Company PLC* (these two latter cases are currently pending before the Court of Appeal. They raise the question of whether a victim of a cartel can bring an action for damages in the English courts against a UK subsidiary of a parent that was found to have violated Article 101, even if that subsidiary was not an addressee of the decision).

³⁸ See Case 48/69, *Imperial Chemical Industries v Commission (Dyestuffs)* [1972] ECR 619, paras 11 and 131-140 and Case 6/72, *Europemballage and Continental Can v Commission* [1973] ECR 215.

Commission's policy in many cartel infringement cases is now, wherever possible, to attribute liability to parent companies. This policy maximizes the total level of fines both by augmenting the maximum cap on the level of fines which can be imposed (which is 10% of the turnover of the undertaking as a whole³⁹) and by enhancing the risk of a finding of recidivism, a deterrence uplift and civil damages' claims.⁴⁰

The application of the doctrine in this way has proved controversial, prompting some to complain that such a use is unconvincing, illogical and breaches fundamental principles, in particular of personal responsibility and limited liability, and the presumption of innocence.⁴¹ Nonetheless, the EU courts have, to date, generally affirmed the Commission's approach adhering to the view that as the "parent company and its subsidiary form a single economic unit and therefore a single undertaking" a decision imposing fines can be addressed "to the parent company, without having to establish the personal involvement of the latter in the infringement."⁴² Responsibility for the competition law infringement falls to the undertaking/ economic unit as a whole.⁴³

The greater volume of cases decided in this area shed light on the question of how, in this context at least, it is determined whether or not the subsidiary and parent constitute part of the same economic unit.⁴⁴ The key issue identified in the cases is whether the parent is able to, and does, exercise decisive influence over the policy and direct the conduct of its subsidiary, so that the subsidiary does not enjoy real autonomy or independence in determining its course of action in the market.⁴⁵ Critically, the cases establish that (i) where a parent holds a 100% shareholding in a

³⁹ See nn 37 and 126.

⁴⁰ The Commission has discretion as to whether to hold the parent jointly and severally liable with the corporate entity directly involved in the infringement. To maximise the deterrent effect of fines, the Commission's "invariable policy today is to hold a group parent automatically responsible for cartel infringements committed down the line by its wholly owned subsidiaries." Joshua, Botteman & Atlee (n 16), 3-4.

⁴¹ See e.g., articles cited in n 16, *Ooms Avenhorn Holding BV v The Netherlands* appl no 40490/11 (appeal to the European Court of Human Rights) and further sections C and D.

⁴² *Akzo Nobel* (n 11), paras 58-59.

⁴³ "The parent's awareness of, still less its participation in, the subsidiaries' wrongdoing has nothing to do with it. The acid test is whether together they compose one and the same undertaking": Joshua, Botteman & Atlee (n 16), 3.

⁴⁴ See nn 27&28 above.

⁴⁵ *Dyestuffs* (n 38), paras 125-146.

subsidiary, or a de minimis amount less than 100%,⁴⁶ a rebuttable presumption that the parent does in fact exercise decisive influence over the commercial policy and conduct of its subsidiary applies;⁴⁷ and (ii) the exercise of decisive influence can be ascertained in other situations “on the basis of a body of factual evidence, including, in particular, any management power exercised by the parent company or companies over their subsidiary”.⁴⁸

b. Defining control and decisive influence

The concepts of control and decisive influence utilized in the cases are also concepts that are used in EUMR to determine whether a “concentration” (or merger) occurs. The term concentration catches mergers between independent undertakings and changes in, or acquisitions of, control of an undertaking – that is situations where one or more undertakings acquire control (sole or joint) of the whole or part of one or more other undertakings through the acquisition of rights which confer the possibility of exercising decisive influence on that other (most commonly from the acquisition of shares).⁴⁹ Control and decisive influence in the EUMR context has been interpreted broadly to include sole or joint control acquired on a de jure or de facto basis. Positive (sole) control is acquired where an undertaking acquires rights which allow it to determine the strategic direction of another undertaking. Negative control arises where rights acquired allow the rights holder to block important strategic decisions to be followed by the subsidiary but not actually to decide strategic direction.⁵⁰ It includes the creation of JVs which are jointly controlled by two or more parents and

⁴⁶ See e.g., Case T-299/08, *Elf Aquitaine v Commission*, 17 May 2011.

⁴⁷ *Akzo Nobel* (n 11), para 60, Cases C-201&216/09 P, *ArcelorMittal Luxembourg SA v Commission* 29 March 2011, and *AEG v Commission* [1983] ECR 3151, para 50. It is for the parent to rebut the presumption by submitting 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: *ibid*, para 65. The Commission is obliged to consider the rebuttal evidence and if it fails to do so its decision will be overturned, see eg Case T-185/06, *L’Air liquide SA v Commission* 6 June 2011.

⁴⁸ Case T-132/07, *Fuji Electric System Co. Ltd v Commission* 12 July 2011, para 181 relying on Case T-314/01, *Avebe v Commission* [2006] ECR II-3085, para 136.

⁴⁹ EUMR, art 3(2).

⁵⁰ The EUMR also applies to changes in the quality of control.

which perform on a lasting basis all the functions of an autonomous economic entity (a “full-function’ JV which is fully autonomous from an operational point of view”).⁵¹

The view could be taken that to ensure consistency and symmetry between the EU competition law provisions, the principles to be applied to determine whether a parent and its subsidiary form part of a single economic unit (and undertaking) should relate to, and be consistent with, those which apply when determining whether there is a concentration within the meaning of the EUMR. Wouter Wils,⁵² for example, has argued that to ensure a coherent competition policy Article 101 should not apply to arrangements between companies which are linked in such a way that the links would amount to the acquisition of *sole* control within the meaning of the EUMR. If one firm acquires sole control over another (with the possibility of exercising decisive influence over that other) so that a concentration is considered to have occurred, that should be sufficient, if the merger is authorised, to conclude that, post-merger, the previously separate entities now operate as an integrated single undertaking. In his view, therefore, the notion of undertaking under Article 101 should coincide with, and relate to, the notion of sole control under the EUMR so that both coincide with the economic notion of the firm the distinctive characteristic of which is “the existence of authority or the power to exercise control over people and physical assets”⁵³.

Although the cases dealing with the concept of undertaking in attribution of liability cases have not generally sought guidance from EUMR practice,⁵⁴ they have extended the notion of control to cover situations of both sole and joint control.

⁵¹ Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings [2008] C95/1, para 61 and IV. Joint control arises where no one shareholder has the power to determine the strategic decision in the subsidiary but where two or more shareholders may block actions which determine the strategic commercial behaviour of the JV and must reach a common understanding in determining its commercial policy.

⁵² Wils (n 17).

⁵³ *ibid.* Wils thus proposes a common notion of undertaking which flows through Article 101, 102 and the EUMR. The theory of the firm derives from the writing of Ronald Coase, “The Nature of the Firm” 1937 *Economica* vol 4 (consisting “of the system of relationships which comes into existence when the direction of resources is dependent on an entrepreneur”. Resource allocation within a firm is not guided through prices (as in the market) but through direct managerial control. In economics therefore a firm is characterised as a single decision-taker and pursues a single goal (of profit maximisation)).

⁵⁴ But see n 64 and accompanying text, Commission’s Draft Horizontal Co-operation Guidelines, SEC(2010) 528/2, para 11, n 7 (although this part of the paragraph was not repeated in the final version of the guidelines).

Indeed, they indicate that conditions may be satisfied where a parent has sole positive control over its subsidiary acquired on a de jure basis, whether through a 100% holding,⁵⁵ the holding of a majority interest⁵⁶ or the holding minority interest in a subsidiary which is allied to rights greater than those normally granted to minority shareholders.⁵⁷ Further they have held that entities may form an economic unit where a parent has negative control over its subsidiary, at least where two or more parents have negative control over their JV and so cooperate to determine the JV's commercial policy – that is, in situations where the parents have the power to exercise, and have actually exercised, *joint control* over a JV. In *Avebe*⁵⁸ the GC equated the situation of both Akzo and Avebe, parents holding a 50% stake in their jointly controlled JV, Glucona, as analogous to the situation in which a single parent company held 100% of its subsidiary for the purpose of establishing the presumption that the parent company actually exerted a decisive influence over its subsidiary's conduct. Thus it concluded that the Commission had not erred in holding that, because of the close economic and legal links between Glucona, Akzo and Avebe, Avebe could be held liable for Glucona's unlawful conduct and that "Glucona, on the one hand, and Akzo and Avebe, on the other, do form an economic unit ... in the context of which the unlawful conduct of the subsidiary may be imputed to the parent companies, who become liable by virtue of the fact that they in reality control its marketing policy."⁵⁹

In *Avebe* the JV did not have legal personality and the parents had knowledge of the infringing conduct. The GC affirmed the principle, however, in *Fuji*⁶⁰ and in

⁵⁵ See n 47.

⁵⁶ "It is generally the case that if a parent company holds a majority interest in the subsidiary's share capital, that can enable it actually to exercise a decisive influence on its subsidiary and, in particular, on the subsidiary's market conduct". Case T-141/89 *Tréfileurop Sales SARL v Commission* [1995] ECR II-791. See also Cases 6,7/73, *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission* [1974] ECR 223 (parent and subsidiary in which the parent held a 51% share, were to be treated as an economic unit).

⁵⁷ *Fuji Electric* (n 48), para 183 (even a minority interest may enable a parent company "actually to exercise a decisive influence on its subsidiary's market conduct, if it is allied to rights greater than those normally granted to minority shareholders in order to protect their financial interest and which, when considered in the light of a set of consistent legal or economic indicia, are such as to show that a decisive influence is exercised over the subsidiary's market conduct.").

⁵⁸ *Avebe* (n 48), especially paras 138-39.

⁵⁹ *Avebe* (n 48), para 141.

⁶⁰ *Fuji Electric* (n 48).

Dow Chemical (and the related case of *EI du Pont de Nemours*).⁶¹ In *Fuji* the Court concluded that the Commission had demonstrated that Fuji actually exercised a decisive influence on the market conduct of its JV, on the basis of factual evidence including management power exercised,⁶² and was fully entitled to hold Fuji jointly and severally liable with the JV for the infringement. Further, in *Dow* the GC upheld the Commission's finding that Dow and EI Du Pont were jointly and severally liable for the infringement of their JV (the creation of which had been approved under the EUMR) and formed part of the same economic unit with it. Relying amongst other things⁶³ on the fact that the Commission had found that they had acquired joint control of the JV when appraising it under the EUMR,⁶⁴ the Court agreed that they had the power to jointly control their JV and further that, in the light of all the economic, legal and organizational links, control had actually been exercised. In so doing the GC specifically rejected the argument that as the parents merely exercised joint negative control they only had a right of veto over the commercial strategy of the JV and not the power to exercise decisive influence over its day-to-day management:

“The ‘negative’ nature of the joint control is not sufficient to preclude the exercise of decisive influence over [JV]. Even if parent companies are not able to impose decisions on their joint venture, they are able to prevent their joint venture from taking certain decisions and thereby exercise decisive influence

⁶¹ Case T-77/08, *The Dow Chemical Company v Commission* 2 Feb 2012, Case C-179/12 P , judgment pending (Dow has appealed on the grounds that it did not exercise decisive influence of the JV and so did not participate in the infringement committed by it and that the GC had misinterpreted the concepts of a single economic unit, of a single undertaking and of the exercise of decisive influence) and Case T-76/08, *EI du Pont de Nemours v Commission*, 2 February 2012, Case C-172/12 P , judgment pending.

⁶² For example the master agreement on the creation of the JV established that the founding companies had to agree on important decisions relating to the JV's management and business and there was considerable overlapping senior management between the parent and JV. The Commission had found that the factual record established that Hitachi and Fuji were able to exercise and have actually exercised a decisive influence with regard to the involvement of the JV in the cartel activities and that the JV did not determine autonomously its market behaviour, but followed the commercial practices and behaviour established by Hitachi and Fuji. “By transferring their GIS interests to [the JV], Hitachi and Fuji were in effect using [JV] as a vehicle to continue their long standing involvement in the cartel”.

⁶³ E.g., the fact that each had the right to participate on a Members' Committee which approved certain matters pertaining to the strategic direction of the JV, they had both withdrawn from the Chloroprene Rubber market and participated on it only through their JV. Net profits or losses of JV were allocated in equal proportions to the two parents.

⁶⁴ Case IV/M.663

over its business strategy ... The ‘negative’ nature of the control that the applicant held over [JV] did not therefore prevent it from exercising over [JV] sufficient decisive influence to enable the Commission to impute to it the unlawful conduct of that joint venture”.⁶⁵

The GC also held that the fact that the Commission had found that the JV was an autonomous full-function JV for the purposes of the EUMR⁶⁶ did not mean that it was autonomous in the sense that it was free from the exercise of decisive influence by its parent on its commercial conduct and policies. The operational autonomy required of full-function JVs under the EUMR thus does not “mean that the joint venture enjoys autonomy as regards the adoption of its strategic decisions (and that it is not therefore under the decisive influence exercised by its parent companies for the purposes of the application of Article [101])”.⁶⁷ The question of whether the GC has correctly interpreted the concepts of undertaking, economic unit and decisive influence is now pending for resolution before the CJ.

Although the terms control and decisive influence have been defined broadly in these undertaking cases, they are not clearly identical to those utilized in the EUMR context. Not only do they extend to cover all jointly controlled JVs (whether or not created as an autonomous full-function JV or another JV falling within the jurisdiction of, and cleared under, the EUMR⁶⁸) but it has yet to be decided if they extend, for example, to sole negative control.⁶⁹ Further, in contrast to the position under the EUMR where it is necessary only to assess whether rights to be acquired give a parent the *possibility* of exercising decisive influence over the subsidiary,⁷⁰ the cases have consistently stressed that such a possibility is not enough - it must also be considered whether that power has *actually been exercised* i.e. whether the persons on

⁶⁵ *Dow* (n 61), para 92.

⁶⁶ See further section (e) below.

⁶⁷ *Dow* (n 61), para 93.

⁶⁸ The finding of economic unity in these cases stemmed simply from the exercise by the parents of joint control and decisive influence over the conduct of the JV: its operational autonomy and the question of whether its creation had been approved under the EUMR or was consistent with Article 101 seemed to be irrelevant, see also e.g., *Candle Waxes*, 1 October 2008, para 481.

⁶⁹ But see n 65 and accompanying text.

⁷⁰ That is, its ability to control the strategic commercial behaviour of the undertaking concerned, on a de jure or de facto basis, through its shareholdings, property rights, assets, and/or through contracts and shareholders agreement, EUMR, art 3(1)(b) and (2) and Jurisdictional Notice (n 51), para 16.

whom liability is to be imposed “either directly managed that undertaking or in fact exercised control over the persons who were managing that undertaking and thereby determined their conduct on the market”.⁷¹ The extent to which this latter requirement in fact constitutes a material difference is controversial, however. In particular, in some scenarios the question of whether power has actually been exercised appears to be inferred from the potential/power to do so. For example, it has been seen that in cases where the parent owns 100%, or a de minimis amount less, of the shareholding in the subsidiary it is presumed that decisive influence has been exercised and it is uncertain whether, and if so how, that presumption can be rebutted.⁷² Further, even in cases of smaller shareholdings it seems that actual decisive influence may be inferred from evidence deriving from the organisational and economic links between the entities and the potential to exercise decisive influence. Indeed, as it seems clear that actual decisive influence does not necessarily have to result from specific instructions on elements of commercial policy but can arise even when a parent does not make use of any actual rights of co-determination and refrains from giving specific instructions or guidelines on individual elements of a commercial policy⁷³ it appears that the power to exercise decisive influence will often be the determining factor.

C. A SINGLE CONCEPT OF AN UNDERTAKING?

1. Support for a single concept of an undertaking in EU competition law

The case-law explored in section B suggests that the concept of an undertaking is a relatively broad one centred on the notion of control and encompassing:

- (a) Natural persons;
- (b) Persons bound together by a contractual relationship which results in one person working for and under the direction of another and so being integrated within that

⁷¹ “It must be pointed out in that regard that, according to that case-law and contrary to the Commission's assertions ..., the Commission cannot merely find that an undertaking “was able to” exert such a decisive influence over the other undertaking, without checking whether that influence actually was exerted. On the contrary, it follows from that case-law that it is, in principle, for the Commission to demonstrate such decisive influence on the basis of factual evidence, including, in particular, any management power one of the undertakings may have over the other ...” *Avebe* (n 48 above), para 136.

⁷² See *Joshua, Botteman & Atlee* (n 43) and *ArcelorMittal* (n 47), Bot AG.

⁷³ See eg *Akzo Nobel* (n 11), para 73, *Kokott AG*, paras 89-93 and *Dow* (n 61), paras 77, 81 and 101. This has led some firms to complain that the rules in this area breach the presumption of innocence from which they benefit in EU competition law.

other (for example, an employment or agency contract) or one person controlling the behaviour of another;⁷⁴

- (c) A parent and a subsidiary, where the latter has no freedom to determine its course of action or economic independence as the parent has sufficient rights to exercise, and does actually exercise, positive control over its behaviour (for example, where the parent owns 100% in the share capital in the subsidiary, a majority interest which enables it actually to exercise a decisive influence on its subsidiary or a minority interest which enables it to exercise a decisive influence on its subsidiary's market conduct, because it is allied to rights greater than those normally granted to minority shareholders);
- (d) (Possibly) a parent and a subsidiary, where the latter has sufficient rights to veto strategic decisions of the latter, and actually exercises such negative control over its behaviour;
- (e) A parent and all subsidiaries which are controlled (within the meaning of (c) or (d) above) by the same parent;
- (f) A JV and parents who have the power to, and do actually, exercise jointly control and decisive influence over the JV's behaviour.

A majority of the case-law in this area has, however, arisen in the context of proceedings relating to the attribution of liability to parents for the behaviour of their subsidiaries. An essential issue, therefore, is whether the notion of an undertaking is the same in all contexts and, in particular, whether the principles developed in the "attribution of liability" cases can be read across and applied to a situation where the matter at issue is the "substantive reach" of Article 101 (and vice versa)?

Although it will be seen that a strong argument could be made that there should be a context-specific approach to the concept of an undertaking,⁷⁵ the cases do

⁷⁴ See e.g., Jurisdictional Notice (n 51), para 20 (suggesting that for the purposes of the EUMR certain contractual relationships may be sufficient to give one undertaking control over another – e.g. a long term supply agreement leading to a position of economic dependence, but not a franchising arrangement). See also the Commission's decision in *Bananas* where the Commission found that the combination of a partnership and distribution agreement was sufficient to give Del Monte the possibility to exercise decisive influence on the way Weichart ran its business and that Del Monte did exercise such influence, paras 383-385.

⁷⁵ In e.g., Singapore, the Competition Commission has held that two entities may not form a single economic entity in one context (e.g. where the issue is whether agreements between the entities should be excluded from its prohibition of anticompetitive agreements) even though they may do

generally suggest that the principles apply to both situations without distinction.⁷⁶ First, the cases all hinge on the interpretation of the term “undertaking”, without any suggestion that the concept should be considered differently in differing scenarios. Secondly, in *Flat Glass*⁷⁷ the GC clarified that the term “undertaking” has the same meaning in Article 102 as to the one given to it in the context of Article 101 and in *Hydrotherm*⁷⁸ the CJ held that “in competition law, the term ‘undertaking’ must be understood as designating an economic unit ...”. Thirdly, in both *Dyestuffs*⁷⁹ and *Viho*,⁸⁰ the CJ held that the consequence of the economic doctrine was both that Article 101(1) was inapplicable in the relationship between the entities within it and that the actions of the subsidiary could be attributed to the parent company.⁸¹ Fourthly, in a number of cases there has been cross-referral between the lines of cases. In *AKZO Nobel*,⁸² for example, the General Court (GC) relied on *Viho* as a case providing authority as to the type of evidence relevant when assessing whether a

so in another context (e.g. where the issue is whether to hold one of the companies liable for the other’s competition infringement or whether to treat them as a single economic entity for the purposes of analysing the competitive effects of a merger), see CCS 400/003/06, *Qantas-Orangestar Cooperation Agreement* 5 March 2007.

⁷⁶ See also P Roth QC and V Rose, *Bellamy & Child: European Community Law of Competition* (OUP, 6th Edn, 2008), 2.017 (setting out the view that the principles established by the case law apply without distinction to both situations) and J Faull and A Nikpay (eds), *The EC Law of Competition* (2nd edn, OUP 2007) 3.89.

⁷⁷ Joined Cases T-68, 77-78/89, *Società Italiano Vetro SpA v Commission* [1992] ECR II-1403, at paras 357–8.

⁷⁸ Case 170/83 (n 11), para 11. See also 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, para 11, n 8.

⁷⁹ *ICI* (n 38), paras 132-36

⁸⁰ *Viho* (n 30) para 16. In Case T-102/92, *Viho* (n 32) the GC also relied on cases concerning parental liability in its judgment upholding the Commission’s conclusion that agreements between Parker Pen and its subsidiaries fell outside of Article 101(1). Indeed it concluded that the Commission had been correct in finding that because the subsidiaries’ conduct could be *imputed* to the parent that the integrated distribution system fell outside of Article 101.

⁸¹ See *ArcelorMittal* (n 47), Bot AG, para 178 (the concept of undertaking “has the consequence of excluding the application of Article 101(1) TFEU to agreements between a subsidiary and its parent company, since there is no agreement ‘between undertakings’” and of allowing the conduct of a subsidiary to be attributed to a parent where the latter does not determine its market behaviour autonomously).

⁸² Case T-112/05, *AKZO Nobel v Commission* [2007] ECR II-5049, paras 63-64. See also *Fuji Electric* (n 48), para 180 and *Dow* (n 61), para 73.

parent exercises decisive influence over a subsidiary. This aspect of the Court's judgment was upheld by the CJ.⁸³

The cases do therefore provide considerable support for the view that a single concept of an undertaking exists for competition law purposes and, consequently that, in line with the attribution of liability cases, the following conduct is to be characterised as unilateral and not the joint conduct of two or more undertakings: agreements between a parent and subsidiary (where the former exercises decisive influence over the behaviour of the latter); agreements between sister companies;⁸⁴ and the conduct and operation of a JV where the latter forms "part of one undertaking with each of the parent companies that jointly exercise decisive influence and effective control over it".⁸⁵ Because of the functional approach taken to the concept of an undertaking, however, it would seem that any exclusion of conduct from Article 101 would be dependent upon the conduct at issue relating to the internal working of, or the internal allocation of responsibilities within, the economic unit.⁸⁶ In the context of a JV, this would suggest that only conduct inherent to the working and operation of the JV falls outside of Article 101.⁸⁷ The conduct of the JV, when acting within its scope, would thus be regarded as the conduct of a single entity and Article 101 should not apply "to agreements between the parent and such a joint venture ... Article 101 could, however, apply to agreements between the parents outside the scope of the joint venture".⁸⁸ In these substantive reach cases, therefore, it may be that the question

⁸³ *Akzo Nobel* (n 11), paras 72-78.

⁸⁴ 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, para 11 ("Horizontal Co-operation Guidelines") ("the same is true for sister companies, that is to say companies over which decisive influence is exercised by the same parent company. They are consequently not considered to be competitors even if they are both active on the same relevant product and geographic markets.")

⁸⁵ Draft Horizontal Co-operation Guidelines, (n 54), para 11 (this part of the paragraph was not repeated in the final version of the Guidelines, however). But see also eg, Case No.IV/M.527 *Thomson CSF/Deutsche Aerospace AG* (1994), para 8.

⁸⁶ See nn 34&26 above, but see *Viho* (n 30), paras 14-18 and *Wils* (n 17), 107.

⁸⁷ This of course leaves a difficult line to be drawn between conduct relating to the working of the economic unit (exempted from Article 101) and that which goes beyond it (falling within Article 101). Unilateral conduct could be caught by Art 102, however.

⁸⁸ "and with regard to the agreement between the parents to create the joint venture", Draft Horizontal Co-operation Guidelines, (n 54), para 11 (this part of the paragraph was not repeated in the final version of the Guidelines, however).

of whether the entities are acting as a single undertaking will turn on the complex question of whether the conduct limits competition among the parents and the JV outside of its core operations.⁸⁹

2. Factors militating against a single concept of an undertaking: concerns about the breadth of the current case-law and inconsistencies

a. The breadth of the principle expounded

Although recognition of a single concept of an undertaking in EU competition law would provide greatest coherence to the system, a number of concerns potentially result from the conclusion that the notion of an undertaking, at least as it has currently been defined, is the same in each line of cases. Not only do the attribution of liability cases seem to push the concept to a broad limit without specific reference to the underlying objectives of the doctrine or to its consequences for the reach and scope of Article 101, but the interpretation given in some of these cases is difficult to reconcile with other strands of jurisprudence and legislation.

b. Do the principles underlying the single economic unit doctrine in each line of cases dictate different outcomes?

It has been seen that in cases dealing with the substantive reach of Article 101, the policy appears to be to take outside of Article 101 arrangements which resemble the internal workings of a firm or arrangements between entities which are in any event bound to pursue a common policy on the market. In attribution of liability cases, however, the policy seems rather different. In the absence of exceptional circumstances, many legal systems are reluctant to look behind corporate personality⁹⁰

⁸⁹ See further n 134 and accompanying text and e.g. the view of the US government, ‘Brief for the United States and Amicus Curiae Supporting the Petitioner: *American Needle*,’ <<http://www.justice.gov/atr/cases/f250300/250316.htm>> pt 2, (a JV’s conduct could be unilateral under the antitrust laws if: (1) the parents had effectively merged the relevant aspect of their operations in a specific sphere (thereby eliminating actual and potential competition among the parents and between the parents and the JV in that operational sphere); and (2) the challenged restraint did not significantly affect actual or potential competition among the parents or between the parents and the JV outside their merged operations).

⁹⁰ In England & Wales, for example, “[t]here is no general principle that all companies in a group are to be regarded as one. On the contrary, the fundamental principle is that each company in a group of companies (a relatively modern concept) is a separate legal entity possessed of separate rights and liabilities” *Adams v Cape Industries* [1990] Ch 433, per Slade LJ. See also Bronckers & Vallery (n 16), 551 (“a recent, careful review of the law of Belgium, France, Germany, the United Kingdom, and the United States shows that, despite considerable differences in approach even within one and the same country, corporate veils are only pierced in the presence of particular

and to impose liability for the conduct of a company on its parents or shareholders. In the attribution line of cases therefore the crucial issue appears to be exactly when it is appropriate to ignore the legal personality of the entity that committed the infringement, to pierce the corporate veil and to impose liability on a parent for an infringement it did not itself commit (particularly where such liability may result in the imposition of punitive fines of a criminal nature).⁹¹ These two different underlying objectives would not necessarily seem to dictate the same answer to the question of what constitutes an economic unit.⁹²

In attribution of liability cases, for example, it is essential that the parent is found to have personal responsibility⁹³ for the infringement at issue – there must be some justification for lifting the corporate veil. Although the EU Courts have held that personal responsibility in competition cases derives not from the parent’s participation in, contribution to, or other awareness or involvement in the offence but from the responsibility of the undertaking as a whole for the breach,⁹⁴ they have also emphasized, in assessing liability, the importance of the parent’s actual control over the behaviour of the subsidiary. “Even if the parent company does not participate

circumstances: notably, intensive involvement of the parent in the subsidiary’s business, bankruptcy of the subsidiary caused by a parent’s conduct, or specific concerns about abuse or lack of good faith in the case at issue”, relying on Vandekerckhove *Piercing the Corporate Veil* (Kluwer, 2007)).

⁹¹ *Akzo Nobel* (n 11), Kokott AG, para 38 (“[i]n selecting criteria for attributing offences, both the sanctionative nature of the measures imposed and their purpose must be taken into account”).

⁹² For the view that the economic unit principle was transplanted uncritically into the law governing fines, see e.g., Hofstetter & Ludescher (n 16) (“Ignoring the fundamental concept of limited liability for subsidiary corporations, the Commission seems to espouse a system of ‘guilt by association’ which, to be sure, lacks a sound basis in EU antitrust law. The legal entry door used by the Commission is the – misinterpreted – construct of the corporate group as an “undertaking”).

⁹³ Given the nature of competition law infringements “and the nature and degree of severity of the ensuing penalties, responsibility for committing those infringements is personal in nature”, Case C-49/92, *Commission v Anic Partecipazioni SpA* [1999] ECR I-04125, para 78. For the view that antitrust fines should primarily be aimed at deterrence and therefore be based on fault, see Hofstetter & Ludescher (n 16) (“Absent any direct involvement in the antitrust violations of the top representatives of a corporation, fault on the part of the company should be defined as a deficiency in its compliance organisation”).

⁹⁴ *Ibid*, paras 56&77. For the view that the meaning of decisive influence has evolved from a general power to direct the subsidiary’s commercial policy into the virtually ineluctable consequence of the group’s structure alone, see n 43 and Thomas (n 16), II.B.4.

directly in the infringement, it exercises, in such a case, a decisive influence over the subsidiaries which have participated in it”.⁹⁵

This suggests that even though it is important that the parent and subsidiary are part of the same undertaking, this factor alone is not, or should not be, sufficient to impose liability – rather some fault or responsibility on the part of the parent is required. For example, the Commission has never sought to impute liability to a subsidiary for the conduct of its parent or to one sister corporation for the conduct of another (even if they can all be said to form part of the same economic unit). Rather, liability for an infringement by an entity within the economic unit is only imputed upwards to another entity which controls the behaviour of, or exercises decisive influence over, the entity in breach. In substantive reach cases, in contrast, the hierarchical relationship is not important. Rather, the doctrine can exclude arrangements both between sister corporations and arrangements between a parent and a subsidiary.⁹⁶

The requirement for personal responsibility on the part of the parent might also explain the condition set out in the cases that the parent must “actually” have exercised decisive influence of its subsidiary, and that the power to do so is not enough. Although evidence of actual exercise seems justifiable, and arguably essential, in this context,⁹⁷ it is questionable whether such evidence should be necessary in substantive reach cases where the issue is simply whether the entities at issue operate unilaterally as a single economic entity rather than jointly. In determining whether a parent and subsidiary would be likely to adopt a common course of conduct on the market it would seem important to focus only on the question of whether the parent has the potential to exercise control over the conduct of its subsidiary: even if the subsidiary does not act in the best interest of the parent, the

⁹⁵ *Akzo Nobel* (n 11), para 77: “In accordance with the principle of personal liability ... under which a person can be held liable only for his own acts ..., it falls, in principle, to the person managing the undertaking when the infringement was committed to answer for that infringement”; Case C-297/98 P, *SCA Holding v Commission* [2000] ECR I-10101, para 27; Case C-286/98 P, *Stora Kopparbergs Bergslags v Commission* [2000] ECR I-9925, para 37.

⁹⁶ This could be because in each case the conduct of the subsidiary is treated as the conduct of, and imputed to, the parent, see n 80 above.

⁹⁷ For the view that a presumption of parental liability for subsidiary conduct breaches fundamental principles of EU law, see authorities cited in n 16.

latter can always take full control and ensure that it does.⁹⁸ A requirement to establish actual exercise of control in substantive reach cases would thus seem to render “the legality of agreements between companies under the same control” dependent “on whether the agreement could be established to have been centrally ordered by the parent company” without serving “any intelligible competition policy objective”.⁹⁹

Conversely, it could also be argued that the notion of an undertaking might have a more expansive role to play in attribution of liability cases. For example, it has been seen that the Commission seeks where possible to attribute liability to parent companies in order to maximize the deterrent effect of the fines it imposes. This policy has driven the Commission to push the concept more broadly and to use it to impute liability to parents which jointly control the behaviour of a JV. Although this use of the doctrine and its extension is in itself extremely contentious, in *Dow* the GC confirmed that negative control and the power to prevent the infringing behaviour of a subsidiary or JV might in certain circumstances be sufficient to constitute control. The CJ’s view on this matter is now awaited. Even if this view were to be upheld by the CJ, it is questionable whether negative control should be sufficient to ensure that the parent and subsidiary pursue a common course of conduct – the rationale for excluding the application of Article 101 in substantive reach cases. Further, application of such a far-reaching concept of an undertaking extending, in particular to JVs, raises concern that the conduct of an entity controlled by a group of competitors, and used as a vehicle for cooperation between them, may escape Article 101 scrutiny and is difficult to reconcile with earlier precedent dealing specifically with the substantive reach of Article 101 and the treatment of JVs under it.

⁹⁸ Such an interpretation could avoid the rather circular situation where e.g., a contract could constitute a relevant factor in the assessment of whether the parent is actually exercising decisive influence over the subsidiary (and hence the determination of whether the agreement falls outside Article 101). If the parent has the possibility of exercising decisive influence and controlling the subsidiary’s conduct, it can exercise control irrespective of the agreement, see n 36 and accompanying text

⁹⁹ Wils (n 17), 107. As Wils points out, however, the case-law dealing with the substantive reach of Article 101 is ambiguous on this point. Some early cases do not seem to require more than the potential to exercise decisive influence, others seems to suggest that actual exercise might be necessary.

In *Centafarm* the CJ held that only agreements between entities belonging to the “same concern”¹⁰⁰ were excluded from Article 101. In line with this wording, the Commission seemed initially to have eschewed the idea that a JV and its parents form part of a single economic unit. In *IJsselcentrale*,¹⁰¹ for example, the Commission decided that a JV and its parent companies could not constitute a single economic unit as the behaviour of the firms within the group was not controlled by a single firm (they were not all part of the same concern): rather the behaviour of each parent was controlled independently. It thus rejected an argument that a cooperation agreement concluded between SEP, a company set up by four electricity generating companies as a vehicle for cooperation between them, and its parent companies fell outside of Article 101 on the grounds that the participating electricity generators together formed an economic unit, the components in “one indivisible public electricity supply system.”¹⁰² Rather, it held that the four companies did not belong to a single group of companies. “They are separate legal persons, and are not controlled by a single person, natural or legal. Each generating company determines its own conduct independently”¹⁰³.

In other cases the Commission also seemed to rule out application of the economic unit doctrine where a parent could not itself decisively influence the commercial strategy of the JV (suggesting that sole positive control is required before the exercise of decisive influence can be established and the ability of the JV to act independently/autonomously ruled out). In *Gosmé/Martell-DMP* the Commission concluded that DMP, a joint subsidiary of Martell and Piper-Heidsieck,¹⁰⁴ and Martell were independent undertakings within the meaning of Article 101 as Martell was not in a position to control the commercial activity of DMP.¹⁰⁵ Rather, it held only 50% of the capital and voting rights and was represented by only half the supervisory board

¹⁰⁰ n 28, para 41.

¹⁰¹ [1991] OJ L28/3.

¹⁰² *ibid* para 22.

¹⁰³ *ibid* para 24. Further, it could not be said that SEP formed an economic unit with one or more of the generating companies: “SEP is a joint venture controlled by its parent companies together.”

¹⁰⁴ [1991] OJ L185/21.

¹⁰⁵ *ibid* para 30.

members. In line with this approach the Commission held in *Rubber Chemicals*¹⁰⁶ that a JV, Flexys, did not constitute a single entity with the two parents that jointly controlled it. On the contrary, it held that as the creation of the JV had been approved by the Commission under the EUMR, the parents had withdrawn from the JV's market, neither parent had sole control over the JV and the JV could be presumed to be autonomous from its parents. Consequently, it "can be presumed to constitute a separate undertaking with respect to its parents".¹⁰⁷

These decisions reflect a more cautious approach to the concept of an undertaking and a reluctance to accept that cooperation through a JV should automatically escape antitrust scrutiny under Article 101. Indeed, as a core objective of Article 101 is to allow the detection, condemnation and elimination of "naked" cartel activity,¹⁰⁸ it seems important, in the context of JVs, to ensure that competitors are not able to manipulate business structures in a way which allows them to put unlawful coordination between them beyond the reach of the antitrust rules: entities should not be able to evade the rules on competition on account simply of the form in which they coordinate their conduct. To ensure that this principle is effective Article 101(1) specifically covers "not only direct methods of coordinating conduct between undertakings (agreements and concerted practices) but also institutionalised forms of cooperation, that is to say, situations in which economic operators act through a collective structure or a common body."¹⁰⁹ The concept of an association of undertaking has therefore been interpreted broadly to encompass entities used as an institutionalized mechanism for coordinating the members/ shareholders' conduct. It has been held to include trade associations, agricultural cooperatives, professional regulatory bodies, associations without legal personality, non-profit making associations and associations of associations, whether or not the entities have a legal

¹⁰⁶ 21 December 2005.

¹⁰⁷ Ibid, para 263.

¹⁰⁸ "An anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories or lines of commerce" OECD, Concerning Effective Action Against Hard Core Cartels C(98)35/FINAL, May 1998.

¹⁰⁹ Case C-309/99, *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1577, Léger AG, para 62, *aff'd* Case T-118/08, *MasterCard v Commission*, 24 May 2012, para 243.

personality or a corporate form (a privately held stock company or a publicly listed company).¹¹⁰

In a series of cases, for example, the rules of Visa¹¹¹ and MasterCard¹¹² have been regarded either as decisions of an association of undertakings or as agreements between the undertaking banks within the meaning of Article 101. In such circumstances the conduct of the “association of undertakings” is characterised as the joint conduct of the member/shareholders not as the unilateral conduct of a separate economic unit. Further, in “Joint selling of the media rights to the FA Premier League”,¹¹³ the Commission treated the arrangements put in place by the football clubs in the Premier League to sell media rights pertaining to Premier League Matches exclusively through the Football Association Premier League (“FAPL”)¹¹⁴ as joint conduct falling within the scope of Article 101(1). FAPL is “an association of undertakings, and action taken in relation to the media rights is therefore a decision by an association of undertakings.”¹¹⁵ The selling of the FAPL Company was thus analysed as “joint” selling which prevented the clubs from taking independent commercial action regarding the exploitation of the media rights and which could restrict output and create foreclosure problems on downstream markets. In none of these cases was the conduct treated as cartel behaviour automatically infringing the competition law provisions. Rather, the substantive antitrust scrutiny took account of

¹¹⁰ See eg Case 96/82, *IAZ International Belgium NV v Commission* [1989] ECR 2117; Case C-250/92 *Gøttrup-Klim* [1994] ECR I-564; Case C-309/99, *Wouters* (n 109); *UEFA* [2003] OJ L291/25; *EPI code of conduct* [1999] OJ L106/14 *MasterCard* case, *Europay (Eurocard-MasterCard)*, 19 December 2007 (the Commission rejected MasterCard’s argument that its public listing on the New York Stock Exchange had changed the organisation’s governance so fundamentally that any decision of its board no longer qualified as a decision of an association but rather constituted a “unilateral” act which each member bank bilaterally agrees to abide by, *aff’d MasterCard* (n 109)).

¹¹¹ Eg *Visa International* [2002] OJ L318/17.

¹¹² E.g. *MasterCard* (n 109&110).

¹¹³ [2006] OJ C7/18. See also *Deutsche Bundesliga* [2005] OJ L134/46.

¹¹⁴ FAPL is a private limited company governed in accordance with its Articles of association and the Rules and Regulations adopted by it. The shareholders of the FAPL are the clubs which from season to season participate in the Premier League competition. The Rules and Regulation grant FAPL the exclusive right to negotiate media rights agreements on behalf of the clubs. It may not enter into broadcast contracts without the prior approval by resolution of the clubs in a general meeting. See also Case T-193/02 *Piau v Commission*[2005] ECR II-209, paras 69-72.

¹¹⁵ See Notice published pursuant to Article 19(3) of Council Regulation No 17 concerning case COMP/C.2/38.173 and 38.453 - joint selling of the media rights of the FA Premier League on an exclusive basis [2004] OJ C 115/02, para 3.

the context of the case and the broader objectives of the venture. Nonetheless, the characterisation of the conduct as joint conduct (rather than the unilateral conduct of a single entity) allowed the antitrust scrutiny under Article 101 to happen.¹¹⁶

In these cases the Commission and Courts have been concerned with the question of whether, and if so how, Article 101 should be applied to the conduct of a JV or other venture/collaboration between actual or potential competitors on a market. The view could be taken that as they were adopted in this particular context, they provide greater weight and suggest a different approach to the concept of an undertaking than that adopted in the attribution of liability cases such as *Dow*. This view is also supported by the Commission's approach to the term undertaking in the context of the EUMR. The Merger Regulation does not apply to internal restructuring within a group of companies but covers only operations resulting in the acquisition of sole or joint control by one undertaking over another.¹¹⁷ The Commission states in its Jurisdictional Guidance that the EUMR applies to changes in quality in control, including a change from joint control to sole control.¹¹⁸ If a jointly controlled JV constitutes a single undertaking, however, then if one of two parents exits the JV there is no acquisition of sole control by the remaining parent over another undertaking as the parent and JV constitute one and the same undertaking.

An alternative view, however, could be that, that the concepts of an undertaking are the same in each line of cases but that in order to ensure that the workings and operation of a lawfully created JV is not hampered by meritless antitrust challenges (claiming, for example, that the JVs pricing decisions constitutes unlawful price fixing automatically violating Article 101¹¹⁹) the GC in cases such as *Fuji* and

¹¹⁶ Eg acceptance that FAPL and UEFA acted jointly on behalf of its members allowed the Commission to scrutinise both the horizontal and the vertical aspects of the joint selling. In the FAPL case, therefore, the Commission not only negotiated with the FAPL but with BSkyB to ensure that there were always two broadcasters of live premier league matches and that no one broadcaster could show all. See also *Visa* (n 111) and *MasterCard* (n 112).

¹¹⁷ Case IV/M.23, *ICI/Tioxide*, Jurisdictional Notice (n 51), paras 83–90.

¹¹⁸ “Decisive influence exercised alone is substantially different from decisive influence exercised jointly, since in the latter case the jointly controlling shareholders have to take into account the potentially different interests of the other party or parties involved”, Jurisdictional Notice (n 51), para 89.

¹¹⁹ See *Werden* (n 15) 705, (arguing that in the US lawful JV activity will otherwise be undermined by “meritless group boycott and price-fixing claims, which could erroneously be decided under the per se rule”).

Dow has carved out a specific exclusion from Article 101 for certain JVs¹²⁰ - that is, those that: (1) are lawful at their inception (either under the EUMR, national competition rules or Article 101),¹²¹ (2) are judged lawful at the time the conduct is challenged;¹²² and (3) where the conduct at issue is within the scope or core activity of the JV.¹²³ It has already been seen that this latter requirement appears essential in order to ensure that a swath of conduct which raises the antitrust dangers that Article 101 is designed to police is not to be carved out from it and a range of potentially exclusionary and collusive behaviour allowed to go unchecked.

3. Other Factors which add to a lack of clarity

a. Terminology

In a number of situations terminology is, or has been, used which confuses further the picture of what constitutes an undertaking. For example, in a number of earlier cases, the language adopted by the EU Courts appears to suggest that an economic unit is made up of “undertakings” and so is something distinct from the undertaking/persons of which it comprises.¹²⁴ More frequently, however, the judgments have emphasized the more traditionally accepted view that “the concept of an undertaking ... must be understood as designating an economic unit even if in law that economic unit consists of several persons, natural or legal”.¹²⁵ Those persons do not therefore themselves

¹²⁰ Indeed, in *Dow* (n 82), para 99 the GC rejected the applicant’s argument that it was not possible to apply the concept of a single economic entity on the basis that the Commission had adopted a different approach in the past (the GC referred however only to *Rubber Chemicals*, concerned with attribution of liability, and not e.g., *Gosmé/Martell*, concerned with the application of Article 101). *Dow* had no legitimate expectation that the Commission would not vary its previous decision-making practice.

¹²¹ As otherwise the creation of the JV would be unlawful and in certain circumstances void.

¹²² In the EU, a further concentration may occur if the parents enlarge the scope of a JV, see Jurisdictional Notice (n 51), paras 106-09.

¹²³ See PE Areeda, *Antitrust Law* (Aspen Publishers 1986) 348 (“once a joint venture is judged to have been lawful at its inception and currently, its decisions should be regarded as those of a single entity rather than the parent’s daily conspiracy on every purchase-sale-hiring-licensing choice”).

¹²⁴ See e.g., n 32, *Viho* (n 30), *Lenz AG, Case 66/86 Ahmed Saeed Flugreisen and Others v Zentrale zur Bekämpfung Unlauteren Wettbewerbs* [1989] ECR 803, para 35 (“Article [101] does not apply where the concerted practice in question is between undertakings belonging to a single group as parent company and subsidiary if those undertakings form an economic unit within which the subsidiary has no real freedom to determine its course of action on the market”), *Cases T-68, 77&78/89 SIV and Others v Commission* [1992] ECR II-1403, para 357 (Article 101(1) does not cover agreements or concerted practices between undertakings belonging to the same group if the undertakings form an economic unit).

¹²⁵ *Akzo Nobel* (n 11), para 55 and *CEES* (n 24), para 40.

constitute undertakings but form part of the larger undertaking as a whole. In line with this latter view, the term “undertaking” in Regulation 1/2003, for instance, is interpreted as referring to the economic unit as a whole, allowing decisions to be addressed to legal entities which form part of the infringing undertaking (even if they were not directly involved in the infringement) and permitting fines to be imposed up to the statutory maximum of 10% of the total turnover in the preceding year of business of each economic unit involved in the infringement.¹²⁶

In other Regulations and Notices, however, a different approach is sometimes adopted. For example, the block exemption for vertical agreements and the Commission’s Notice on Agreements, apply to certain agreements between two or more undertakings. In each case, however, it is clarified that the term “undertaking” shall include the undertaking’s respective “connected undertakings”. Connected undertakings are defined to include, for example, “undertakings” in which a party to the agreement, directly or indirectly, has the power to exercise more than half the voting rights, or has the power to appoint more than half of the supervisory board, management or has the right to manage the undertaking’s affairs.¹²⁷ Clearly these connected undertakings will, in most cases, be found to form part of the same economic unit/ undertaking as the party to the agreement. It does not seem correct, therefore, to use the terms “undertakings” or “connected undertakings” in this way. Although it is understood that definition is designed to provide legal certainty in the application of the respective Regulation/Notice, it is not entirely clear why a definition is required in this context but not in the context of Regulation 1/2003 and to what extent the definition can apply in so far as it differs from the definition of the term undertaking set out in the case-law of the EU courts. A similar approach is also taken in the context of the EUMR. Although when conducting its substantive assessment the Commission considers whether the merger between the merging undertakings/ economic units as a whole will significantly impede effective

¹²⁶ Reg 1/2003 (n 37), art 23(2), Case T-112/05, *Akzo Nobel* (n 82), para 90 (“[t]he maximum amount of 10% of turnover ... must be calculated on the basis of the total turnover of all the companies constituting the single economic entity acting as an undertaking for the purposes of Article [101 TFEU], since only the total turnover of the component companies can constitute an indication of the size and economic power of the undertaking in question ...”).

¹²⁷ Reg 330/2010, art 1(2), see also the Commission’s Notice on agreements of minor importance (de minimis notice), point 12(2).

competition in the common market,¹²⁸ the EUMR provides specifically that in calculating the turnover of the “undertakings concerned” for the purposes of determining Community dimension, the respective turnover shall be added together of the undertakings concerned and a number of entities including, for example, those undertakings in which the undertaking concerned, directly or indirectly either owns more than half the capital or business assets, or has the power to exercise more than half the voting rights etc.¹²⁹ Again, although this need for legal certainty is understood, the use of the term undertaking in this context and the way it is defined causes confusion as it suggests an approach to the concept of undertaking which is not evidently consistent with the notion as defined by the EU Courts.

b. Can an entity act jointly and unilaterally at the same time?

A further conceptual difficulty, and a particular feature perhaps of Article 101 which applies both to undertakings and associations of undertakings, is that some case-law suggests that an entity can be found to be acting both jointly with its parents/members and unilaterally as a single undertaking at the same time. In *Laurent Piau*,¹³⁰ for example, the GC held that although a sporting association constituted an association of undertakings it also constituted an undertaking in so far as it engaged in economic activity in a market itself. This reasoning is not easy, however. If the association is viewed as a single economic actor, the parents/members are viewed as part of that economic unit and not as separate undertakings. But if the parents are not undertakings; the sporting association cannot be an association of undertakings. Nonetheless, in *FA Premier League v QC Leisure*,¹³¹ an Article 101 challenge was launched before the UK courts to licensing agreements for premier league broadcasting rights concluded between FAPL and various national broadcasters. In

¹²⁸ See e.g. Thomas (n 16), 12.

¹²⁹ EUMR, art 5(4). With the aim of providing greater legal certainty in the application of the EUMR, this definition of control is different from, and more tightly defined than, the definition of control set out in Article 3(2) and described B.2.b above. Although the Commission invited comments as to whether the differences between the two meanings of control was problematic and whether it would be appropriate to harmonize the two provisions, no harmonization of the rules was in fact made, see 2001 Green Paper on the Review of Council Regulation (EEC) No. 4064/89, COM(2001) 745/6 final.

¹³⁰ Case T-193/02, *Piau v Commission* [2005] ECR II-209, para 69.

¹³¹ [2008] EWHC 1411 (Ch), para 365. The same issue also arose in *Murphy v Media Protection Services Ltd* [2008] EWHC 1666 (Admin), see Case C-429/08, *Murphy v Media Protection Services Ltd* [2010] OJ C100/10.

spite of the Commission's earlier characterisation of the FAPL as an association of undertakings, the FAPL was treated in these proceedings as an undertaking when considering whether the licensing agreement it had concluded with Greek broadcasters infringed Article 101(1). In the end, the characterisation may not have mattered as the CJ indicated, following an Article 267 reference to it, that exclusivity provisions incorporated within the licensing agreement, designed to prevent Greek broadcasters serving UK customers, violated Article 101.¹³² Had the FAPL decided to refuse to supply certain broadcasters, however, the distinction could have been material: it is difficult to establish that a unilateral refusal to deal by a dominant undertaking is unlawful. In contrast, a collective refusal to deal or boycott would be more likely to violate Article 101.

D. THE NEED FOR A REFINED APPROACH?

It has been seen that the interpretation of the notion of an undertaking as an economic unit has evolved in a series of cases arising in different contexts over a lengthy period of time. It has also been seen that, partly perhaps as a result of this piecemeal approach, it is not now easy to pull all of the strands of jurisprudence together and to reconcile the interpretation given to the concept of an undertaking in all cases, decisions, regulations and notices. It appears, therefore, to be an appropriate moment to take a step back and to look at the practice and approach to the term undertaking¹³³ in its totality and for a more holistic approach to be taken to the concept in the future. Indeed, the appeals pending before the CJ in the *Dow* and *du Pont* cases may provide the CJ with an opportunity to consider some of these matters.

A first issue which needs to be addressed is whether the notion of undertaking is in fact the same for both "substantive reach" and "attribution of liability" cases. It has been that the objectives underpinning the two strands of cases might suggest different models. In the most recent parental liability cases, for example, the EU Courts have upheld the Commission's view that it is appropriate to extend the concept of an undertaking to include parents and their JV where the parents control, the JV's behaviour and are able to prevent violations by it. In so doing they have rejected arguments that attributing liability to parents in this way breaches fundamental

¹³² Case C-429/08, *Murphy* (n 131).

¹³³ And possibly also to the term association of undertakings.

principles, such as the principle of personal responsibility. The breadth of these rulings is contentious and the principles set out in these cases are yet to be affirmed by the CJ. Further, these cases have not had to deal explicitly with the additional question of whether the entities are sufficiently closely linked that competition between them cannot be expected, so that their unity of purpose rules out the need to apply Article 101 to agreements between them. Although early cases such as *Hydrotherm* and *Viho* might support the view that firms may form an economic unit where one has positive control over another and the power to decisively influence that other's strategic behaviour, it would be interesting to have an EU Court specifically address the policy question of whether power to exercise negative control is sufficient to establish decisive influence in this context and, particularly, whether, and if so when, the conduct of a JV should be excluded from scrutiny under Article 101.

Although the logic behind adopting a context-specific approach is understood, a single concept of an undertaking, which applies throughout EU competition, would provide greater clarity and coherence to the system. Further, it appears to be approach supported by jurisprudence. If there is to be a single concept of an undertaking, further issues to be decided are whether some rationalization or refinement of the concept of undertaking/economic unit is required to make it consistent with the policy underlying it and whether the same general concept can be applied in slightly nuanced ways in the different contexts in which it is utilized. These questions may require consideration of a number of issues including, for example: whether or not the concept of control in undertaking cases should be aligned with the concept of control under the EUMR and/or whether, and if so when, the economic unit extends to relationships of negative control and JVs; whether the actual, or potential, exercise of control should be the seminal factor; and the relevance of the conduct engaged in by the entities. In considering any modifications, it should be ensured that the concept is defined with sufficient precision to allow firms, competition agencies and courts to determine with some certainty whether or not a group of entities constitute a single undertaking and that it is, in so far as is possible, reconcilable with all the jurisprudence in this area.

The clearest and perhaps simplest solution might at first sight appear to be to align the concept of "control" and "decisive influence" in undertaking and EUMR cases, accepting that if one firm has sufficient control over another that they should be

considered to have merged that they should thereafter be treated as a single undertaking. The discussion in this paper has established that the attribution of liability jurisprudence has come fairly close to accepting this proposition, placing increasing weight to the question of whether a parent has the power to exercise decisive influence over the behaviour of its subsidiary, accepting that joint control is sufficient to establish decisive influence and, for the first time (in *Dow*), relying on a finding of control for the purposes of an EUMR decision to reinforce a finding that sufficient control existed to uphold a single economic unit finding.

A concern with such a solution, however, is that the extension of the concept of an undertaking so broadly, and especially to situations of negative and joint control, expands the concept considerably and perhaps beyond the objectives underpinning the notion. Further, such an approach might become excessively complicated and hard to administer. For example, in order to ensure that not too expansive a range of conduct, in particular, of a JV and its parents, is excluded from the ambit of Article 101(1), it has been emphasized that it would be essential to ensure that the economic unit only encompasses legitimately created JVs where the JV and/or parents are acting within its scope or core activities. If this is correct, then in JV cases the question of whether a JV and its parents form an economic unit will rest on the complex issues of whether the JV was legitimately created initially and whether the conduct at issue is inherent to the working and operation of the JV. Clearly, such an approach would be “fact-intensive”, provide firms with “precious little predictability about their potential liability” and is likely to result in complex debate about what conduct can be said to be inherent to, or part of the core activity of, the JV.¹³⁴

The better approach, therefore, may be to accept a narrower theory of an economic unit confining it to parent/ subsidiary relationships where the former has sole control over the latter and the power to control positively the subsidiary’s strategic behaviour on the market.¹³⁵ Arguably, such an approach¹³⁶ fits better with

¹³⁴ Devlin and Jacobs (n 15), 12-13 (“The ‘core’ must, however, have a logical limit, since without one the concept of a ‘core activity’ would break loose from its moorings and encompass clearly unlawful conduct ... Since the core-activity inquiry cannot be tethered to an identifiable, objective metric ... we believe that a venture’s ‘core activity’ should not enjoy independent force as a substantive concept”).

¹³⁵ Even if such an approach were adopted the Commission might still indirectly be able to hold parents responsible for the behaviour of an entity characterised as an association of undertakings. In particular, Reg 1/2203, art 23(2) (4) allows for fines to be imposed on an association of

the policy supporting the doctrine and is easier to reconcile with jurisprudence dealing with the application of Article 101 to the conduct of JVs, with associations of undertakings and with the Commission's interpretation of the EUMR. Although such a proposal would bring the conduct of a legitimately created JV within the scope of Article 101, sight must not be lost of the fact that such conduct is simply subject to scrutiny under Article 101 – it is not necessarily prohibited by it. Clearly, Article 101 should not nullify or prohibit the buying, pricing and other commercial decisions that are inherent to the operation of a legitimately created and lawful JV.¹³⁷ Rather, the conduct of the JV is to be analysed in the legal and economic context in which it occurs, including the legitimate goals and objectives pursued by the JV.

If such an approach were to be adopted, another issue to be determined would be whether proof of power to exercise sole control should be sufficient or whether actual exercise of control or something further should be required. One solution would be to accept that the general rule should be that the power to control is sufficient, but that in attribution of liability cases actual control is required in order to ensure that the imposition of liability on a parent is compatible with fundamental principles such as personal responsibility, the presumption of innocence and limited liability. The EU authorities should not therefore pierce the corporate veil and impose liability on another entity within the economic unit unless it can be said to be at fault in some way and/or to have some responsibility for the infringing behaviour. Where the notion is to turn on the potential or power to exercise sole control then useful guidance on the issue could be derived from EUMR practice. In cases where actual exercise of control is required, however, further and more explicit guidance from the EU Courts would be helpful on the policy supporting the principle of parental liability,¹³⁸ exactly what is

undertakings and provides that where the infringement relates to the activities of its members the fine can amount to 10% of the sum of the total turnover of each member's activity on the market affected by the infringement. Where this occurs and, if the association is not solvent, fines can be collected from members.

¹³⁶ Confining it to situations where one person not accepting risk acts for or at the direction of another and is treated as integrated within that other or where one legal person's market conduct/strategy can be positively controlled by a parent company

¹³⁷ See L Ainsworth, 'American Needle - Through European Eyes' ABA Spring Meeting, March 2011, 9 for the view that such activity is covered by the EUMR clearance ("such decisions and any agreement that gave rise to them will be treated as intrinsic to the establishment of the joint venture and so covered by the EUMR clearance").

¹³⁸ And why if it is legitimate to impose liability on a legal person that forms part of the economic unit it is not legitimate to impose liability on natural persons within it, see Thomas (n 16).

required to demonstrate actual exercise of control and whether, and if so when, a finding of actual exercise of control should be able to be based on inference deriving from the power to exercise control and the distinction between the two requirements. The case-law as it currently stands, indicating that actual decisive influence can sometimes be inferred from, for example, shareholdings or from the fact that a parent has not exercised its rights of co-determination, is not easy to reconcile and frequently comes perilously close to holding that potential exercise is sufficient (and consequently that liability of a parent with power to control is automatic).

Whatever solution is adopted, further clarification on the meaning of an economic unit from both the EU courts and the European Commission¹³⁹ would be most welcome. Any further light which could be shed on the core concepts and the principles underpinning them would be helpful to ascertain the breadth of the principle and, ultimately, how the boundaries of an undertaking are to be identified.

¹³⁹ The Commission might, e.g., consider the publication of a Notice on the meaning of an undertaking and an association of undertakings.