The unsung harmony of *Sumal* and the *Akzo* line of case law

Niklas Brueggemann
niklas.brueggemann@ec.europa.eu
Policy Officer
Directorate-General for Competition
European Commission, Brussels

1. On 6 October 2021, the Grand Chamber of the Court of Justice of the European Union ("CJEU") issued its long-awaited judgment in case C-882/19, *Sumal*.[1] Already by now, less than three months after its adoption, *Sumal* is generally perceived as one of the landmark judgments of EU competition law.

2. While *Sumal*, indeed, raises a plethora of highly interesting questions that truly merit a special edition of *Concurrences*, this note focuses on its relationship with previous decisions of the Union courts on the notion of undertaking and the allocation of liability. In contrast to most of the contributions published thus far, mainly in the blogosphere,[2] this note puts forth that *Sumal* neither changes nor contradicts the previous case law of the CJEU. Though yet largely unsung, *Sumal* follows in perfect harmony the CJEU's *Akzo* line of case law[3] as gradually developed over the last fifty years.[4]

I. The *Sumal* case

3. Sumal SL ("Sumal") is a Barcelona-based company active in the manufacture and distribution of roll and metal containers.[5] Between 1997 and 1999, it acquired two trucks from Mercedes Benz Trucks España SL ("MBTE"). MBTE is a wholly owned subsidiary of German-based Daimler AG. Daimler AG was one of the fifteen trucks producers fined by the Commission on 19 July 2016 for their participation in the *Trucks* cartel.[6] MBTE was not an addressee of the Commission's decision.[7]

4. Nevertheless, Sumal brought an action for damages only against MBTE before the Barcelona Commercial Court No. 7. It did not initiate proceedings against Daimler AG, presumably in order to avoid a lengthy international service of document procedure.[8] The court rejected Sumal's claim for lack of standing, holding that only Daimler AG as an addressee of the Commission's decision had infringed Article 101 TFEU.

5. On appeal, the Barcelona Provincial Court noted a split of the Spanish courts on the issue of the allocation of liability within a group of companies and on 24 October 2019 referred five questions for a preliminary ruling under Article 267 TFEU, which were rephrased by the CJEU as follows: "[W]*hether Article 101(1) TFEU must be interpreted as meaning that the victim of an anti-competitive practice by an undertaking may bring an action*

1 CJEU, 6 October 2021, *Sumal*, case C-882/19.

2 Cf. in particular M. Araujo Boyd, Of undertakings, legal entities and groups of companies. The CJEU's judgment in Sumal (C-882/19), *Chillin'Competition*, 7 October 2021, https://chillingcompetition.com/2021/10/07/of-undertakings-legal-entities-and-groups-of-companies-the-cjeus-judgment-in-sumal-c-882-19; A. López Usatorre, Red pill or blue pill? The European Court of Justice makes its choice: subsidiaries can be held liable for the infringements of their parent companies (Case C-882/19 – Sumal), Kluwers Antitrust Blog, 12 October 2021, http://competitionlawblog.kluwercompetitionlaw.com/2021/10/12/red-pill-or-blue-pill-the-european-court-of-justice-makes-its-choice-subsidiaries-can-be-held-liable-for-the-infringements-of-their-parent-companies-case-c-882-19-sumal/#comments; M. Barennes, B. Braeken, J. Versteeg, ECJ Redefines the "Economic Entity"Doctrine and Rules that a Subsidiary May be Liable for Behavior of Its Parent Company (*Sumal* C-882/19), *Competition Policy International*, 14 October 2021, https://www.competitionpolicyinternational.com/ecj-redefines-the-economic-entity-doctrine-and-rules-that-a-subsidiary-may-be-liable-for-behavior-of-its-parent-company-sumal-c-882-19; S. van Dijk, The concept of undertaking as means to ascertain liability within a corporate group for an infringement on EU competition law (C-882/19, Sumal), CCM Blog, 20 October 2021, https://law.kuleuven.be/ccm/blog/?p=245.

3 Named after CJEU, 10 September 2009, *Akzo Nobel*, case C-97/08, arguably the most prominent—albeit neither the first nor the most important—judgment on the notion of undertaking and the allocation of liability in EU competition law.

4 For a comprehensive overview cf. R. Whish and D. Bailey, *Competition Law* (9th ed., Oxford University Press), pp. 83–101; D. Bailey and O. Odudu, The single economic entity doctrine in EU competition law, *Common Market Law Review*, Vol. 51, Issue 6, 2014, pp. 1721–1758.

5 https://sumal.com/en/empresa.

6 European Commission, decision C(2016) 4673 final of 19 July 2016, *Trucks*, case AT.39824.

7 For a more comprehensive overview of the facts, cf. *Sumal*, case C-882/19, paras. 8–15; Opinion AG Pitruzzella, 15 April 2021, *Sumal*, case C-882/19, paras. 8–15.

8 Despite Regulation (EC) No. 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service of documents (OJ L 324, 10.12.2007, p. 79), it appears that cross-border service of documents still raises some (perceived) obstacles *in praxi*.

for damages, without distinction, either against a parent company which has been punished by the Commission for that practice in a decision or against a subsidiary of that company which is not referred to in that decision, where those companies together constitute a single economic unit."[9]

6. Following the issuance of Advocate General Pitruzzella's Opinion on 15 April 2021, the Grand Chamber of the CJEU rendered its judgment on 6 October 2021. While the judgment, indeed, contains a number of highly interesting aspects,[10] two aspects are of particular importance for the purposes of this note: First, within an undertaking, that is within an economic unit, any legal entity is jointly and severally liable for any infringement of Article 101 TFEU by any other legal entity forming part of that same economic unit.[11]

7. Second, for the purposes of holding a subsidiary liable for an infringement of its parent company, the finding of an economic unit between the parent company and its subsidiary not only requires general economic, organizational or legal links (general links) between the two.[12] It also requires a specific link "*between the economic activity of that subsidiary and the subject matter of the infringement for which the parent company was held to be responsible*." A parent company may therefore, for instance in case of a conglomerate consisting of several groups of companies, be part of several economic units.[13] According to the CJEU, this holds true not only for the purposes of damages actions (private enforcement), but also for the purposes of infringement decisions under Regulation No. 1/2003 (public enforcement).[14]

II. A judgment well founded on precedent

8. As can be seen from this short summary of the aspects relevant for this note, *Sumal* constitutes a seminal judgment. For the first time, the CJEU explicitly held that a subsidiary can be liable for an infringement committed by its parent company.[15] However, while remarkable, *Sumal* does not constitute a revolution. Upon closer examination, it is the logical and correct consequence of a line of case law dating back to 1972.

1. The notion of undertaking

9. The heart of the *Sumal* judgment forms the part dealing with the notion of undertaking.[16] The CJEU first states that in accordance with its settled case law set out at para. 140 of *ICI*[17] and para. 41 of *CEEES*,[18] the notion of undertaking primarily refers to the "*unity of conduct on the market*" irrespective of any formal distinctions between separate legal entities. It is essential to recall that in its 1972 judgment *ICI*, the court held that the conduct of a subsidiary having a separate legal personality is attributable to the parent company if the subsidiary "*does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company*."[19] Such "*unity of the group thus formed*"[20] existed *in casu* since the parent held "*all or at any rate the majority of the shares*" in its subsidiaries and exercised decisive influence over their business conduct.[21] On this basis, the court concluded that the formal separation between companies "*cannot outweigh the unity of their conduct on the market for the purposes of applying the rules on competition*."[22]

10. This conclusion in *ICI* was later explicitly confirmed by the CJEU (then CJEC) at para. 41 of *CEEES*. In addition, the court in *CEEES* made two further clarifications: First, by reference to para. 11 of *Hydrotherm*,[23] the court held that the notion of undertaking "*must be understood as designating an economic unit for the purpose of the subject matter of the agreement in question even if in law that economic unit consists of several persons, natural or legal*."[24] Second, it referred to para. 21 of its 1990 judgment in *Höfner and Elser* and repeated that the notion of undertaking, within the meaning of an economic unit defined as an "*independent economic* [actor]" refers to "*any entity engaged in an economic activity, regardless of the legal status of that entity and the way in which it is financed*."[25] Both *Höfner and Elser* and *CEEES* form the explicit basis of the CJEU's famous *Akzo* decision,[26] which the CJEU repeatedly refers to in *Sumal*.[27]

9 *Sumal*, case C-882/19, para. 31.

10 In addition to the notion of undertaking and the allocation of liability, other interesting aspects contain for example the relationship of public and private enforcement (paras. 31–37) or the subsidiary's rights of defense (paras. 51–63).

11 Ibid., paras. 38–50.

12 Ibid., para. 43.

13 Ibid., paras. 45–52.

14 Ibid., para. 38.

15 While in *Biogaran*, case T-677/14, paras. 206–234, the GCEU confirmed that a subsidiary can be held jointly and severally liable for an infringement arising from the conduct of its parent company, this finding was based on the fact that the subsidiary's conduct had directly contributed to the infringement.

16 *Sumal*, case C-882/19, paras. 38–52.

17 CJEC, 14 July 1972, *Imperial Chemical Industries*, case 48/69.

18 CJEC, 14 December 2006, Confederación Española de Empresarios de Estaciones de Servicio, case C-217/05.

19 Imperial Chemical Industries, case 48/69, para. 132 et seq.

20 Ibid., para. 135.

21 Ibid., para. 136 *et seq*.

22 Ibid., para. 140.

23 CJEC, 12 July 1984, *Hydrotherm*, case 170/83, para. 11.

24 Confederación Española de Empresarios de Estaciones de Servicio, case C-217/05, para. 40.

25 Ibid., para. 38 *et seq*.

26 *Akzo Nobel*, case C-97/08 P, para. 54 *et seq*.

27 Cf. *Sumal*, case C-882/19, paras. 41–43 and 62.

11. It is interesting to note that the CJEU in *Sumal* links this classic line of case law on the notion of undertaking to paras. 84 and 86 of *Knauf Gips*.[28] There, the CJEU had stated that an economic unit consists of a "*unitary organisation of personal, tangible and intangible elements, which pursues a specific economic aim on a long-term basis*."[29] In the same vein, *Sumal* at para. 46 also references *Dow Chemical,* where the CJEU had held that a joint venture and its two controlling shareholders can be considered an economic unit "*only for the purposes of establishing liability for participation in the infringement.*"[30] In other words, the CJEU in *Knauf Gips* and *Dow Chemical* had already linked the functional concept of undertaking to a specific economic aim as well as to a specific functional purpose, thus further opening the door for more than one specific economic aim—i.e., several economic units—within one group of companies.

12. *Sumal* essentially draws the logical consequence from these precedents: Whether the subsidiary and the parent belong to the same economic unit for the purposes of the specific infringement in question has to be analyzed on the basis of a two limbs test—namely (i) the economic, organizational and legal links as summarized in *Akzo*[31] (general links) as well as (ii) a specific link "*between the economic activity of that subsidiary and the subject matter of the infringement for which the parent company* [was] *held responsible*."[32] In order to show this specific link *in casu*, it is "in principle" required that the infringement of the parent company "concerns" the same products as those marketed by the subsidiary.[33] While the exact details of this test will need to be further interpreted by courts and competition authorities in the EU, it essentially only restates the "engaged in same conduct on the market" requirement that EU competition law has known ever since *ICI* from 1972 and that has been explicitly called "*specific economic aim*" in *Knauf Gips*.[34]

13. In light of this tradition, one should be careful to call the allegedly new specific link requirement of the economic unit test a major departure from previous precedents. Rather, the specific link test has—albeit sometimes not mentioned explicitly[35]—always been there. The reason why it has rarely been mentioned apparently stems from the fact that the Commission mostly fined parent companies for infringements based on conduct of their subsidiaries.[36] In such scenarios, it is hard to conceive of a case where the specific link test would not be met. This is because in almost all cases will the parent company have a close relationship—and be it through the exercise of control[37]—with the economic activity of that subsidiary and, by consequence, with the subject matter of the infringement. It is only from the perspective of the subsidiary—which only private enforcement has dragged into the spotlight of EU competition law—that the specific link with its parent's or a sister's economic activity requires closer analysis.

14. What emerges from the above is a clear picture: the way for one of the allegedly most "revolutionary" aspects of *Sumal*—one company can be part of different economic units[38]—had already been well paved. In fact, dating back to the 1970s, the CJEU has always held that an undertaking constitutes a single unit that pursues a specific economic activity. The notion of undertaking must be understood as a dynamic and market-related concept, not as a concept merely based on formal structural links such as shareholdings or control. Where a company, be it a parent company or a subsidiary, is involved in more than one economic activity, it can also form part of more than one economic unit.[39]

2. The allocation of liability within an undertaking

15. Having thus, in consistency with previous case law, interpreted the concept of undertaking, the CJEU in *Sumal* moves on to flesh out the allocation of liability within such an undertaking.

16. The CJEU first notes that according to its 2017 *Akzo* judgment,[40] an undertaking can be held liable for an infringement of EU competition law if at least one entity belonging to that undertaking constituted by the relevant economic unit has committed an infringement.[41] According to the CJEU, this type of derivative personal responsibility—i.e., personal responsibility based not on an entity's own conduct but rather on conduct attributable to the undertaking of which the entity forms part and which is then by consequence attributable to all entities forming part of the undertaking—applies in both

28 Ibid., para. 41.

29 CJEU, 1 July 2010, *Knauf Gips*, case C-407/08 P, paras. 84 and 86.

30 CJEU, 26 September 2013, *Dow Chemical*, case C-179/12 P, para. 58.

31 *Akzo Nobel*, case C-97/08 P, para. 58.

32 *Sumal*, case C-882/19, para. 51 *et seq*.

33 Ibid., para. 52.

34 *Knauf Gips*, case C-407/08 P, paras. 84 and 86.

35 Cf., e.g., CJEC, 24 October 1996, *VIHO*, case C-73/95 P, para. 15 *et seq*.

36 For an overview of the various reasons, cf. Whish and Bailey, *Competition Law*, 9th ed., p. 99 *et seq*.

37 CJEC, 10 January 2006, Cassa di Risparmio di Firenze, case C-222/04, para. 112: "On the other hand, an entity which, owning controlling shareholdings in a company, actually exercises that control by involving itself directly or indirectly in the management thereof must be regarded as taking part in the economic activity carried on by the controlled undertaking."

38 Cf. M. A. Boyd, Of undertakings, legal entities and groups of companies. The CJEU's judgment in Sumal (C-882/19), *Chillin'Competition*, 7 October 2021, (as cited in fn. 2): "*However, its impact is far reaching beyond the matter at hand, changing the notion of undertaking as hitherto regarded by supplementing the presence of 'control' with 'sharing an economic field'. Wow.*"; M. Barennes, B. Braeken, J. Versteeg, ECJ Redefines the "Economic Entity" Doctrine and Rules that a Subsidiary May be Liable for Behavior of Its Parent Company (*Sumal* C-882/19), *Competition Policy International*, 14 October 2021, (as cited in fn. 2): "[T]*he ECJ appears to narrow down the classical concept of an 'economic unit' which has been developed over decades. For the first time, the ECJ considers that one parent undertaking can be part of several economic units*."

39 By analogy, as held in, e.g., CJEC, 1 July 2008, *MOTOE*, case C-49/07, para. 25, such functional approach also determines, for each respective activity, whether a company engages in economic activity or in the exercise of public authority, cf. also Whish and Bailey, *Competition Law*, 9th ed., p. 84 *et seq*.

40 CJEU, 27 April 2017, *Akzo*, case C-516/15 P, paras. 49 and 60.

41 *Sumal*, case C-882/19, para. 42.

public and private enforcement.[42] The reason for joint and several liability is intended to strengthen the effectiveness of the Commission's enforcement of Article 101 TFEU. In particular, joint and several liability mitigates the risk of insolvency of specific legal entities which could undermine the collection of fines—and, following *Skanska*[43] and *Sumal*, one could also add: the compensation of cartel victims—and thereby ensures the deterrence pursued by the EU competition rules.[44]

17. Against this background, the CJEU then, second, reiterates that an infringement by a subsidiary can be attributed to its parent company where the subsidiary does not independently determine its market conduct but follows the instructions of the parent. Whether this is the case has to be determined in particular based on "*economic, organisational and legal links*" between the two entities.[45] In this context, the CJEU explicitly refers to its two *Akzo* decisions and then goes on to note that it is "*therefore the very existence of that economic unit which committed the infringement that decisively determines the liability*" of both the subsidiary and the parent.[46]

18. It is essential to understand that the CJEU had clarified at paras. 58 and 59 of the 2009 *Akzo* decision—which are explicitly referenced at para. 43 of *Sumal*—that the attribution of liability from a subsidiary to its parent company follows from the fact that the two form an economic unit, irrespective of whether the parent company had been involved in the conduct. In other words, liability derives from being part of the relevant economic unit (derivative personal responsibility), not from being involved in the relevant conduct constituting the infringement (strict personal responsibility). The economic entity forms the connecting factor for the attribution of personal liability.[47] On this basis, the CJEU in *Sumal* is able to refer to both *Villeroy & Boch* and *GEA* in order to conclude that the concept of economic unit mandates the joint and several liability of all entities constituting that economic unit.[48]

19. In *GEA*, the CJEU had confirmed its previous case law according to which several legal persons may be held personally liable for an infringement on the basis that they form part of the undertaking responsible for the infringement. The concept of joint and several liability constitutes a "*manifestation of an ipso jure legal effect*" of the concept of undertaking. Accordingly, joint and several liability derives directly from the concept of undertaking itself.[49]

20. The precise meaning of this *ipso jure* legal effect had been set out in detail by the CJEU in *Villeroy & Boch*, which in turn relies in large part on *Siemens Österreich*.[50] At para. 150 of *Villeroy & Boch*, the CJEU had specified that joint and several liability relates only to the undertaking concerned as such, "*and not the companies of which it is made up.*"[51] By consequence, the Commission only has the power to hold a number of legal entities jointly and severally liable from an external perspective for the payment of a fine provided that they formed part of the same undertaking. By contrast, the Commission does not have the power to determine from an internal perspective the individual shares to be paid by those companies that are held jointly and severally liable as part of the same undertaking.[52]

21. At this point, the essence of the CJEU's decision in *Sumal* becomes apparent. It was generally agreed, including by the Advocate General,[53] that the liability of subsidiaries who by definition do not control the (parent) company that committed the conduct forming the basis of the infringement had to be limited. As opposed to parental liability, where liability could also be imputed based on strict personal responsibility on the basis of control,[54] such strict personal responsibility cannot be relied on when establishing the liability of subsidiaries.[55] In addition, absent a limiting principle, large conglomerates would have been subjected to unforeseeable and excessive liability, hampering business and leading to uncertainty.[56]

22. The limitation of liability could have been achieved in two ways: either by modifying the notion of undertaking thereby indirectly also limiting the joint and several liability of the entities constituting the undertaking (derivative personal liability), or by directly modifying the liability of the entities forming part of the undertaking (strict personal liability). The second option would have meant to separate liability from the notion of undertaking. This would not only have undermined the "*ipso jure legal effect*" of joint and several liability as underlined in *Villeroy & Boch* and *GEA*, thereby establishing two different systems of liability in public and private enforcement, it would also have meant that an infringement is not necessarily committed by an undertaking but rather by a part of an undertaking. This would, in turn, have raised a host of difficult follow-up questions, for instance with regard to the calculation of fines under Article 23 of Regulation No. 1/2003 or with regard to contribution claims among the legal entities that constitute the undertaking but did not participate in the

42 Ibid., para. 42.

43 CJEU, 14 March 2019, *Skanska*, case C-724/17.

44 CJEU, 26 January 2017, *Villeroy & Boch*, case C-625/13 P, para. 152.

45 *Sumal*, case C-882/19, para. 43.

46 Ibid.

47 Cf., e.g., GCEU, 2 February 2012, Dow Chemical, case T-77/08, para. 74: "Where such an economic entity infringes the rules of competition, it falls to that entity, in accordance with the principle of personal responsibility, to answer for that infringement."

48 *Sumal*, case C-882/19, para. 44.

49 CJEU, 25 November 2020, *GEA*, case C-823/18 P, para. 60 *et seq*.

50 CJEU, 10 April 2014, *Siemens Österreich*, joined cases C-231/11 P to C-233/11 P.

51 *Villeroy & Boch*, case C-625/13 P, para. 150.

52 Ibid., para. 151. Cf. also *Siemens Österreich*, joined cases C-231/11 P to C-233/11 P, para. 58 *et seq*.

53 Opinion AG Pitruzzella, *Sumal*, case C-882/19, paras. 54–59.

54 Cf. ibid., paras. 32–47; Opinion AG Kokott, 23 April 2009, *Akzo*, case C-97/08 P, para. 97; cf. also Whish and Bailey, *Competition Law*, 9th ed., p. 95.

55 Bailey and Odudu, The single economic entity doctrine in EU competition law, *Common Market Law Review*, Vol. 51, Issue 6, 2014, pp. 1747 *et seq*.

56 *Sumal*, case C-882/19, para. 45 *et seq*.

relevant conduct.[57] Presumably, in order to avoid these difficult questions, the CJEU went for the first option and adapted the notion of undertaking in order to indirectly limit the joint and several liability of the companies in question on the basis of their specific economic activity.

23. Of course, this wide-reaching decision has triggered an intense legal debate. However, when analyzing *Villeroy & Boch* through the spectacles of *Sumal* it becomes apparent why the CJEU's case law has so far often (and falsely) been interpreted as only establishing parental liability rather than joint and several liability of all entities forming part of an economic unit.[58] At para. 148 of *Villeroy & Boch*, the CJEU explicitly held that "[i]*f the parent company fails to rebut the presumption* [of decisive influence], *the Commission will be able to consider the parent and its subsidiary to form part of the same economic unit and to consider the parent to be responsible for the subsidiary's conduct and it will be able to hold the two companies jointly and severally liable for payment of a fine, without having to establish the personal involvement of the parent company in the infringement*."[59] What the CJEU had always meant—but admittedly not always clearly expressed—was not that the subsidiary's conduct could be imputed to the parent company on the basis of the latter's decisive influence (strict personal responsibility). Rather, the subsidiary's conduct could be imputed to the parent due to the two companies forming part of the same undertaking (derivative personal responsibility). The finding of the existence of an undertaking within the meaning of an economic unit, in turn, required the decisive influence of the parent company over its subsidiaries, but not the attribution of liability as such.

24. Against this background, it also becomes clear why in *Dow Chemical*, a decision likewise referenced at para. 46 of *Sumal*, the Commission was able to hold a joint venture and its two controlling shareholders jointly and severally liable for an infringement committed by the joint venture.[60] Had liability only been attributable on the basis of decisive influence, each of the two shareholders could only have been held jointly and severally liable with the joint venture committing the infringement, but not also with each other.

25. In other words, the decisive influence is not a prerequisite for the attribution of liability, but for establishing an economic unit. Once an economic unit has been established, all legal entities forming part of it can be held jointly and severally liable for any infringement committed by the economic unit as such, *ipso jure*, irrespective of whether they had decisive influence over the specific legal entity involved in the conduct amounting to an infringement of Article 101 TFEU. The line adopted in *Sumal*, it seems, has always been sitting right there in the CJEU's case law.

III. Facit: A revolution postponed

26. *Sumal* will continue to trigger a number of interesting questions: How exactly do we determine the specific link to establish an economic unit? How does this specific link have to be interpreted in functional contexts other than attributing liability, e.g., for the purposes of calculating fines or analyzing intra-group agreements?[61] The debate is far from over in this respect.

27. At the same time, it can already be concluded that with regard to establishing liability under Article 101 TFEU, the CJEU in *Sumal* did not launch an all-out revolution. Rather, the CJEU has stayed true to the dogmatic principles developed throughout its previous case law. As the Commission had already argued back in 1972: "[W]*hile the existence of a group-relationship can have favourable consequences for undertakings as regards the application of Community competition law, it must be admitted on the other hand that unfavourable consequences can also follow*."[62] *Sumal* is the case in point for this general principle of EU competition law. One can rest assured that the CJEU will continue to refine the notion of undertaking in the years to come. ■

57 According to *Siemens Österreich*, joined cases C-231/11 P to C-233/11 P, para. 61 *et seq.*, contribution claims are governed by national law and cannot be determined by the Commission under Regulation No. 1/2003.

58 For a critique of the allocation of liability based on the concept of economic unit, cf. Bailey and Odudu, The single economic entity doctrine in EU competition law, *Common Market Law Review*, Vol. 51, Issue 6, 2014, p. 1742.

59 *Villeroy & Boch*, case C-625/13 P, para. 148.

60 *Dow Chemical*, case C-179/12 P, para. 58.

61 While beyond the scope of this note, it follows from *Dow Chemical*, case C-179/12 P, para. 58, that the functionality of the notion of undertaking serves not only to delineate economic and non-economic activities of an undertaking, but also to determine the precise scope of the economic unit depending on the respective purpose of the determination. Accordingly, the determination of the specific legal entities constituting an undertaking when analyzed in the context of attributing liability for an infringement of Article 101 TFEU may well be different from the one for the purposes of calculating fines under Article 23 of Regulation No. 1/2003 or analyzing intra-group agreements.

62 *Imperial Chemical Industries*, case 48/69, ECR 1972, p. 621 (632).