JUDGMENT OF THE COURT (Grand Chamber)

6 October 2021

(Reference for a preliminary ruling – Competition – Compensation for harm caused by a practice prohibited under Article 101(1) TFEU – Determination of the undertakings liable to provide compensation – Action for compensation directed against the subsidiary of a parent company and brought following a decision finding only that the parent company participated in a cartel – Concept of an 'undertaking' – Concept of 'economic unit')

In Case C-882/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Audiencia Provincial de Barcelona (Provincial Court, Barcelona, Spain), made by decision of 24 October 2019, received at the Court on 3 December 2019, in the proceedings

Sumal SL

v

Mercedes Benz Trucks España SL,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, J.-C. Bonichot, A. Arabadjiev, A. Prechal, M. Ilešič, L. Bay Larsen, A. Kumin and N. Wahl, Presidents of Chambers, D. Šváby (Rapporteur), L.S. Rossi, I. Jarukaitis and N. Jääskinen, juges,

Advocate General: G. Pitruzzella,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Mercedes Benz Trucks España SL, initially by C. von Köckritz and H. Weiß, Rechtsanwälte, and by P. Hitchings and M. Pérez Carrillo, abogados, and subsequently by C. von Köckritz and H. Weiß, Rechtsanwälte, A. Ward, abogado, and by M. López Ridruejo, abogada,

– the Spanish Government, by S. Centeno Huerta and L. Aguilera Ruiz, acting as Agents,

– the Italian Government, by G. Palmieri, acting as Agent, and by S. Fiorentino, avvocato dello Stato,

– the European Commission, by S. Baches Opi, F. Jimeno Fernández and C. Urraca Caviedes, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 15 April 2021,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 101 TFEU.

2 The request has been made in proceedings between Sumal SL and Mercedes Benz Trucks España SL concerning the latter's liability resulting from the participation of its parent company, Daimler AG, in an infringement of Article 101 TFEU.

Legal context

European Union law

Regulation (EC) No 1/2003

3 Under the heading 'Uniform application of [EU] competition law', Article 16 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101] and [102 TFEU] (OJ 2003 L 1, p. 1) provides:

'1. When national courts rule on agreements, decisions or practices under Article [101] or Article [102 TFEU] which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission. They must also avoid giving decisions which would conflict with a decision contemplated by the Commission in proceedings it has initiated. To that effect, the national court may assess whether it is necessary to stay its proceedings. This obligation is without prejudice to the rights and obligations under Article 234 of the Treaty.

2. When competition authorities of the Member States rule on agreements, decisions or practices under Article [101] or Article [102 TFEU] which are already the subject of a Commission decision, they cannot take decisions which would run counter to the decision adopted by the Commission.'

4 Under the heading 'Fines', Article 23(2)(a) of that regulation provides:

'The Commission may by decision impose fines on undertakings and associations of undertakings where, either intentionally or negligently:

(a) they infringe Article [101] or [102 TFEU] …'

5 Entitled 'Hearing of the parties, complainants and others', Article 27(1) of that regulation provides:

'Before taking decisions as provided for in Articles 7, 8, 23 and Article 24(2), the Commission shall give the undertakings or associations of undertakings which are the subject of the proceedings conducted by the Commission the opportunity of being heard on the matters to which the Commission has taken objection. The Commission shall base its decisions only on objections on which the parties concerned have been able to comment. Complainants shall be associated closely with the proceedings.'

Regulation (EU) No 1215/2012

6 Article 7 of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2012 L 351, p. 1) provides:

‘A person domiciled in a Member State may be sued in another Member State:

…

(2) in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur;

…’

Spanish law

7 Under the title ‘Compensation for loss caused by practices that restrict competition’, Article 71 of the Ley 15/2007 de Defensa de la competencia (Law 15/2007 on the protection of competition) of 3 July 2007 (BOE No 159, of 4 July 2007, p. 28848), in the version applicable to the dispute in the main proceedings (‘the Law on the protection of competition’), provides:

‘1. Those responsible for infringements of competition law are liable for loss and damaged caused.

2. For the purposes of this title:

(a) An infringement of competition law means any infringement of Articles 101 or 102 [TFEU] or of Articles 1 or 2 of this law.

(b) The conduct of an undertaking may also be attributed to the undertakings or persons that control it, except where its economic conduct is not determined by any of them.’

The dispute in the main proceedings and the questions referred for a preliminary ruling

8 Mercedes Benz Trucks España is a subsidiary company in the Daimler group, the parent company of which is Daimler. Between 1997 and 1999, Sumal acquired two trucks from Mercedes Benz Trucks España, via the intermediary Stern Motor SL, a dealership for the Daimler group.

9 On 19 July 2016, the Commission adopted Decision C(2016) 4673 final relating to proceedings under Article 101 [TFEU] and Article 53 of the EEA Agreement (Case AT.39824 – Trucks), a summary of which was published in the *Official Journal of the European Union* of 6 April 2017 (OJ 2017 C 108, p. 6) (‘the decision of 19 July 2016’).

10 According to that decision, 15 European truck producers, including Daimler, participated in a cartel that took the form of a single continuous infringement of Article 101 TFEU and Article 53 of the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3), consisting of concluding collusive arrangements on pricing and gross price increases for trucks in the European Economic Area (EEA) and on the timing and the passing on of costs for the introduction of emission technologies for those trucks as required by the standards in force. For 3 of the participating companies, that infringement took place between 17 January 1997

and 20 September 2010 and, for the 12 other participating companies, including Daimler, between 17 January 1997 and 18 January 2011.

11 Following that decision, Sumal brought an action for damages before the Juzgado de lo Mercantil No 07 de Barcelona (Commercial Court nº 07 of Barcelona, Spain) seeking to obtain from Mercedes Benz Trucks España a payment of EUR 22 204.35, corresponding to the additional cost of acquisition that it bore due to the cartel in which Daimler, the parent company of Mercedes Benz Trucks España, had taken part.

12 By a judgment of 23 January 2019, that court rejected the action on the ground that Mercedes Benz Trucks España could not be sued by means of that action since Daimler, which alone is referred to in the Commission decision, must be regarded as solely responsible for the infringement concerned.

13 Sumal brought an appeal against that judgment before the referring court, which wonders whether the actions for damages following decisions of competition authorities making findings of anticompetitive practices may be brought against subsidiary companies which are not referred to in those decisions but which are wholly owned by the companies directly referred to in those decisions.

14 In that regard, it sets out the differences in the positions adopted by the Spanish courts. Whereas some of those courts accept that such actions may be brought against subsidiary companies, relying on the 'doctrine of a single economic unit', others reject such actions on the ground that that doctrine permits the civil liability of a subsidiary company to be attributed to a parent company but does not permit a subsidiary company to be sued as a result of the conduct of its parent company.

15 In those circumstances, the Audiencia Provincial de Barcelona (Provincial Court of Barcelona, Spain) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does the doctrine of the single economic unit developed by the [Court] itself provide grounds for extending liability from the parent company to the subsidiary, or does the doctrine apply solely in order to extend liability from subsidiaries to the parent company?

(2) In the context of intra-group relationships, should the concept of single economic unit be extended solely on the basis of issues of control, or can it also be extended on the basis of other criteria, including the possibility that the subsidiary may have benefited from the infringing acts?

(3) If it is possible to extend liability from the parent company to the subsidiary, what would be required in order for it to be possible?

(4) If the answers to the earlier questions support the extension of subsidiaries' liability to cover acts of the parent company, would a provision of national law such as Article 71(2) of the [Law on the Protection of Competition], which provides only for liability incurred by the subsidiary to be extended to the parent company, and then only where the parent company exercises control over the subsidiary, be compatible with that line of the Court's case-law?'

Application for the oral part of the procedure to be reopened

16 By document lodged at the Court Registry on 28 April 2021, Mercedes Benz Trucks España requested the Court to order the oral part of the procedure to be reopened, pursuant to Article 83 of the Rules of Procedure of the Court.

17 In support of its request, it argued that the Advocate General's reasoning in his Opinion delivered on 15 April 2021 in this case rests on new elements of fact or hypotheses that were not raised by the referring court and which were not debated between the parties to the main proceedings or the interested persons, within the meaning of Article 23 of the Statute of the Court of Justice of the European Union.

18 Mercedes Benz Trucks España thus disputes, first, the statement set out in the footnote 10 of the Advocate General's Opinion, according to which, in the request for a preliminary ruling, the amount of damage Sumal alleges it suffered appears to have already been assessed by the referring court.

19 Secondly, Mercedes Benz Trucks España considers that the Advocate General wrongly observed, in point 75 and footnote 86 of his Opinion, that, in the decision of 19 July 2016, the Commission had found that the collusive contracts, which initially occurred at the level of the employees of the parent companies involved in the cartel, were later also found at the level of the subsidiaries of those companies, more specifically the sole German subsidiaries of Daimler.

20 It is true that, pursuant to Article 83 of its Rules of Procedure, the Court may, at any time, after hearing the Advocate General, order that the oral part of the procedure be reopened, in particular if it considers that it lacks sufficient information or where a party has, after the close of that part of the procedure, submitted a new fact which is of such a nature as to be a decisive factor for the decision of the Court, or where the case must be decided on the basis of an argument which has not been debated between the parties or the interested persons referred to in Article 23 of the Statute of the Court of Justice of the European Union.

21 In that regard, it is appropriate to observe, at the outset, that the content of the Advocate General's Opinion cannot constitute in itself a new fact, otherwise it would be possible for the parties, by invoking such a fact, to respond to those conclusions. The Advocate General's Opinion cannot be debated by the parties. The Court has had the opportunity of underlining that, in accordance with Article 252 TFEU, the role of the Advocate General is to make, in open court, acting with complete impartiality and independence, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice of the European Union, require the Advocate General's involvement in order to assist the Court in the performance of the task assigned to it, which is to ensure that in the interpretation and application of the Treaties the law is observed (see, to that effect, judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, C-824/18, EU:C:2021:153, paragraphs 63 and 64). Pursuant to Article 20, paragraph 4, of that statute and Article 82(2) of the Rules of Procedure, the Opinion of the Advocate General brings the oral part of the procedure to an end. The opinion does not form part of the proceedings between the parties, but rather opens the stage of deliberation by the Court. It is not therefore an opinion addressed to the judges or to the parties which stems from an authority outside the Court, but rather, it is the individual reasoned opinion, expressed in open court, of a Member of the Court of Justice itself (Order of 4 February 2000, *Emesa Sugar*, C-17/98, EU:C:2000:69, paragraph 13).

22 In the present case, the Court finds, having heard the Advocate General, that the elements set out by Mercedes Benz Trucks España do not disclose any new fact capable of having a decisive influence on the decision that it is called upon to deliver in this case and that it is not necessary

to make that decision on the basis of an argument which has not been debated between the parties and interested persons. Finally, since the Court has at its disposal, at the close of the written and oral stages of the procedure, all the elements necessary, it is thus sufficiently informed to make a ruling. Consequently, the Court considers that it is not necessary to order that the oral part of the procedure be reopened.

Consideration of the questions referred

Admissibility of the request for a preliminary ruling

23 Mercedes Benz Trucks España raises doubts as to the admissibility of the request for a preliminary ruling on two grounds.

24 In the first place, it submits that request does not meet the requirements set out in Article 94 of the Rules of Procedure in that it failed to set out the relevant and proven facts on the basis of which the questions for a preliminary ruling were posed, or the content of Article 71(2) of the Law on the protection of competition. In addition, that request provided an imprecise, biased and inaccurate summary of the relevant national law.

25 In the present case, it is clear from a reading of the request for a preliminary ruling as a whole that the referring court has adequately defined the factual and legal framework within which it has made its request for an interpretation of EU law so as to enable both the interested persons to submit their observations, in accordance with Article 23 of the Statute of the Court of Justice of the European Union, and the Court to provide a useful reply to that request.

26 In the second place, Mercedes Benz Trucks España submits that the four questions posed are purely hypothetical. Thus, the first three questions bear no relation to the facts of the main proceedings to the extent that Sumal neither relied on nor proved facts that could justify the extension to Mercedes Benz Trucks España of the liability for infringements committed by Daimler, but based its action exclusively on the decision of 19 July 2016. Likewise, since Article 71(2) of the Law on the protection of competition does not apply to the dispute in the main proceedings, that provision is of no relevance for the resolution of the dispute.

27 In that regard, it should be recalled that it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of a rule of EU law, the Court is in principle bound to give a ruling (judgment of 9 July 2020, *Santen*, C-673/18, EU:C:2020:531, paragraph 26 and the case-law cited).

28 It follows that questions relating to EU law enjoy a presumption of relevance. The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment of 9 July 2020, *Santen*, C-673/18, EU:C:2020:531, paragraph 27 and the case-law cited).

29 That is not so in this case. The answer that the Court will provide to the four questions referred will determine the outcome of the dispute in the main proceedings to the extent that it will

enable the referring court, first, to determine whether it is possible to engage the liability of Mercedes Benz Trucks España and, second, to rule on whether Article 71(2) of the Law on the protection of competition is compatible with EU law.

30 It follows from the foregoing considerations that the questions referred for a preliminary ruling are admissible.

The first to third questions

31 By its first to third questions, the referring court asks, in essence, whether Article 101(1) TFEU must be interpreted as meaning that the victim of an anticompetitive practice by an undertaking may bring an action 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.

32 At the outset, it should be recalled that Article 101(1) TFEU produces direct legal effects in relations between individuals and directly creates rights for individuals which national courts must protect (judgments of 30 January 1974, *BRT and Société belge des auteurs, compositeurs et éditeurs*, 127/73, EU:C:1974:6, paragraph 16, and of 14 March 2019, *Skanska Industrial Solutions and Others*, C-724/17, EU:C:2019:204, paragraph 24 and the case-law cited).

33 The full effectiveness of Article 101 TFEU and, in particular, the practical effect of the prohibition laid down in paragraph 1 of that provision would be put at risk if it were not open to any individual to claim damages for loss caused to him or her by a contract or by conduct liable to restrict or distort competition (judgments of 20 September 2001, *Courage and Crehan*, C-453/99, EU:C:2001:465, paragraph 26, and of 14 March 2019, *Skanska Industrial Solutions and Others*, C-724/17, EU:C:2019:204, paragraph 25).

34 Any person is thus entitled to claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Article 101 TFEU (judgments of 13 July 2006, *Manfredi and Others*, C-295/04 to C-298/04, EU:C:2006:461, paragraph 61, and of 14 March 2019, *Skanska Industrial Solutions and Others*, C-724/17, EU:C:2019:204, paragraph 26 and the case-law cited), it being understood that the determination of the entity which is required to provide compensation for damage caused by an infringement of Article 101 TFEU is directly governed by EU law (judgment of 14 March 2019, *Skanska Industrial Solutions and Others*, C-724/17, EU:C:2019:204, paragraph 28).

35 The right for any person to seek compensation for such harm strengthens the working of the EU competition rules, since it discourages agreements or practices, frequently covert, which are liable to restrict or distort competition, by contributing to the maintenance of effective competition in the European Union (see, to that effect, the judgments of 20 September 2001, *Courage and Crehan*, C-453/99, EU:C:2001:465, paragraph 27, and of 14 March 2019, *Skanska Industrial Solutions and Others*, C-724/17, EU:C:2019:204, paragraph 44 and the case-law cited).

36 Beyond the compensation itself for the harm alleged, the establishment of such an entitlement contributes to the objective of dissuasion, which is at the heart of task of the Commission, which is under a duty to pursue a general policy designed to apply, in competition matters, the principles laid down by the FEU Treaty and to guide the conduct of undertakings in the light of

those principles (see, to that effect, the judgment of 7 June 1983, *Musique Diffusion française and Others* v *Commission*, Joined Cases 100/80 to 103/80, EU:C:1983:158, paragraph 105). That entitlement is thus capable not only of providing a remedy for the direct damage alleged to have been suffered by the person in question, but also the indirect harm done to the structure and operation of the market, which was not able to reach full economic efficacy, in particular as regards benefits to the consumers concerned.

37 It follows from the foregoing that, just as is the case for the implementation of the EU competition rules by public authorities (public enforcement), actions for damages for infringement of those rules (private enforcement) are an integral part of the system for enforcement of those rules, which are intended to punish anticompetitive behaviour on the part of undertakings and to deter them from engaging in such conduct (judgment of 14 March 2019, *Skanska Industrial Solutions and Others*, C-724/17, EU:C:2019:204, paragraph 45).

38 It follows that the concept of 'undertaking', within the meaning of Article 101 TFEU, which constitutes an autonomous concept of EU law, cannot have a different scope with regard to the imposition of fines by the Commission under Article 23(2) of Regulation No 1/2003 as compared to actions for damages for infringement of EU competition rules (judgment of 14 March 2019, *Skanska Industrial Solutions and Others*, C-724/17, EU:C:2019:204, paragraph 47).

39 It is clear from the wording of Article 101(1) TFEU that the authors of the Treaties chose to use the concept of an undertaking to designate the perpetrator of an infringement of competition law, who is liable to be punished by application of that provision, rather than other concepts such as those of 'company' or 'legal person'. Moreover, the European Union legislature used that concept of 'undertaking' in Article 23(2) of Regulation No 1/2003 to define the entity on which the Commission may impose a fine in order to penalise an infringement of EU competition rules (judgments of 10 April 2014, *Areva and Others* v *Commission*, C-247/11 P and C-253/11 P, EU:C:2014:257, paragraph 123 and 124, and of 25 November 2020, *Commission* v *GEA Group*, C-823/18 P, EU:C:2020:955, paragraphs 62 and 63).

40 In the same way, it follows from Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (OJ 2014 L 349, p. 1), and in particular from Article 2(2) thereof, that the same legislature defined the 'infringer' upon whom it is incumbent, in accordance with that directive, to provide compensation for loss caused by the infringements of competition law attributable to that 'infringer', as being 'an undertaking or association of undertakings which has committed an infringement of competition law'.

41 In so doing, EU competition law, in targeting the activities of undertakings, enshrines as the decisive criterion the existence of unity of conduct on the market, without allowing the formal separation between various companies that results from their separate legal personalities to preclude such unity for the purposes of the application of the competition rules (see, to that effect, judgments of 14 July 1972, *Imperial Chemical Industries* v *Commission*, 48/69, EU:C:1972:70, paragraph 140, and of 14 December 2006, *Confederación Española de Empresarios de Estaciones de Servicio*, C-217/05, EU:C:2006:784, paragraph 41). The concept of 'undertaking', therefore covers any entity engaged in an economic activity, irrespective of the legal status of that entity and the way in which it is financed, and thus defines an economic unit even if in law that economic unit consists of several persons, natural or legal (see, to that effect, judgments of 10 September 2009, *Akzo Nobel and Others* v *Commission*, C-97/08 P,

EU:C:2009:536, paragraphs 54 and 55, and of 27 April 2017, *Akzo Nobel and Others* v *Commission*, C-516/15 P, EU:C:2017:314, paragraphs 47 and 48). That economic unit consists of a unitary organisation 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 of the kind in Article 101(1) TFEU (judgment of 1 July 2010, *Knauf Gips* v *Commission*, C-407/08 P, EU:C:2010:389, paragraphs 84 and 86).

42 When such an economic unit infringes Article 101(1) TFEU, it is for that unit, in accordance with the principle of personal responsibility, to answer for that infringement. In that regard, in order to hold any entity within an economic unit liable, it is necessary to prove that at least one entity belonging to that economic unit has committed an infringement of Article 101(1) TFEU, such that the undertaking constituted by that economic unit is to be treated as having infringed that provision, and that that fact is recorded in a decision of the Commission which has become definitive (see, to that effect, judgment of 27 April 2017, *Akzo Nobel and Others* v *Commission*, C-516/15 P, EU:C:2017:314, paragraphs 49 and 60), or established independently before the national court concerned where no decision as to the existence of an infringement has been adopted by the Commission.

43 It is thus clear from the case-law that the conduct of a subsidiary may be attributed to the parent company in particular where, although having a separate legal personality, that subsidiary does not determine independently its own conduct on the market, but essentially carries out the instructions given to it by the parent company, having regard especially to the economic, organisational and legal links between those two legal entities, with the result that, in such a situation, they form part of the same economic unit and, hence, form one and the same undertaking responsible for the conduct that constitutes an infringement (see, to that effect, judgments of 10 September 2009, *Akzo Nobel and Others* v *Commission*, C-97/08 P, EU:C:2009:536, paragraphs 58 and 59, and of 27 April 2017, *Akzo Nobel and Others* v *Commission*, C-516/15 P, EU:C:2017:314, paragraphs 52 and 53 and the case-law cited). Where it is established that the parent company and its subsidiary are part of the same economic unit and thus form a single undertaking, within the meaning of Article 101 TFEU, it is therefore the very existence of that economic unit which committed the infringement that decisively determines the liability of one or other of the companies making up that undertaking for the anticompetitive conduct of the latter.

44 On that basis, the concept of an 'undertaking' and, through it, that of 'economic unit' automatically entail the application of joint and several liability amongst the entities of which the economic unit is made up at the time that the infringement was committed (see, to that effect, as regards joint and several liability for fines, the judgments of 26 January 2017, *Villeroy & Boch* v *Commission*, C-625/13 P, EU:C:2017:52, paragraph 150, and of 25 November 2020, *Commission* v *GEA Group*, C-823/18 P, EU:C:2020:955, paragraphs 61 and the case-law cited).

45 However, it is also appropriate to observe that the organisation of groups of companies that may constitute an economic unit may be very different from one group to another. There are, in particular, some groups of companies that are 'conglomerates', which are active in several economic fields having no connection between them.

46 Therefore, the possibility for the victim of an anticompetitive practice of invoking, in the context of an action for damages, the liability of a subsidiary company rather than that of the parent company cannot automatically be available against every subsidiary of a parent company targeted in a decision of the Commission punishing conduct that amounts to an infringement.

As the Advocate General observes, in essence, in point 58 of his Opinion, the concept of an 'undertaking' used in Article 101 TFEU is a functional concept, in that the economic unit of which it is constituted must be identified having regard to the subject matter of the agreement at issue (see, to that effect, judgments of 12 July 1984, *Hydrotherm Gerätebau*, 170/83, EU:C:1984:271, paragraph 11, and of 26 September 2013, *The Dow Chemical Company* v *Commission*, C-179/12 P, EU:C:2013:605, paragraph 57).

47 Therefore, the same parent company may be part of several economic units made up, depending on the economic activity in question, of itself and of different combinations of its subsidiaries all belonging to the same group of companies. If that were not the case, a subsidiary within such a group could be held liable for infringements committed in the context of economic activities entirely unconnected to its own activity and in which they were in no way involved, even indirectly.

48 It follows from all the foregoing that, in the context of an action for damages based on an infringement of Article 101 TFEU found by the Commission in a decision, a legal entity which is not designated in that decision as having committed the infringement of competition law may nevertheless be held liable on that basis due to conduct amounting to an infringement committed by another legal entity, where those two entities both form part of the same economic unit and thus constitute an undertaking which is the perpetrator of the infringement within the meaning of that Article 101 TFEU (see, to that effect, the judgments of 10 April 2014, *Commission* v *Siemens Österreich and Others* and *Siemens Transmission & Distribution and Others* v *Commission*, C-231/11 P to C-233/11 P, EU:C:2014:256, paragraph 45, and of 26 January 2017, *Villeroy & Boch* v *Commission*, C-625/13 P, EU:C:2017:52, paragraph 145).

49 The Court has already held that the joint and several liability which applies to the members of an economic unit justifies, inter alia, upholding the aggravating factor of repeated infringement as regards a parent company, even though that company was not the subject of earlier proceedings giving rise to a statement of objections and a decision. In such a situation, what is seen to matter is the earlier finding of a first infringement resulting from the conduct of a subsidiary with which the parent company involved in the second infringement already formed, at the time of the first infringement, a single undertaking for the purposes of Article 101 TFEU (judgment of 5 March 2015, *Commission and Others* v *Versalis and Others*, C-93/13 P and C-123/13 P, EU:C:2015:150, paragraph 91).

50 Therefore, there is nothing to prevent, in principle, a victim of an anticompetitive practice from bringing an action for damages against one of the legal entities which make up an economic unit and thus the undertaking which, by infringing Article 101(1) TFEU, caused the harm suffered by that victim.

51 Consequently, in circumstances where the existence of an infringement of Article 101(1) TFEU has been established as regards the parent company, it is possible for the victim of that infringement to seek to invoke the civil liability of a subsidiary of that parent company rather than that of the parent company, in accordance with the case-law cited in paragraph 42 of this judgment. The liability of that subsidiary cannot however be invoked unless victim proves – whether by relying on a decision adopted earlier by the Commission under Article 101 TFEU or by any other means, in particular where the Commission has remained silent on the point in that decision or has not yet been called upon to adopt a decision – that, having regard, first, to the economic, organisational and legal links referred to in paragraphs 43 and 47 of the present judgment and, second, to the existence of 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, that subsidiary, together with its parent company, constituted an economic unit.

52 It follows from the foregoing considerations that such an action for damages brought against a subsidiary presupposes that the claimant must prove, in order for it to be found that the parent company and the subsidiary form an economic unit within the meaning of paragraphs 41 and 46 of this judgment, the links uniting those companies referred to in the preceding paragraph, as well as the specific link, referred to in the same paragraph, between the economic activity of that subsidiary company and the subject matter of the infringement for which the parent company has been held responsible. Thus, in circumstances such as those at issue in the main proceedings, the victim should in principle establish that the anticompetitive agreement concluded by the parent company, for which it has been punished, concerns the same products as those marketed by the subsidiary. In so doing, the victim shows that it is precisely the economic unit of which the subsidiary, together with its parent company, forms part that constitutes the undertaking which actually committed the infringement found earlier by the Commission pursuant to Article 101(1) TFEU, in accordance with the functional interpretation of the concept of 'undertaking' identified in paragraph 46 of this judgment.

53 It is appropriate to add that the requirements of the right to an effective remedy and to a fair trial, guaranteed by Article 47 of the Charter of the Fundamental Rights of the European Union, must be observed in respect of the defendant to an action for damages that may lead to that party being ordered to compensate the victim of an anticompetitive practice. Therefore, it is essential that the subsidiary company concerned is able to defend its rights, in accordance with the principle of respect for the rights of the defence, which is a fundamental principle of EU law (see, by analogy, judgments of 5 March 2015, *Commission and Others* v *Versalis and Others*, C-93/13 P and C-123/13 P, EU:C:2015:150, paragraph 94, and of 29 April 2021, *Banco de Portugal and Others*, C-504/19, EU:C:2021:335, paragraph 57). Therefore, before the national court concerned, that subsidiary company must dispose of all the means necessary for the effective exercise of its rights of the defence, in particular in order to be able to dispute that it belongs to the same undertaking as its parent company.

54 In that regard, the subsidiary company must be able to refute its liability for the harm alleged, inter alia by relying on any ground that it could have raised if it had participated in the proceedings brought by the Commission against its parent company which led to the adoption of a decision by the Commission finding that there was conduct which infringed Article 101 TFEU ('public enforcement').

55 However, as regards the situation in which an action for damages relies on a finding by the Commission of an infringement of Article 101(1) TFEU in a decision addressed to the parent company of the defendant subsidiary company, the latter cannot challenge, before the national court, the existence of an infringement thus found by the Commission. Article 16(1) of Regulation No 1/2003 provides, inter alia, that where national courts rule on agreements, decisions or practices under Article 101 TFEU, which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission.

56 In that regard, it should be recalled that, admittedly, Article 27(1) of Regulation No 1/2003 provides that, prior to taking a decision establishing an infringement of the rules of competition and imposing a fine, the Commission is required to give those who are the subject of the proceedings the opportunity of having their point of view heard as regards the grounds that the Commission has advanced and is to base its decisions solely on the objections in respect of

which the relevant parties have been able to set out their observations. In that context, the statement of objections is designed to ensure the exercise of the rights of the defence by each legal person concerned by the administrative proceedings in relation to the competition rules. By contrast, if the Commission has no intention of establishing that an infringement was committed by a company, the rights of defence do not require a statement of objections to be sent to that company. The sending of a statement of objections to a given company seeks to ensure that the rights of defence of that company are respected, rather than those of a third party, even though that latter party may well be affected by the same administrative proceedings (see, to that effect, the judgment of 14 September 2017, *LG Electronics and Koninklijke Philips Electronics* v *Commission*, C-588/15 P and C-622/15 P, EU:C:2017:679, paragraphs 44 to 46).

57 Those principles are, however, specific to infringement proceedings conducted by the Commission which have the particular characteristic of potentially leading to the imposition of a fine on the legal entities specifically covered by such proceedings.

58 By contrast, the principle of personal responsibility does not preclude the possibility, in the circumstances described in paragraph 56 of this judgment, that a finding of such an infringement should be definitive with regard to a subsidiary company since, as has been recalled in paragraph 42 of this judgment, it is for the economic unit which constitutes the undertaking that has committed the infringement to answer for it.

59 As is apparent from the case-law of the Court, recalled in paragraph 49 of this judgment, the Court has already held – with respect to taking into account, for the purposes of the application of the aggravating factor of repeated infringement as regards a parent company, an infringement committed by the subsidiary of that parent company – that it is not required that the latter has been the subject of earlier proceedings giving rise to a statement of objections and a decision, on condition that the subsidiary whose conduct gave rise to the infringement already formed, together with the parent company in question, at the time of the first infringement, a single undertaking within the meaning of Article 101 TFUE. Thus, in so far as a decision finding that there was an infringement committed by an undertaking has been addressed to one of the companies that already constituted that undertaking at the time, such that that company, and, through it, that undertaking, were given the opportunity of contesting the reality of that infringement, the rights of the defence of the other companies which constituted that undertaking are not breached by the taking into account of the existence of that infringement in the context of later proceedings for compensation brought by a person who suffered harm as a result of the conduct in question that amounted to an infringement, in particular since such an action is not capable of leading to the imposition of a penalty, such as a fine, on those other companies.

60 By contrast, in a situation where the Commission has not made a finding of conduct amounting to an infringement in a decision adopted under Article 101 TFEU, the subsidiary of a parent company which is accused of an infringement is naturally entitled to dispute not only that it belongs to the same undertaking as the parent company, but also the existence of the infringement alleged.

61 It is also appropriate to state, in order to supplement what is set out in paragraph 51 of this judgment, that, as the Commission stated in reply to a written question put by the Court and as the Advocate General observed in point 76 of his Opinion, the possibility, for the national court concerned, of making a finding of the subsidiary's liability for the harm caused is not precluded merely because, as the case may be, the Commission has not adopted any decision or that the

decision in which it found that there was an infringement did not impose an administrative penalty on that company.

62 As the Court held in paragraph 51 of the judgment of 27 April 2017, *Akzo Nobel and Others* v *Commission*, (C-516/15 P, EU:C:2017:314), neither Article 23(2)(a) of Regulation No 1/2003 nor the case-law lays down which legal or natural person the Commission is obliged to hold responsible for the infringement or to punish by the imposition of a fine.

63 Thus, in accordance with the case-law cited in paragraph 42 of this judgment, the Commission may freely choose to hold liable for an infringement, and to punish by the imposing a fine, any legal entity belonging to an undertaking that participated in an infringement of Article 101 TFEU. It follows that a finding cannot be inferred from the identification, by the Commission, of a parent company as a legal person which may be held liable for an infringement committed by an undertaking that one or other of its subsidiaries is not part of the same undertaking which must answer for that same infringement.

64 It should be added that, in principle, there was nothing to preclude, in the circumstances of the dispute in the main proceedings, the applicant in the main proceedings, which is the alleged victim of the infringement at issue, from bringing its claim for compensation before the Spanish courts against the parent company, Daimler, or even against that company and also against Mercedes Benz Trucks España jointly, the possible liability of the latter for the infringement being subject to the conditions set out in paragraph 52 of this judgment.

65 Indeed, it should be recalled that an action seeking legal redress for damage resulting from alleged infringements of EU competition law, such as that in the main proceedings, comes within the definition of 'civil and commercial matters', within the meaning of Article 1(1) of Regulation No 1215/2012, and, therefore, falls within the scope of that regulation. In addition, it follows from the consistent case-law of the Court concerning Article 7(2) of that regulation that the notion of 'place where the harmful event occurred' is intended to cover both the place where the damage occurred and the place of the event giving rise to it, meaning that the defendant may be sued, according to the applicant's choice, in the courts for either of those places (judgment of 29 July 2019, *Tibor-Trans*, C-451/18, EU:C:2019:635, paragraphs 24 and 25 and the case-law cited).

66 The Court has also stated that damage consisting of additional costs imposed by a truck manufacturer on dealerships and passed on to the end users constituted direct damage which, in principle, could provide the basis for the jurisdiction of courts of the Member State on whose territory the loss materialised, to the extent that the additional costs paid due to the artificially high prices arose as the immediate consequence of the infringement committed under Article 101 TFEU. Where the market affected by the anticompetitive conduct is in the Member State on whose territory the alleged damage is said to have occurred, it is to be held that that Member State must be regarded as the place where the damage occurred for the purposes of applying Article 7(2) of Regulation No 1215/2012 (judgment of 29 July 2019, *Tibor-Trans*, C-451/18, EU:C:2019:635, paragraphs 30, 31 and 33).

67 In the light of the foregoing, the answer to the first to third questions is that Article 101(1) TFEU must be interpreted as meaning that the victim of an anticompetitive practice by an undertaking may bring an action for damages, without distinction, either against a parent company who 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. The subsidiary company concerned must be able

effectively to rely on its rights of the defence in order to show that it does not belong to that undertaking and, where no decision has been adopted by the Commission under Article 101 TFEU, it is also entitled to dispute the very existence of the conduct alleged to amount to an infringement.

The fourth question

68 By its fourth question, the referring court asks, in essence, whether Article 101(1) TFEU must be interpreted as meaning that it precludes a national regulation which provides for the possibility of imputing liability for conduct of a company to another company only in circumstances where the second company controls the first.

69 Since it follows from the answer given to the first to third questions that Article 101(1) TFEU must be interpreted as meaning that a victim of an anticompetitive practice by an undertaking may bring an action for damages against a subsidiary on the basis of the participation of the parent company in that practice, where they form a single economic unit and therefore together make up that undertaking, it must be held that that provision precludes, as a consequence, a national law that provides, in such a situation, for the possibility of imputing liability for the conduct of one company to another company only in circumstances where the second controls the first.

70 It is however necessary to recall that, in order to ensure the effectiveness of all provisions of EU law, the primacy principle requires, inter alia, national courts to interpret, to the greatest extent possible, their national law in conformity with EU law (judgments of 24 June 2019, *Popławski*, C-573/17, EU:C:2019:530, paragraph 57, and of 4 March 2020, *Bank BGŻ BNP Paribas*, C-183/18, EU:C:2020:153, paragraph 60).

71 When applying national law, those courts are therefore required to interpret it, to the greatest extent possible, in the light of the text and the purpose of the provision of primary law applicable, taking into consideration the whole body of national law and applying the interpretative methods recognised by national law, with a view to ensuring that that provision is fully effective and to achieving an outcome consistent with the objective which it pursues (see, to that effect, judgment of 24 June 2019, *Popławski*, C-573/17, EU:C:2019:530, paragraphs 73 and 77, and of 4 March 2020, *Bank BGŻ BNP Paribas*, C-183/18, EU:C:2020:153, paragraph 66).

72 The obligation to interpret national law in a manner consonant with EU law cannot, however, serve as a basis for an interpretation of national law *contra legem* (see, to that effect, judgments of 4 July 2006, *Adeneler and Others*, C-212/04, EU:C:2006:443, paragraph 110, and of 4 March 2020, *Bank BGŻ BNP Paribas*, C-183/18, EU:C:2020:153, paragraph 67).

73 In those circumstances, if the referring court considered that it was not possible for it to uphold an interpretation of Article 71(2) of the Law on the protection of competition that was consistent with the interpretation of Article 101(1) TFEU set out in paragraph 67 of this judgment, it would be required to disregard that national provision and to apply directly Article 101(1) TFEU to the dispute in the main proceedings.

74 In that regard, it does not appear at first sight to be precluded, as the Spanish Government submits in its written observations, that, in the context of an action for damages, the liability of a subsidiary company may be invoked on the basis of Article 71(2)(a) of the Law on the protection of competition. Under that provision, an infringement of competition law means any

infringement of Articles 101 or 102 TFEU or of Articles 1 or 2 of that law. That government submits that it is possible to impute the harmful event to the subsidiary company by virtue of Article 71(2)(a) of that law, which it will however be for the referring court to ascertain.

75 In those circumstances, the answer to the fourth question is that Article 101(1) TFEU must be interpreted as precluding a national law which provides for the possibility of imputing liability for one company's conduct to another company only in circumstances where the second company controls the first company.

Costs

76 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. **Article 101(1) TFEU must be interpreted as meaning that the victim of an anticompetitive practice by an undertaking may bring an action for damages, without distinction, either against a parent company who 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. The subsidiary company concerned must be able effectively to rely on its rights of the defence in order to show that it does not belong to that undertaking and, where no decision has been adopted by the Commission under Article 101 TFEU, it is also entitled to dispute the very existence of the conduct alleged to amount to an infringement.**

2. **Article 101(1) TFEU must be interpreted as precluding a national law which provides for the possibility of imputing liability for one company's conduct to another company only in circumstances where the second company controls the first company.**