**Chapter 7: Private Enforcement and the Imputation of Antitrust Liability**

Professor Peter Whelan

Abstract:
This chapter examines the issue of imputing liability in the context of the private enforcement of competition law. It focuses specifically on the notion of imputing liability to a legal person for the EU competition law violation committed by another legal person within the same corporate group. The chapter thus evaluates the rules that National Courts in the EU Member States must follow with respect to subsidiary liability, parental liability, and sister liability when ruling on antitrust damages actions for breaches of Article 101 or 102 TFEU. It argues that, whilst EU-level jurisprudence has recently provided some clarification on imputation in private antitrust enforcement, as well as an explicit, useful legal foundation for the analysis of the applicability of these forms of liability, an evident lack of clarity remains with respect to some key issues.

Keywords:
Private enforcement; undertaking; parental liability; imputation; subsidiary liability; sister liability

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# Chapter 7:
# Private Enforcement and the Imputation of Antitrust Liability

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## I. INTRODUCTION

This chapter examines the issue of imputing liability in the context of the private enforcement of competition law. It focuses specifically on the notion of imputing liability to a legal person for the EU competition law violation committed by another legal person within the same corporate group. The chapter thus evaluates the rules that National Courts in the EU Member States must follow with respect to parental liability, subsidiary liability, and sister liability when ruling on antitrust damages actions for breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union ('TFEU'). It argues that, whilst EU-level jurisprudence has recently provided some clarification on imputation in private antitrust enforcement, as well as an explicit, useful legal foundation for the analysis of the applicability of these forms of liability, an evident lack of clarity remains with respect to some key issues.

To achieve its aim, the chapter comprises three substantive parts in addition to its conclusion. Part II provides the conceptual underpinning to the debate at hand: it articulates the notion of 'undertaking', a notion that designates the 'perpetrator' of an EU competition law violation, thereby facilitating the potential imposition of antitrust liability upon one legal person for the competition infringement of another. Part III relies upon recent EU-level jurisprudence in the area of the private enforcement of EU competition law to articulate the general legal principles that are applicable with respect to determining whether liability should be imputed from one 'infringing' legal person to another 'non-infringing' legal person. Following on from this context, Part IV examines in turn the status of subsidiary liability, parent liability, and sister liability in the private enforcement of EU competition law. When relevant, it highlights areas for further legal clarification. Finally, Part V concludes.

## II. THE 'PERPETRATOR' OF EU COMPETITION VIOLATIONS: 'UNDERTAKING'

The EU competition law rules are found in Title VII, Chapter 1, Section 1 of the TFEU, which is entitled 'Rules Applying to Undertakings'. Those rules are therefore not addressed to legal or natural persons as such. Rather, they are addressed to 'undertakings'. Anticompetitive agreements *between undertakings* are prohibited, as are anticompetitive decisions of *associations of undertakings*: Article 101 TFEU. Article 102 TFEU prohibits the abuse by *one or more undertakings* of a dominant position. The authors of the Treaties therefore made the decision to employ the term 'undertaking' to designate the 'perpetrator' of a competition law infringement, rather than a more common legal concept at the time, such as a company, a corporation, a body corporate or a legal person.[1] 'Undertakings' are

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[1] Joined Cases C-231/11 P to C-233/11 P, *Commission v. Siemens AG Österreich and others*, ECLI:EU:C:2014:256, [42].

consequently the actual subjects of EU competition law:[2] they establish the scope of such law *ratione personae*.[3] In addition to performing this crucial role in determining those entities to which the antitrust rules actually apply, the concept of undertaking also acts as a critical device in the establishment of the legal person(s) to whom a given instance of anticompetitive behaviour can be attributed,[4] a fact that is vital to an understanding of the operation of any of the doctrines of liability in EU competition law.[5]

Unsurprisingly given the specific nature of EU law, there is no actual definition of an 'undertaking' in the Treaty framework. The EU Courts, however, have filled this gap with their pronouncements in jurisprudence. Accordingly, an undertaking 'consists of a unitary organisation of personal, tangible and intangible elements, which pursue a specific economic aim on a long term basis, and can contribute to the commission of an infringement' of the EU competition law provisions.[6] On a conceptual level, an undertaking is to be understood as 'any entity engaged in economic activity, regardless of its legal status or the way in which it is financed'.[7] A functional approach is taken in this context: an entity may be an undertaking when it is engaging in certain (i.e., *economic*) activities but not when it is engaging in other types of activities, such as exercising powers which are unique to a public authority.[8] This functional approach allows one to avoid a situation where a given activity would be held to be unlawful in one Member State but lawful in another (as it falls outside of the competition law rules), on the sole basis of the relevant market actors' legal statuses under the respective national laws.[9] This particular understanding of the notion of 'undertaking' consequently ensures the unity and effectiveness of EU competition law.[10] Indeed, both the coherence and strength of EU competition law depend upon a shared European definition of its specific subjects (namely, 'undertakings'), and one that is independent of the national laws of the EU Member States.[11] By definition, then, this approach places no emphasis on the specifics of national corporate laws when determining the outer boundary of a given undertaking.[12] Importantly, it does not consider their respective laws on either enterprise liability, group liability or 'piercing the corporate veil' in order to disregard the separate corporate identities (i.e., personhoods) of the companies within a given corporate group and to place them within the same undertaking. Furthermore, the fact that determining the contours of an 'undertaking' does not involve consideration of the legal status of the entity at issue also ensures that the application of the EU competition provisions is not confined to enterprises that are 'nationals' of any of the EU Member States.

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[2] W. Wils, *Optimal Enforcement of EC Antitrust Law: A Study in Law and Economics* (Kluwer Law International, London, 2002) 164. Technically, there are in fact two subjects of the competition provisions: (a) undertakings themselves; and (b) (for Article 101 TFEU only) associations of undertakings: O. Odudu, *The Boundaries of EC Competition Law: The Scope of Article 81* (Oxford University Press, 2007) 23.
[3] I. Wendt, *EU Competition Law and Liberal Professions: An Uneasy Relationship?* (Martinus Nijhoff Publishers, Leiden, 2013) 89.
[4] Case C-67/96, *Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751, Opinion of AG Jacobs, [206].
[5] See, e.g., Case C-152/19 P, *Deutsche Telekom AG v. Commission*, ECLI:EU:C:2021:238, [94].
[6] Case T-112/05, *Akzo Nobel NV v. Commission* [2007] ECR II-5049, [57].
[7] Case C-41/90, *Höfner and Elser v. Macrotron* [1991] ECR I-1979, [21].
[8] See, e.g., Case C-343/95, *Diego Calì v. Servizi Ecologici Porto di Genova SpA* [1997] ECR I-1582, [22].
[9] W. Sauter and H. Schepel, *State and Markets in European Union Law* (Cambridge University Press, 2009) 77.
[10] ibid, citing in support Case 118/85, *Commission v. Italy* [1987] ECR 2599, [11].
[11] M. Kuntz, *Conceptualising Transnational Corporate Groups for International Criminal Law* (Nomos, Baden-Baden, 2017) 44.
[12] ibid 113.

Given that its foundation is economic rather than legal, the concept of an undertaking does not necessarily correspond with either natural or legal personality.[13] Nonetheless, both natural and legal persons can be deemed to be undertakings for the purpose of EU competition law. In fact, a given undertaking can be made up of numerous natural and legal persons,[14] and there is no need in law for the undertaking itself to have legal personality for the EU competition law provisions to apply to it.[15] In this respect the notion of 'undertaking' can often – but by no means always will[16] – display very similar characteristics to a corporate group.[17] An undertaking, then, can be understood as an economic unit which has the capacity to take independent decisions, as opposed to an entity which has been granted legal personality.[18] Put slightly differently, 'formal separation of two companies resulting from their having distinct legal identity is not decisive' in determining whether they form part of the same undertaking; what matters is 'whether or not there is unity in their conduct on the market'.[19] The ability on behalf of a given person to exercise decisive influence over the market conduct of another person will thus bring those two persons within the boundaries of a given undertaking: the ability to exercise decisive influence is the test that determines whether persons can be viewed as constituent elements of a given undertaking.[20]

## III. GENERAL LEGAL PRINCIPLES ON IMPUTATION WITHIN THE PRIVATE ENFORCEMENT OF EU COMPETITION LAW

The above articulation of the notion of undertaking does not provide one with all of the relevant rules or principles to determine whether a given type of liability exists in EU competition law enforcement. The sanctioned legal person certainty needs to be part of an infringing undertaking. The notion of undertaking *facilitates* the imposition of liability. It does not represent the sole legal construct that determines imputation, however. In other words, mere 'membership' of an infringing undertaking does not suffice for liability to be imposed upon a person for that undertaking's infringement: membership of an infringing undertaking is a necessary but not a determinative condition for imputation. With imputation, other legal queries in addition to ability to exercise decisive influence will need to be addressed. (For example, in the context of public enforcement, with parental liability an

[13] A. Jones, 'The Boundaries of an Undertaking in EU Competition Law' (2012) 8(2) European Competition Journal 301, 302.
[14] See: Case 170/83, *Hydrotherm Gerätebau GmbH* [1984] ECR 2999, [11]; and Case C-217/05, *Confederación Española de Empresarios de Estaciones de Servicio* [2006] ECR I-11987, [40].
[15] See, e.g.: Case T-9/99, *HFB v. Commission* [2002] ECR II-1487, [66]; and Case T-52/03, *Knauf Gips KG v. Commission* [2008] ECR II-115, [341].
[16] Cp D. Ashton, 'The Application of the Jurisprudence of the ECJ in Intellectual Property Cases to Issues of Jurisdiction in Antitrust Litigation' (2014) 13(2) Competition Law Journal 188, 190.
[17] Cp M. Jaspers and G. Miersch, 'Recent Developments in the European Commission's Anti-Cartel Enforcement' (2017) 31(2) Antitrust 51, 56.
[18] A. Toth, 'Undertaking', in A. Toth (ed.), *The Oxford Encyclopaedia of European Community Law, Volume III: Competition Law and Policy* (Oxford University Press, 2008) 757.
[19] Case T-66/99, *Minoan Lines SA v. Commission* [2003] ECR II-5515, [123].
[20] See, e.g., European Commission, *Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Cooperation Agreements*, [2011] OJ C11/1, [11] (providing that '[w]hen a company exercises decisive influence over another company they form a single economic entity and, hence, are part of the same undertaking. 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' (footnote omitted)).

*actual* exercise of decisive influence – and not the *mere ability* to exercise such influence – will need to be proven in order for the imposition to sanction the parent company.) There are thus two distinct processes involved in sanctioning an infringing undertaking: (i) identifying the constituent elements of an undertaking for the purpose of determining the *potential* persons to which/whom an infringement of that undertaking could *in theory* be imputed ('drawing an outer boundary of an undertaking');[21] and (ii) identifying the *actual* persons within that undertaking to which/whom an infringement of that undertaking *can legally* be imputed ('imputing liability within that boundary'). Rather confusingly, the EU Courts have frequently used the term 'undertaking' (or 'single economic unit') to refer to the substantive inquiry at the heart of both of these processes, without making it clear which of the processes it is conducting.[22]

As a result of the existence of the said two processes, to determine whether a given doctrine of imputation exists in the private enforcement of EU competition law, one needs to move beyond the conceptual foundation of undertaking (as a boundary) and consider any relevant EU-level jurisprudence that articulates the rules regarding the application of that doctrine (so that liability can be imposed upon persons *within that boundary*). In the absence of specific rules, one should have recourse to any relevant principles that have been articulated by the EU Courts: those principles help one to evaluate the case for or against legal recognition of a given doctrine of imputation in the absence of a definitive ruling on the status of that doctrine. The Court has ruled definitively on the existence of one type of liability in private enforcement: subsidiary liability (i.e., the imposition of liability where the subsidiary company is held liable for the competition law violation committed by its parent company). That said, two recent judgments of the Court of Justice do provide us with the general principles that can help one to determine whether any given doctrine of imputing liability is present in the private enforcement of EU competition law: *Skanska*;[23] and *Sumal* (the judgment that recognises subsidiary liability).[24]

In *Skanska* the Court of Justice clarified the legal situation with respect to the place of the doctrine of economic succession in private antitrust enforcement and, in doing so, demonstrated a willingness to set aside national corporate law rules on the separation of liability in the civil context.[25] In that particular case, the Court expressly stated 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'.[26] That entity is, rather unsurprisingly, the 'undertaking' that has breached the law.[27] For the Court, the right to claim compensation for damage caused by anticompetitive conduct 'ensures the full effectiveness'

[21] That outer boundary has an obvious practical significance with respect to corporate groups: it provides immunity from the operation of Article 101 TFEU to agreements created between constituent legal persons of a corporate group where the corporate group can be understood as an undertaking; see, e.g., Case C-531/16, *Šiaulių regiono atliekų tvarkymo centras and 'Ecoservice projektai' UAB*, ECLI:EU:C:2018:324, [28].
[22] This has in fact occurred with respect to a key judgment regarding the imputation of liability in the context of the private enforcement of EU competition law; see the discussion below in Part IV.A.
[23] Case C-724/17, *Vantaan Kaupunki v Skanska Industrial Solutions Oy, NCC Industry Oy, Asfaltmix Oy*, ECLI:EU:C:2019:204 (hereafter '*Skanska* judgment').
[24] Case C-882/19, *Sumal, S.L. v. Mercedes Benz Trucks España, S.L.*, ECLI:EU:C:2021:800 (hereafter '*Sumal* judgment').
[25] See J. Hennah, 'The Role of Undertakings in Private Law Following *Skanska*' (2019) 12(2) Global Competition Law Review 75.
[26] *Skanska* judgment [28].
[27] ibid [29]-[32].

of the EU competition provisions,[28] in that it 'strengthens the working of the EU competition rules' through its discouragement of anticompetitive behaviour, with the result that it makes 'a significant contribution to the maintenance of effective competition in the European Union'.[29] Damages actions are in fact 'intended to punish anticompetitive behaviour on the part of undertakings and to deter them from engaging in such conduct'.[30] Given this context, the objective of antitrust enforcement and the effectiveness of the competition law rules would be undermined 'if the undertakings responsible for damage caused by infringement of the EU competition rules could escape liability by simply changing their identity through restructurings, sales or other legal or organisational changes'.[31] As a result,

> 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 with actions for damages for infringement of EU competition rules.[32]

On this basis, then, the Court acknowledged that, given the facts as stated and subject to the final assessment of the relevant National Court in that case, the doctrine of economic succession would appear to apply to those facts.[33]

In *Sumal*, the Court of Justice was asked in effect to rule on whether – and if so when – subsidiary liability is available as a matter of law in the private enforcement of EU competition law.[34] The Court ruled that such liability would be available in principle, provided that sufficient economic, organisational and legal links exist between the parent company and the subsidiary and that 'a specific link' exists 'between the economic activity of that subsidiary and the subject matter of the infringement'.[35] In coming to this conclusion, the Court articulated a number of principles that should be noted here. First, it reiterated the point that 'the determination of the entity which is required to provide compensation for damage caused by an infringement of Article 101 TFEU [or Article 102 TFEU] is directly governed by EU law'.[36] Second, it acknowledged that, just like public enforcement, the private enforcement of EU competition law aims to punish and deter anticompetitive behaviour'.[37] Third, the meaning of 'undertaking' does not change depending on whether public or private enforcement is at issue.[38]

## IV. THE *STATUS QUO* ON DOCTRINES OF IMPUTING LIABILITY WITHIN THE PRIVATE ENFORCEMENT OF EU COMPETITION LAW

[28] ibid [43].
[29] ibid [44].
[30] ibid [45].
[31] ibid [46].
[32] ibid [47].
[33] ibid [48]-[50].
[34] See Case C-882/19, *Request for a preliminary ruling from the Audiencia Provincial de Barcelona (Spain) lodged on 3 December 2019 – Sumal, S.L. v. Mercedes Benz Trucks España, S.L.*, Questions A and C.
[35] *Sumal* judgment [51].
[36] ibid [34].
[37] ibid [37].
[38] ibid [38].

As was noted already, in articulating the above-noted principles, the Court of Justice has in fact directly addressed one form of liability in the context of private enforcement that is relevant for current purposes: subsidiary liability. The two other relevant forms of liability were not directly addressed in the said jurisprudence, however: parental liability (where the parent company is held liable for the competition law violation committed by its subsidiary company); and sister liability (i.e., where a subsidiary company is held liable for the competition law violation committed by a company with which it shares a common parent company (i.e., where a company is held liable for a competition law violation committed by a sister subsidiary)). We can be *certain* that, on the basis of extant jurisprudence, subsidiary liability is a part of the private enforcement of EU competition law; that said, some uncertainty still exists as to how that doctrine of liability operates in practice (Part IV.A). In addition, due to the content of the general principles noted in Part III above, we can be *almost certain* that parental liability is also a part of the private enforcement of EU competition law (Part IV.B). What remains *unclear*, however, is whether sister liability exists in this context (Part IV.C). As argued below, however, a credible case can be made that if parental liability exists for the private enforcement of EU competition law, then sister liability will also exist (at least in some form).

### A. What We Can Be Certain Of: Subsidiary Liability

Until relatively recently, there was complete legal uncertainty on whether subsidiary liability was a legally-recognised doctrine in the private enforcement of EU competition law, and thus there was obvious divergence in national practice.[39] For example, the Court of Appeal of Arnhem-Leeuwarden in the Netherlands found subsidiary liability to be mandated under EU law,[40] holding in a civil judgment in November 2019 that, as a direct result of *Skanska*, a subsidiary could be held liable for the competition law infringement of its parent company on the basis that they form part of the same undertaking.[41] In contrast, other courts in the Member States took a different opinion on the matter.[42] Indeed, even within some Member States a divergence of views within the judiciary was evident on this matter.[43] In October 2021 in the *Sumal* case, the Court of Justice resolved this issue when it ruled that subsidiary

[39] Cp F. Marcos, 'The Uneven and Unsure Playing Field for Competition Damages Claims in the EU: Shortcomings and Failures of Directive 2014/104/EU and Its Implementation' (2021) 52(4) International Review of Intellectual Property and Competition Law 468, 475.

[40] See C. Cauffman, 'Beyond *Skanska*. The Court of Appeal of Leeuwarden's Latest Decision in *TenneT*' (1 January 2020) https://ssrn.com/abstract=3512364.

[41] *Alstom and others v. TenneT cs TSO BV and Saranne BV*, Judgment of the Arnhem-Leeuwarden Court of Appeal, Case No. 200.177.480, ECLI:NL:GHARL:2019:10165, [2.12].

[42] See, e.g.: H.M. Wagener, 'Follow-Up to *Skanska* – The "Implementation" by National Courts So Far' [2019] 10 Neue Zeitschrift für Kartellrecht 535, 535; R. Amaro, 'Private Enforcement in France', in F. Wollenschläger, W. Wurmnest and T. Möllers (eds), *Private Enforcement of European Competition and State Aid Law: Current Challenges and the Way Forward* (Wolters Kluwer, Alphen aan den Rijn, 2020) 65-66; and S. Vande Walle, 'Private Enforcement of Antitrust Law in Belgium and the Netherlands – Is There a Race to Attract Antitrust Damages Actions?', in P.L. Parcu, G. Monti and M. Botta (eds), *Private Enforcement of EU Competition Law: The Impact of the Damages Directive* (Edward Elgar, Cheltenham, 2018) 132.

[43] For example, an *obiter dictum* in the following German case takes inspiration from the *Skanska* judgment and comes to a view on the matter that is contrary to that expressed in earlier German judgments (see Wagener, *op. cit.*): *'L1 Group'*, Judgment of the Landgericht (District Court) Dortmund, 8th Civil Chamber, 8 O 75/19 (Kart), 8 July 2020, [47]. On this divergence, see C. Kersting and H.M. Wagener, 'German Premiere: Dortmund Court on Group Liability' (15 July 2020) https://www.d-kart.de/en/blog/2020/07/15/deutschlandpremiere-lg-dortmund-zur-haftung-von-konzernunternehmen.

liability would be available in principle, provided that sufficient economic, organisational and legal links exist between the parent company and the subsidiary and that 'a specific link' exists 'between the economic activity of that subsidiary and the subject matter of the infringement'.[44] That judgment, then, is unequivocal in one sense: it establishes the existence of subsidiary liability in the private enforcement of EU competition law. That said, unfortunately, the pronouncement of the Court has also engendered a degree of uncertainty as to when subsidiary liability will in fact be available in practice. This uncertainty exists due to the Court's insistence that the said 'specific link' is a condition *sine qua non* for the imposition of subsidiary liability. The Court provided limited detail on the concept of a specific link, simply stating that:

> 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.[45]

On its face, it could be taken to require that the non-infringing subsidiary be engaged in economic activity on the market where the parent company's infringement occurred in order for it to be liable under a theory of subsidiary liability. Incidentally, the AG's Opinion in the case expressly stated that, for subsidiary liability to be imposed, the non-infringing subsidiary should be active in the market where the parent company's infringement occurs.[46] Whilst the Court of Justice did not adopt the specific wording of the AG's Opinion, it did not expressly reject it either. The bottom line here is that, due to the relative silence to date from the Court on what a relevant 'specific link' would entail, the term 'specific link' is open to potential interpretation;[47] uncertainty thus exists on the rather novel theory of subsidiary liability. It is hoped that future cases will clarify what the concept of 'specific link' actually requires in practice.

Regrettably, whilst clarifying the existence in principle of subsidiary liability, the *Sumal* judgment also injected a dose of ambiguity and thus further uncertainty into the notion of undertaking and how specifically that concept is used to determine antitrust liability within a corporate group. Indeed, in getting to its conclusion, the Court made an apparent pronouncement of law that gives some scope to allow one to argue – incorrectly as far as this author is concerned – that the *constituent elements* of an undertaking (i.e., the boundary of an undertaking) should be identified in a slightly different manner to that assumed to date. It suggested that the constituent elements should be identified via a process that relies upon an *additional condition* to that of the ability to exercise decisive influence, namely that 'a specific link' also exists between the economic activity of the person under consideration for inclusion within the scope of a given undertaking and the economic activity of the legal person which has committed that undertaking's infringement. Although scepticism can

[44] *Sumal* judgment [51].
[45] ibid [52].
[46] Case C-882/19, *Sumal, S.L. v. Mercedes Benz Trucks España, S.L.*, ECLI:EU:C:2021:293, Opinion of AG Pitruzzella, [77].
[47] See, e.g., A. Kadri and S. Campbell, 'Subsidiary Liability - The *Provimi* Point Answered?' (2021) 42(12) European Competition Law Review 686, 690 (noting that there exits at present 'some scope for argument over what amounts to a sufficiently "specific link" between the activities of a subsidiary and the subject matter of an infringement').

certainly be identified amongst antitrust scholars on this issue,[48] it has already been posited that, as a direct result of the said pronouncement in the *Sumal* judgment, the Court has adopted a new approach to the concept of undertaking, thereby engendering a new era in its development.[49]

The Court pronouncement in question expressly addressed the link between the concept of an 'economic unit' and the notion of a corporate group. Specifically, after noting that the concept of 'undertaking' is a functional one (in that 'the economic unit of which it is constituted must be identified having regard to the *subject matter* of the agreement at issue'),[50] the Court stated that

> 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.[51]

This statement seems to suggest that the inquiry as to whether a hierarchical corporate group comprising a parent company at its top and its respective subsidiaries and sub-subsidiaries etc. constitutes *a single undertaking for the purposes of Article 101 or 102 TFEU* would depend upon whether the said constituent elements of the corporate group were engaging in *a particular* type of economic activity that links them together (e.g., that they are all active on a particular antitrust market that represents the market for the purposes of an alleged antitrust infringement). In other words, it could be taken as implying that decisive influence is not the determinative factor with respect to the *boundaries* of an undertaking. Indeed, some commentators seem to have already accepted this specific interpretation of the significance of the *Sumal* judgment.[52] This is not a matter without practical implications: if the process of drawing the boundary of an undertaking has indeed been changed, then two (unacceptable) results will be engendered. First, *Sumal* would in effect remove antitrust immunity with

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[48] See, e.g., M. Sousa Ferro, '*Sumal* (C-882/19): Solving One Problem, While Creating Many Others?' (EU Law Live, 8 October 2021) https://eulawlive.com/op-ed-sumal-c-882-19-solving-one-problem-while-creating-many-others-by-miguel-sousa-ferro/ (arguing that with the judgment the Court 'created a lot of superfluous headaches for itself' and 'is likely to reject attempts to extend this case-law to other issues of competition law', such as, for example 'determining whether an intra-conglomerate agreement is an agreement between undertakings subject to Article 101 TFEU').

[49] See, e.g., 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)' (Kluwer Competition Law 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/ (arguing that the Court in *Sumal* 'is basically establishing that groups of companies can be comprised of several economic units and thus undertakings, depending on their economic activity', in the process initiating '[a] new era on the application of the single economic entity doctrine to both private and public enforcement of competition law').

[50] *Sumal* judgment [46] (emphasis added).

[51] ibid [47] (emphasis added).

[52] See, e.g., M. Araujo Boyd, 'Of Undertakings, Legal Entities and Groups of Companies. The CJEU's Judgment in Sumal (C-882/19)' (Chillin'Competition Blog, 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/ (arguing that '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. It is difficult to overestimate the relevance of this logic. From now on, groups of companies may, at least where their activities substantially differ, be understood to integrate various economic units or undertakings').

respect to agreements between companies within the same corporate group, unless (it seems) those companies were active in the same market where the infringement occurred. This would be a development that jars with the idea of seeking to protect competition between *independent* entities. It would in effect create a spurious distinction between the status of a subsidiary and that of an unincorporated division of a parent company.[53] Second, it may reduce the scope for parental liability to those situations where the parent company and the infringing subsidiary are (it seems) active on the same antitrust market, a development that has obvious unnecessary, negative implications for the effectiveness of EU competition law enforcement.

It is submitted here that one can reasonably interpret the *Sumal* judgment in way that does not impact upon the determinative test for identifying the constituent elements of an undertaking. The central point to be made here is that, in *Sumal*, there has occurred an apparent conflation between the two processes involved in sanctioning an infringing undertaking: (i) identifying the constituent elements of an undertaking for the purpose of determining the *potential* persons to which/whom an infringement of that undertaking could *in theory* be imputed; and (ii) identifying the *actual* persons within that undertaking to which/whom an infringement of that undertaking *can legally* be imputed on the basis of a specific doctrine of liability. The first process sets out the boundaries of an undertaking (and thus the boundaries of any potential imputation), whilst the second involves the actual imputation of the infringement to a (legal) person within the boundaries of an infringing undertaking (on the basis of any specific legal rules that apply to that given instance of imputation, rules that will vary depending on the doctrine of liability being employed). These processes are conceptually distinct: the second requires recourse to different legal rules than the first. Indeed, despite statements in EU-level jurisprudence that, for example, parental liability 'is merely the manifestation of an *ipso jure* effect of the concept of an "undertaking"',[54] we can detect from that jurisprudence that the EU Courts have refrained from adopting an expansive doctrine of liability that would allow it – *without more* – to attribute a subsidiary's infringement to the parent company *and to any other legal or natural person within the same corporate group* (i.e., within the same undertaking).[55] As the Court of Justice has emphasised, it is settled case law that

> *in certain circumstances*, a legal person who is not the perpetrator of an infringement of competition law may nevertheless be penalised for the unlawful conduct of another legal person, if both those persons form part of the same economic entity and thus constitute an undertaking.[56]

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[53] Cp D. Brodie, *Enterprise Liability and the Common Law*, Cambridge University Press, 2010, 64.
[54] Case C-625/13 P, *Villeroy & Boch AG v. Commission*, ECLI:EU:C:2017:52, 26 January 2017, [150].
[55] R. van Leuken, 'Parental Liability for Cartel Infringements Committed by Wholly Owned Subsidiaries' (2016) 24(3-4) European Review of Private Law 513, 518. This position is consistent with the General Court's expressed view that a subsidiary cannot be responsible for a parent company's antitrust infringement *merely* because it is its subsidiary; see, e.g., Case T-146/09, *Parker ITR Srl v. Commission*, ECLI:EU:T:2013:258, 17 May 2013, [126] (holding that 'although the subsidiary may be penalised instead of the parent company, it is to the extent that it itself participated in the infringement'). It is also consistent with the Court of Justice's statement in *Sumal* itself that 'the liability of a subsidiary 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': *Sumal* judgment [46].
[56] Case C-625/13 P, *Villeroy & Boch AG v. Commission*, ECLI:EU:C:2017:52, [154] (emphasis added).

In other words, it is only in 'certain circumstances' that membership of an infringing undertaking can lead to the imposition of liability upon a person who/which has not personally committed the infringement in question: being part of an infringing undertaking *plus some other proven fact(s)* provides the basis for liability; not mere membership of that undertaking alone. Likewise, given that not all constituent persons within a given undertaking can be sanctioned by the Commission for the competition law violation of another constituent person of that undertaking (e.g., natural persons *as constituent elements of an infringing undertaking* are not subject to antitrust liability[57]), it logically follows that something more than mere membership of an undertaking is required in order to be penalised for that undertaking's competition law violation.[58]

With this context established, one can now detail the specifics of the conflation at issue in *Sumal*. The said conflation occurs because the statements of the Court of Justice on subsidiary liability and the circumstances within which such liability can be legally imposed relate to the *second* process identified directly above, rather than the *first* one. More concretely, the Court's material statements on the concept of 'economic unit' are about the process of imputation itself, rather than the determination of the boundaries of the undertaking for the purpose of subsequently proceeding to the process of imputation. When the Court employs the term 'economic unit' in the *Sumal* judgment it is using it to indicate the entity comprising *solely* those legal persons to which an infringement may in law be imputed (under a particular doctrine of liability) rather than merely to indicate the concept that determines the boundaries of an undertaking prior to imputation (which may include natural and legal persons who/which, depending on the circumstances, cannot be subjected to liability).[59] Two key statements from the Court in *Sumal* can be used to demonstrate how this is so. According to the Court,

> 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.[60]

In the second statement, the Court announces that

> 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.[61]

[57] One should recall that the Court of Justice has acknowledged that a given undertaking may be made up of various legal *and natural persons*: Case 170/83, *Hydrotherm Gerätebau GmbH* [1984] ECR 2999, [11]; and Case C-217/05, *Confederación Española de Empresarios de Estaciones de Servicio* [2006] ECR I-11987, [40].
[58] See: O. Odudu and D. Bailey, 'The Single Economic Entity in EU Competition Law' (2014) 51(6) Common Market Law Review 1721, 1746-1747; and A. Kalintiri, 'Revisiting Parental Liability in EU Competition Law' (2018) 43(2) European Law Review 145, 156.
[59] The Courts have sometimes been similarly sloppy in their use of language when considering directly the issue of parental liability; see, e.g.: Case C-97/08 P, *Akzo Nobel v. Commission* [2009] ECR I-8237, [59] (using the term 'single undertaking' in a manner that could be taken to imply *membership of that unit alone* provides the legal basis for imputation).
[60] *Sumal* judgment [44] (emphasis added).
[61] ibid [62] (emphasis added).

Neither of these statements makes sense if the use of the terms 'undertaking' and 'economic unit' is to be taken to refer to the first process noted above. It is simply not the case that once the boundaries of an undertaking or single economic unit have been determined that *any* entity within that undertaking/economic unit can have liability imputed to it for the undertaking's infringement. For a start, natural persons (directors, managers and employees) are excluded,[62] even though they are 'incorporated' into the undertaking for which they work.[63] Moreover, for the purposes of imputing liability, different rules are applied to different legal persons depending on their position within the undertaking.[64] As noted above, parent companies are only fined if they have *actually* exercised decisive influence over the commercial policy of the infringing subsidiary; and, as *Sumal* itself established, subsidiary companies can only face liability for the competition infringement of their parent companies when a specific link exists between their economic activity and the subject matter of the parent company's infringement.

In fact, viewing *Sumal* as impacting upon the boundaries of an undertaking leads to an absurdity: it requires one to accept that a parent company and a given subsidiary fall within the boundaries of the same undertaking if the conditions for parental liability are fulfilled, but *at the same time* are not part of the same undertaking if, for example, the conditions for subsidiary liability are not completely fulfilled. Or, to put it differently, such an (incorrect) interpretation of *Sumal* moves legal persons in and out of the boundary of an undertaking depending on whether they have infringed competition law. To understand how this is so, one can consider the following example. Assume that a parent company has the ability to exercise and does exercise in fact decisive influence over the commercial policy of a subsidiary. Assume too that there is no specific link between the parent company's economic activity and that of the subsidiary (as per the meaning of 'specific link' in *Sumal*). If the subsidiary violates competition law, the parent company can be sanctioned for that violation (as, according to the EU Courts, the parent and the subsidiary will form a single economic unit[65]). If it is the parent company that violates competition law, then the subsidiary will not be subjected to any sanction (as it does not fulfil the conditions to be part of a single economic unit with the parent). This simply does not make sense.

By contrast, both of the above-noted statements from the Court in *Sumal* make perfect sense – and are consistent with a long line of case law on imputation – if they are taken to refer solely to the second process involved in sanctioning (i.e., the application of a doctrine of liability within the boundaries of an already defined undertaking, rather than the determination of the scope of an undertaking for the purposes of then proceeding to imputation via a doctrine of liability). When the 'economic unit' or 'undertaking' in those statements is taken to mean the entity comprising *solely* the legal persons to which – in the

[62] Cp: R. Alexander, 'Systematically Flogging the Wrong: EU Corporate Fines Violate the Fundamental Rights of Shareholders – The European Commission as Revenant of the Persian Great King Xerxes' (2021) 32(4) European Business Law Review 681, 689 (noting that 'fines for competition law infringements can be imposed on undertakings and associations of undertakings only, not on corporate officers, other managers or other individuals acting on behalf, or in the interest, of the relevant undertaking'); and A. Riley, 'The Modernisation of EU Anti-Cartel Enforcement: Will the Commission Grasp the Opportunity?' (2010) 31(5) European Competition Law Review 191, 205 (noting that, under Regulation 1/2003, 'no individual in his or her capacity as an employee, director or officer can be fined or otherwise penalised').

[63] See Case C-22/98, *Jean Claude Becu* [1999] ECR I-5665, [26].

[64] Cp Case C-882/19, *Sumal, S.L. v. Mercedes Benz Trucks España, S.L.*, ECLI:EU:C:2021:293, Opinion of AG Pitruzzella, [59].

[65] See Case C-97/08 P, *Akzo Nobel v. Commission* [2009] ECR I-8237, [59].

specific circumstances that apply – an infringement may in law be imputed *on the basis of an accepted doctrine of liability*, they are both self-evidently correct, without engendering any inconsistency with extant case law. In short, by providing meaning to the concept of 'undertaking' or 'economic unit' *by reliance on the specific context in which the term is used* (drawing an outer boundary versus imputation within that boundary),[66] one can avoid the conflation at issue and reasonably understand the Court's ruling in *Sumal* as one that affects *imputation alone* and not the wider notion of the *boundaries of an undertaking*.

### B. What We Can Be Almost Certain Of: Parental Liability

One can now move the analysis from subsidiary liability to another form of liability: parental liability. Parental liability is an established – albeit rather controversial – aspect of the public enforcement (at EU level) of EU competition law. In essence, the current practice of the Commission, supported by the EU Courts, is to 'pierce' or 'lift' the corporate veil in a routine manner and impose joint and several liability upon the parent company and its subsidiary when the latter engages in a competition law violation and the parent is deemed to have exercised 'decisive influence' over the commercial policy of the infringing subsidiary. 'Decisive influence' is understood as the power of one entity over another whereby the latter does not determine independently its own market conduct and follows in all material ways the instructions given to it by the former, having regard in particular to the economic, organisational and legal links between those two entities.[67] With this doctrine at its disposal, the Commission in effect operates one of the most accommodating approaches to veil piercing globally. There is no need to prove that the parent company knew about, condoned, encouraged, supported, implemented, instigated or even benefitted from the competition law infringement of the subsidiary: the mere exercise of decisive influence over the commercial policy (very broadly understood) of the subsidiary by its parent company is sufficient for liability to be imposed upon the latter entity for the infringement at issue. The exercise of decisive influence is assumed to have been exercised when the parent owns 100% (or very close to 100%[68]) of the shares of the subsidiary.[69] To rebut the presumption, the parent company must adduce evidence concerning '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'.[70] Despite the EU Courts' claims about its rebuttable nature, we have not yet witnessed a rebuttal of the 100% shareholding presumption that was successfully established and subsequently upheld by the Court of Justice.

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[66] Cp T. Cheng and K. Kwok, *Hong Kong Competition Law: Comparative and Theoretical Perspectives* (Cambridge University Press, 2021) 36 (in effect accepting, with reference to EU competition law, that, in a given factual scenario, the application of the rules underpinning the doctrine of the single economic entity can lead to different conclusions about the composition of an undertaking *depending on the context in which that specific term is used*: i.e., whether it implies its defensive aspect (i.e., whether one is determining the boundaries of an undertaking for the purpose of deciding upon the legality of *intra*-undertaking agreements) or its offensive one (i.e., whether one is engaged in a process of imputation for a competition law infringement that has been committed)).

[67] Case C-97/08 P, *Akzo Nobel v. Commission* [2009] ECR I-8237, [58] et seq.

[68] The case law allows for the application of the presumption when 'almost all' or 'substantially all' of the share capital of the subsidiary is owned by the parent: Case C-289/11 P, *Legris Industries v. Commission*, ECLI:EU:C:2012:270, [48].

[69] Case C-97/08 P, *Akzo Nobel v. Commission* [2009] ECR I-8237, [60].

[70] Case T-112/05, *Akzo Nobel NV v. Commission* [2007] ECR II-5049, [65].

Until recently, it was assumed by a number of antitrust commentators – but certainly not all of them[71] – that the EU-level doctrine of parental antitrust liability did not form part of the private enforcement of EU competition law.[72] Indeed, various academics had interpreted certain EU-level judicial statements prior to *Skanska* as ruling out the possibility that the EU-level doctrine of parental liability would apply in private enforcement.[73] For example, van Leuken emphasised the following statement of the Court of Justice in arguing that in all likelihood the application of the EU-level doctrine of parental liability would not extend to private enforcement:[74]

> the appellants submit that the case-law of the European Union judicature infringes the principle of personal liability of legal persons. However, as the Advocate General has observed in points 65 and 66 of her Opinion, whilst this principle is of particular importance especially as regards *liability in the sphere of civil law*, it cannot be relevant for defining the perpetrator of an infringement of competition law, which is concerned with the actual conduct of undertakings.[75]

Van Leuken welcomed this particular statement on the basis that it implies that the civil liability of the parent company would be judged 'on its own merits'.[76] The point here is that, in the quotation presented directly above, the Court seems to be making a distinction between the civil enforcement of competition law (which respects the company law principle of separation/limitation of liability) and its public enforcement (which does not), with the result that parental liability (a doctrine that does not respect the company law principle of separation of liability) should not be transposed to the civil sphere. In a similar fashion, Sieburgh relied upon the AG's Opinion in that same case to argue that it helps to clarify that 'the reasoning concerning administrative liability for fines cannot be transferred to the assessment of the civil liability of a parent company'.[77] At the time of their publication, these arguments were by no means beyond reproach, not least due to the fact that the judicial statements relied upon could in fact be reasonably interpreted as not ruling out an exception for *antitrust* civil liability. Either way, their logic does not survive the *Skanska* judgment.

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[71] See, e.g., the citations provided in S.F. Janka, 'Parent Company Liability in German and EU Competition Law: Two Worlds Apart?' (2016) 7(9) Journal of European Competition Law & Practice 614, 618 (Footnote 31).

[72] See, e.g., C. Rusu, 'EU Antitrust Law Infringements and Private Damages Actions: How to Hold Cartelists Liable for Damages' [2017] Ars Aequi 796, 804.

[73] See, e.g.: S. Oliveira Pais, 'A First Look at the Portuguese Act 23/2018 Transposing the Private Enforcement Directive', in M. Strand, V. Bastidas Venegas and M. Iacovides (eds), *EU Competition Litigation: Transposition and First Experiences of the New Regime* (Hart Publishing, Oxford, 2019) 67-68; and I. Pico and S. Bouwers, 'The Netherlands Post-Damages Directive: Will the Popularity as a Preferred Forum for Actions for Damages for Competition Law Infringements Increase?' (2017) 10(2) Global Competition Litigation Review 72, 72-73.

[74] R. van Leuken, 'Parental Liability for Cartel Infringements Committed by Wholly Owned Subsidiaries' (2016) 24(3-4) European Review of Private Law 513, 525.

[75] Case C-501/11 P, *Schindler Holding and others v. Commission*, ECLI:EU:C:2013:522, [101] (emphasis added).

[76] Van Leuken, *op. cit.*., 525.

[77] C. Sieburgh, 'The Attribution of Acts: Towards a Principled Assessment under EU and National Private Law' (2016) 24(3-4) European Review of Private Law 645, 668. The relevant parts of the AG's Opinion are: Case C-501/11 P, *Schindler Holding and others v. Commission*, ECLI:EU:C:2013:248, Opinion of AG Kokott [64]-[68].

1. Impact of *Skanska*

It is submitted here that, on the basis of the extant EU-level jurisprudence, it is almost certain that, if directly asked, the Court would hold that the EU-level doctrine of parental liability should indeed apply in the context of the private enforcement of the EU competition provisions, irrespective of whether the claim at issue is a stand-alone action or a follow-on one. The foundational judgment that provides an 'explicit and authoritative endorsement'[78] of this argument is *Skanska*.

What matters here is that, first of all, it is *EU law* that has been acknowledged by the Court to be determinative with respect to the *subjects* who can be sued in the Member States for competition law violations. In other words, EU law is the specific law that determines who has 'passive standing' in the private enforcement of EU competition law. This is a crucial ruling by the Court, in that it implements 'a conceptual paradigm-shift',[79] facilitating what has been termed 'a creeping harmonisation' of the provisions of national law on civil liability for EU competition law infringements.[80] EU-level jurisprudence regarding the breach of Treaty rights has continually attempted to strike a fine balance between the need for the Member States to provide sufficient protection for EU rights once invoked in national litigation and the desire to ensure appropriate respect for the organisational and procedural autonomy of the legal systems that exist in the Member States.[81] The consequence of this legal exercise is that, ordinarily, when there are no specific EU-level rules that apply with respect to national (private) enforcement of EU competition law, national law may step up to play a central role in filling in the gaps.[82] In such a case, Member States are free to enact their own comprehensive rules that will govern how claimants exercise their rights to obtain compensation for antitrust damage, provided of course that they observe both the principle of equivalence and the principle of effectiveness.[83] The principle of effectiveness provides here that sanctions under national law should be 'effective, proportionate and dissuasive'[84] and that national law 'must not be so framed as to make it virtually impossible or excessively difficult' to exercise the rights conferred by EU law.[85] For its part, the principle of equivalence provides that national law must ensure that infringements of Union law 'are penalised under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance',[86] which for present purposes would be national competition law. By holding in *Skanska* that it is EU law that will govern who can be sued in National Courts for damage due to a violation of the EU competition law rules, the Court has in effect removed this particular determination from the

[78] E. Camilleri, 'Private Enforcement in Italy', in F. Wollenschläger et al., *op. cit.*, 127.
[79] C.I. Nagy, 'Has the Time Come to Federalize Private Competition Law? The Autonomous Concept of Undertaking in the CJEU's Ruling in Case C-724/17 *Vantaa v. Skanska*' (2019) 26(5) Maastricht Journal of European and Comparative Law 720, 721.
[80] V. Fasoula, 'Extending the Principle of Economic Continuity to Private Enforcement of Competition Law. What Lies Ahead for Corporate Restructuring and Civil Damages Proceedings after *Skanska*?' (2019) 12 Yearbook of Antitrust and Regulatory Studies 259, 267.
[81] F. Jacobs, 'Enforcing Community Rights and Obligations in National Courts and Striking the Balance', in J. Lonbay and A. Biondi (eds), *Remedies for Breach of EC Law* (Wiley, London, 1997) 25.
[82] K. Havu, 'Horizontal Liability for Damages in EU Law – The Changing Relationship of EU and National Law' (2012) 18(3) European Law Journal 407, 410.
[83] Case C-557/12, *Kone AG and others v. ÖBB-Infrastruktur AG*, ECLI:EU:C:2014:1317, [24].
[84] Case 68/88, *Commission v. Greece* [1989] ECR 2965, [24].
[85] Case C-261/95, *Rosalba Palmisani v. Istituto nazionale della previdenza sociale* [1997] ECR I-4025, [27].
[86] Case C-354/99, *Commission v. Ireland* [2001] ECR I-7657, [46].

realm of national sovereignty.[87] The Member States are thus not able to determine via national law who the subjects of the private enforcement of EU competition law should be, even if in doing so they could undoubtedly demonstrate perfect adherence to the principles of effectiveness and equivalence. To use the words of the AG who provided the Opinion in *Skanska* and echoing an essential distinction made by AG van Gerven on the enforcement of EU law,[88] the determination of the persons having to pay compensation for injury caused by a violation of the EU competition rules is 'a constitutive condition of liability governed by EU law'.[89] To hold otherwise would be to risk different approaches in different Member States, which would potentially undermine the effectiveness of EU competition enforcement, allow for an unlevel 'playing field' within private enforcement, and encourage forum shopping.[90]

The key issue, then, for present purposes is what EU law actually says on this matter. In terms of the specific statements in *Skanska*, it is clear that the notion of *undertaking* takes central place in this assessment. Furthermore, the Court was keen to emphasise that, for reasons of effectiveness, the conceptualization of the responsible undertaking for private enforcement purposes should be identical to that employed in the context of the imposition of EU-level fines. From that position, in *Skanska* the Court logically moved to the recognition of the applicability of the doctrine of economic succession within private antitrust enforcement. The point to be made here is that, if a different set of material facts were at issue in the dispute with the result that the referring question(s) concerned parental liability as opposed to economic succession, it would also seem perfectly logical for the Court to recognise the applicability of parental liability within private antitrust enforcement.[91] Indeed, not only would there be an absence of clear EU-level jurisprudence standing in its way, but there would also in fact be a number of repeated statements in the jurisprudence, not to mention in the academic commentary,[92] about the necessity of parental liability for ensuring the 'effectiveness' of the EU competition law rules. For example, in *Areva v. Commission*, the Court of Justice noted, in the context of examining parental liability, that

> the joint and several liability mechanism enables the Commission to reduce the risk that one of the companies forming part of the same undertaking will be insolvent, which forms part of the objectives of ensuring that the Commission operates *effectively* and of deterrence when dealing with infringements of the competition rules.[93]

[87] See Case 33/76, *Rewe-Zentralfinanz eG and Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland* [1976] ECR 1989, [5].
[88] See W. van Gerven, 'Of Rights, Remedies, and Procedures' (2000) 37(3) Common Market Law Review 501. See also Case C-128/92, *H.J. Banks & Co. Ltd v. British Coal Corporation* [1994] ECR I-1212, Opinion of AG van Gerven.
[89] Case C-724/17, *Vantaan Kaupunki v. Skanska Industrial Solutions Oy, NCC Industry Oy and Asfaltmix Oy*, ECLI:EU:C:2019:100, Opinion of AG Wahl, [60].
[90] ibid [67].
[91] Cp W. Wurmnest, 'Liability of "Undertakings" in Damages Actions for Breach of Articles 101, 102 TFEU: *Skanska*' (2020) 57(3) Common Market Law Review 915, 933.
[92] See, e.g., K.E. Sørensen, 'Groups of Companies in the Case Law of the Court of Justice of the European Union' (2016) 27(3) European Business Law Review 393, 398.
[93] Joined Cases C-247/11 P and C-253/11 P, *Areva SA v. Commission*, ECLI:EU:C:2014:257, [132] (emphasis added).

AG Kokott has also clearly stated that parental liability accords 'with the objective of effective enforcement of the competition rules'.[94] In words not dissimilar to those present in the Court's judgment in *Skanska*,[95] AG Bot in *ArcelorMittal Luxembourg SA v. Commission* was keen to point out that in a corporate group 'the movements of restructuring, transfers or … legal or organisational changes in the group' may thwart the proper enforcement of EU competition law.[96] Therefore, in AG Bot's estimation, 'to ensure the *effective* implementation of competition rules', the EU Courts 'takes the economic reality of groups into account',[97] in particular through its employment of the doctrine of parental liability.[98] The bottom line, then, is that the jurisprudence has clearly relied upon the doctrine of parental liability to strengthen the effectiveness of EU competition law,[99] with the result that the rationale for the Court's decision in *Skanska* points undoubtedly in favour of recognising parental liability in civil damages suits.[100]

Unsurprisingly, given this context, there is a solid body of academic commentary in support of the proposition that *Skanska* plainly paves the way for recognition of parental liability in private enforcement.[101] For Ulfbeck, for example, 'it must be assumed' following *Skanska* that the doctrine of parental liability will apply in private enforcement,[102] including its 100% shareholding presumption.[103] Havu takes a similar view, positing that 'on the basis

[94] Case C-97/08 P, *Akzo Nobel NV and others v. Commission* [2009] ECR I-8237, Opinion of AG Kokott, [43].
[95] See *Skanska* judgment [46].
[96] Joined Cases C-201/09 P and C-216/09 P, *ArcelorMittal Luxembourg SA v. Commission* [2011] ECR I-2239, Opinion of AG Bot, [183].
[97] ibid [184] (emphasis added).
[98] ibid [185].
[99] See B. Cortese, 'Piercing the Corporate Veil in EU Competition Law: The Parent Subsidiary Relationship and Antitrust Liability', in B. Cortese (ed.), *EU Competition Law: Between Public and Private Enforcement* (Kluwer Law International, Alphen aan den Rijn, 2014) 77-79.
[100] Incidentally, if so, then there would also be resolution of one particular issue that potentially arises due to Recital 11 of the Damages Directive (*Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union*, [2014] OJ L349/1). That Recital provides in its material part that '[w]here Member States provide other conditions for compensation under national law, such as *imputability*, adequacy or culpability, they should be able to maintain such conditions in so far as they comply with the case-law of the Court of Justice, the principles of effectiveness and equivalence, and this Directive' (emphasis added), which could be read as implying that in fact divergences in national law on parental liability in private enforcement can legally exist. If – as the current author contends – the interpretation of the implications of *Skanska* is correct, then there would be no contradiction in respecting Recital 11 and putting aside national law on imputability where that law contradicts the EU-level doctrine of parental liability: there would be 'case-law of the Court of Justice' insisting on the implementation of the EU-level doctrine of parental liability. Admittedly, even if that were not the case, Recital 11 does not really introduce a problematic legal issue (particularly given the use of the term 'undertaking' in Article 1(1) of the Damages Directive). This would be the case for two reasons: (a) Recital 11 itself provides that the rest of the content of Directive may negate the Member States' purported competence concerning imputability; and (b), in any case, EU law would provide a similar result, as 'the preamble to a [Union] act has no binding legal force and cannot be relied on either as a ground for derogating from the actual provisions of the act in question or for interpreting those provisions in a manner clearly contrary to their wording' (Case C-134/08, *Hauptzollamt Bremen v. J. E. Tyson Parketthandel GmbH hanse j.* [2009] ECR I-2875, [16]).
[101] See, e.g., J.U. Franck, 'Private Enforcement in Germany', in Wollenschläger et al., *op. cit.*, 104; and R. Meijer and E.J. Zippro, 'Private Enforcement in the Netherlands', in Wollenschläger et al., *op. cit.*, 152.
[102] V. Ulfbeck, 'Vicarious Liability in Groups of Companies and in Supply Chains – Is Competition Law Leading the Way?' (CEVIA Working Paper Series, Issue 4/2019, Copenhagen, 2019) 7.
[103] ibid 8. See also B. Freund, 'Reshaping Liability – The Concept of Undertaking Applied to Private Enforcement of EU Competition Law' (GRUR International, 26 March 2021) 6.

of *Skanska*, it appears that parent companies may also be held liable for damages'.[104] For her part, Hornkohl is unequivocal in her assessment that the *Skanska*

> judgment in essence means that parent companies in general may be held liable for infringements of group companies to the same great extent as known from the jurisprudence of the concept of 'undertaking' concerning the imposition of fines for the breach of competition law. This will give a claimant a wide range of possible enterprises to sue for civil damages.[105]

In a similar fashion, and placing considerable emphasis on its holding (in paragraph 28) that EU law determines the entity which must provide compensation for any damage caused by a violation of the EU competition law provisions, Connolly argues that the Court in *Skanska* 'left little room for doubt' about the future applicability of the EU-level doctrine of parental liability in the private enforcement of competition law.[106] Likewise, and without hesitation, Robertson takes it as a given that the judgment inevitably ensures that parental liability will need to be applied in private enforcement.[107] The author fully accepts the position of these commentators.

2. Impact of *Sumal*

The judgment in *Sumal* provides even further support for the existence of parental liability in the private enforcement of EU competition law (and particularly so if one accepts the interpretation of that case offered by the author in Part IV.A above). Of course, the factual scenario underpinning the *Sumal* preliminary reference involved a parent company's own infringement (for which it had been sanctioned by the Commission), and thus the judgment's specific ruling on subsidiary liability is constructed with that situation in mind.[108] Nonetheless, in arriving at its conclusion the Court not only expressly relies upon statements in the jurisprudence that provide for the legal foundation for *parental* liability, it also makes no effort to distinguish public enforcement from private enforcement in that context.[109] In fact, at key points within its judgment, the Court emphasises both that: (a) public and private competition enforcement pursue the same enforcement objectives (viz., punishment and deterrence); and (b) the term 'undertaking' cannot have a different scope when fines are being imposed by the Commission as compared to actions for damages for EU competition law violations.[110] Given that parental liability exists to further both punitive and deterrent aims, as well as the fact that the concept of undertaking plays a foundational role in the application of the doctrine of parental liability, one can employ such key points to further

[104] K. Havu, 'Competition Infringement Damages Actions: Ruling in *Skanska* (C-724/17) Provides Clarifications on Who is Liable' (2020) 45(4) European Law Review 526, 532.
[105] L. Hornkohl, 'The Economic Continuity Test in Private Enforcement of Competition Law – The ECJ's Judgment in *Skanska Industrial Solutions* (C-724/17)' (2019) 40(7) European Competition Law Review 340, 342.
[106] D. Connolly, 'Parental Liability in EU Competition Law: The House Always Wins' (2020) 22(1) Irish Journal for European Law 1, 1-2.
[107] A. Robertson, '*Skanska Industrial Solutions*: What Does the Court of Justice's Landmark Judgment Mean for Cartel Damages Litigation?' (2019) 40(8) European Competition Law Review 347, 352.
[108] See *Sumal* judgment, Ruling No. 1.
[109] See ibid [43].
[110] See respectively ibid [37] and [38].

emphasise that the Court can be taken to have (implicitly) endorsed the view that the doctrine of parental liability is indeed part of the private enforcement of EU competition law. Of course, interested parties may well seek to argue differently in a future case, a situation which could lead to a preliminary reference on this issue. To this author at least, the outcome of such a preliminary reference would be obvious: parental liability would be expressly acknowledged to exist in the private enforcement of EU competition law.

Before moving to sister liability, one should explain why acceptance of the above argument (that the EU-level doctrine of parental liability also applies to the private enforcement of EU competition law) implies acceptance of the author's earlier argument for a limited interpretation of the implications of some statements made by the Court of Justice in *Sumal*. The point here is that one should reject the interpretation of *Sumal* that views the Court as having held that the *specific boundaries* of an undertaking are determined not solely by the test of decisive influence (i.e., control) but also by the requirement that *all persons* within that undertaking have a 'specific link' between their own economic activity and the 'subject matter' of the competition law infringement under investigation. According to that interpretation, where a *parent company* does not have such a 'specific link' with its infringing subsidiary, that parent company will not be part of the same undertaking as its infringing subsidiary. Such an outcome would thus by its nature preclude the imposition of parental liability *as it is currently understood in the public enforcement of EU competition law*: it would preclude the imposition of parental liability where that liability is imposed *on the sole basis* that the parent company actually exercised decisive influence over the commercial policy of the infringing subsidiary (i.e., where there is no specific link between the parent company's economic activity and the 'subject matter' of the subsidiary's competition law infringement). In short, parental liability – as currently understood – would not be possible, as an additional specific link would have to be established before such liability could be imposed. Instead, a much more limited form of parental liability would exist. Such an outcome is clearly incorrect in principle: the EU Courts have never expressly held that in order for parental liability to be imposed, the parent company must be economically active in the market where the infringing subsidiary has broken the law. In addition, the Courts have expressly and consistently rejected the idea that, for parental liability to be imposed, the Commission must demonstrate that the parent 'influences its subsidiary's policy in the specific area in which the infringement occurred'.[111] Furthermore, parental liability can be imposed merely on the basis that the parent company takes *strategic* decisions that affect the infringing subsidiary.[112] It thus makes no sense for a parent company to be excluded from the scope of an infringing undertaking encompassing its subsidiary (and thus from potential imputation) merely on the basis that the parent company did not engage in a certain economic activity that demonstrates a specific link with the subject matter of the subsidiary's infringement. One should also understand that a claim that a parent company is a non-operational holding company, or a mere financial holding company which does not carry on commercial or industrial activity, will fail to rebut the 100% shareholding presumption,[113] irrespective of the fact that this implies that the parent 'does not act directly in the market'.[114] This legal fact alone would undermine any effort to argue that the scope of an infringing

[111] Case T-138/07, *Schindler Holding and others v. Commission* [2011] ECR II-4819, [85].
[112] See, e.g.: Case T-132/07, *Fuji Electric System Co. Ltd v. Commission* [2011] ECR II-4091, [184]; and Case T-189/06, *Arkema France v. Commission* [2011] ECR II-5455, [69].
[113] Case T-69/04, *Schunk v. Commission* [2008] ECR II-2567, [59]-[71].
[114] Case C-520/09 P, *Arkema SA v. Commission* [2011] ECR I-8901, [48].

undertaking (and thus the potential targets for imputation within that undertaking) is determined, *inter alia*, by a requirement to demonstrate a 'specific link' between a parent company's economic activity and the subject matter of the subsidiary's infringement. Parental liability can be imposed without such a link, so logically the scope of an infringing undertaking that includes a non-infringing parent company cannot depend on such a link either (given that the scope of the undertaking is a pre-requisite for imputation). In any case, and very importantly, if the legal imposition of parental liability were dependent on the parent company being active on the same market as its infringing subsidiary then it would be very easy indeed for that parent company to avoid parental liability altogether (with a resultant nullification of the contribution of such liability towards the achievement of the enforcement objectives of competition law). The parent company could simply organise its corporate group to ensure there is in fact no 'specific link' between its own economic activity (assuming it engages in such activity of course) and the subsidiary's economic activity.

For these reasons too, then, one should interpret the *Sumal* judgment in way that does not impact upon the determinative test for identifying the *constituent elements* of an undertaking. Instead, as argued above, that judgment should only be interpreted as impacting upon *imputation within the boundaries* of an already defined undertaking (determined by the test of decisive influence). In understanding the *Sumal* judgment in this manner, one thus allows for subsidiary liability and parental liability to *co-exist*. Such an interpretation does not remove a parent company from the boundaries of an infringing undertaking when it is not active in the same market as the infringing subsidiary, thus paving the way for parental liability as we currently know it under public antitrust enforcement at EU level. In other words, by leaving the boundary of an undertaking unaffected by the judgment in *Sumal*, one is free to use different, conceptually-distinct doctrines of imputation (subsidiary liability and/parental liability) without either of those doctrines having a material impact on the existence of its counterpart.

### C. What Remains Unclear: Sister Liability

For a number of years, there was not much[115] doubt that liability could not be imposed upon one subsidiary on the basis that it shares a common parent with an infringing subsidiary.[116] Indeed, although an EU-level case exists where a company was in fact held liable for the anticompetitive conduct of a sister company,[117] that case involved the very unusual circumstance of a company exercising decisive influence over its infringing sister subsidiary, and thus liability was not imposed on the basis of the mere existence of the sister subsidiary relationship.[118] Control thus remained key to the imposition of liability, even when sister

[115] Cp B. Rodger, M. Sousa Ferro and F. Marcos, 'A Panacea for Competition Law Damages Actions in the EU? A Comparative View of the Implementation of the EU Antitrust Damages Directive in Sixteen Member States' (2019) 26(4) Maastricht Journal of European and Comparative Law 480, 483 (positing that at EU level the issue of 'sister liability' has been 'addressed, albeit not decisively').

[116] See: Case C-196/99 P, *Aristrain v. Commission* [2003] ECR I-11005, [98]-[99]; and Joined Cases C-231/11 P to C-233/11 P, *Commission v. Siemens AG Österreich and others*, ECLI:EU:C:2013:578, Opinion of AG Mengozzi, [80]-[81]. See also *Sainsbury's Supermarkets v. Mastercard* [2016] CAT 11, [363(8)], [363(11)] and [363(22)]-[363(23)].

[117] Case T-43/02, *Jungbunzlauer v. Commission* [2006] ECR II-3435, [101]-[105] and [123]-[133].

[118] C. Koenig, 'The Boundaries of the Firm and the Reach of Competition Law: Corporate Group Liability and Sanctioning in the EU and the US', in M. Corradi and J. Nowag (eds), *The Intersections between Competition*

subsidiaries are involved, a stance that can be justified in normative terms: without the existence of such a relationship of control between subsidiaries, 'sister liability' lacks a solid (compliance-focused) justification:

> extending liability to legal entities that were not directly involved in the infringement, serves to induce them to influence the conduct of the real perpetrator. If this is understood, it is obvious that mutual liability of sister companies for their respective infringements makes little sense. ... Instead, liability should depend strictly on the possibility of control. In corporate groups, however, control is typically exercised from top to bottom.[119]

On that basis, then, one could possibly claim that sister liability is not a feature of the private enforcement of EU competition law. That said, following the Court of Justice's judgment in the *Sumal* case, one can now argue that there appears to be some (as of yet untested) scope for the imposition of 'sister liability', even when the non-infringing sister subsidiary to be sanctioned does not in fact exercise any control over its infringing sister.

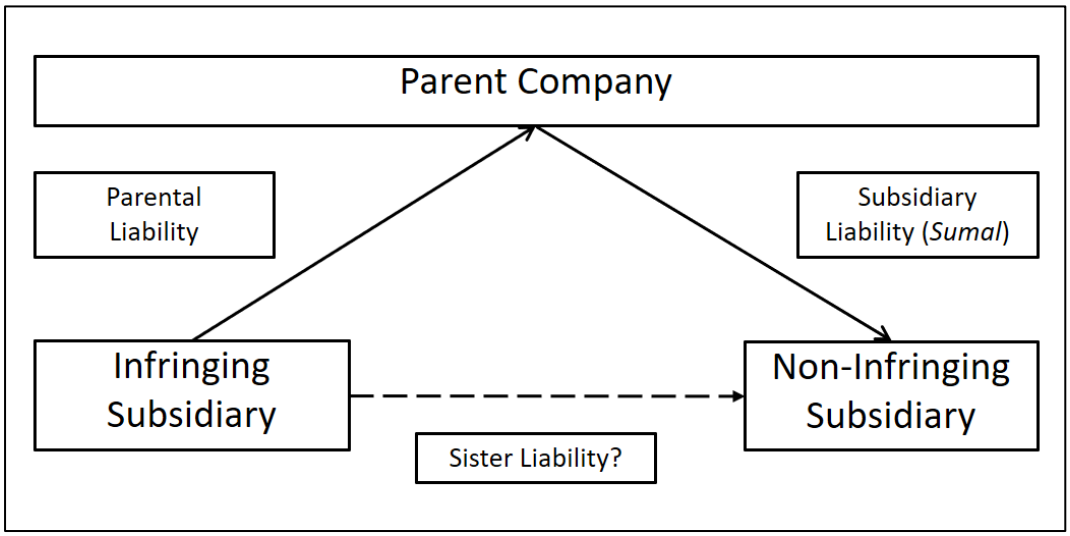


**Figure 1: Potential for 'Sister Liability'**

To understand the argument in question, one can consider Figure 1. Effectively, the argument involves combining parental liability with subsidiary liability: sister liability is constructed, then, by following the infringement upwards from the infringing subsidiary to the common parent company (i.e., via parental liability) and then downwards again from the parent company to the non-infringing subsidiary (i.e., via subsidiary liability). Parental liability is a reality in EU competition law. Subsidiary liability is, however, a novelty in EU competition law. To recap, the relevant circumstances are that: (a) by virtue of the economic, organisational and legal links that exist between them the parent and the subsidiary are part of the same undertaking; and (b) there exists a 'specific link between the economic activity of that subsidiary and the subject matter of the infringement for which the parent company was

*Law and Corporate Law and Finance*, Cambridge University Press, forthcoming, https://ssrn.com/abstract=3708958, 29.

[119] ibid 30 (footnote omitted).

held to be responsible'.[120] Circumstance (a) (i.e., the existence of economic, organisational and legal links) would not be problematic in practice due to the relationship that usually exists between a parent company and its subsidiary. By contrast, due to the relative silence to date from the Court on what a relevant 'specific link' would entail, circumstance (b) would be wide open to potential interpretation. As noted above, on its face it could be taken to require that the non-infringing subsidiary be engaged in economic activity on the market where the infringement occurred in order for it to be liable under a theory of 'sister liability'. In other words, although it is by no means certain, it seems that the sister subsidiaries would need to be present on the same market for such liability to be established. Of course, this outcome presupposes that the doctrines of parental liability and subsidiary liability can indeed be combined to impute liability in a specific case. Such an assumption has yet to be expressly accepted by the Courts, and thus the legal situation of sister subsidiaries remains open to question (even if they are active on the same market as the one where the infringing subsidiary's infringement was committed). Nonetheless, the author sees no reason in principle why the said doctrines cannot be combined in this way.

It may even be the case that, in future, a doctrine of sister liability will be acknowledged to exist independently of the doctrine of parental liability. At present, such a development cannot be predicted on the basis of the extant EU-level jurisprudence dealing with either public or private enforcement. The Court of Justice had the opportunity in *Sumal* to hold that mere membership of a given infringing corporate group (which constitutes an undertaking, determined via the test of decisive influence) suffices for liability to be imposed upon a legal person. Such a pronouncement would certainly have allowed sister liability to exist, independently of the doctrine of parental liability. The Court obviously did not make such a pronouncement. It did not collapse the second process involved in sanctioning a legal person for a competition law violation (applying a doctrine of liability within the boundaries of a defined infringing undertaking) into the first one (determining the boundaries of an infringing undertaking). As was detailed above, it in effect disavowed such an approach: subsidiary liability cannot be imposed merely because an infringing parent company exercises decisive influence over a subsidiary. Indeed, notwithstanding the exercise of decisive influence over a subsidiary by an infringing parent company, subsidiary liability will only be available in those situations where a specific link exists between the parent's infringement and the subsidiary's economic activity. If sister liability were to be acknowledged as an independent doctrine of liability in future, it thus seems likely that, at the very least, a similar restriction would also be articulated with respect to its operation. At this point one will simply have to wait and see if any such development materialises.

## V. CONCLUSION

With reference to corporate groups, this chapter focused on the issue of imputation of liability within the private enforcement of EU competition law. It emphasised that subsidiary liability is an acknowledged aspect of such enforcement. A distinct lack of clarity was noted, however, with respect to how the doctrine of subsidiary liability operates in practice. This is due to the ambiguity surrounding the meaning of the 'specific link' that must exist between the parent company's infringement and the subsidiary's economic activity. It was argued too that, on the basis of the principles articulated in recent EU-level jurisprudence (namely, the

[120] *Sumal* judgment [51].

*Skanksa* and *Sumal* judgments), the doctrine of parental liability is almost certainly applicable in the private enforcement of EU competition law. Far less certainty exists with respect to sister liability, however. That form of liability is arguably available in the private enforcement of EU competition law in certain circumstances: where, on the facts that exist, the doctrines of parental liability and subsidiary liability can in effect be combined in a given case. Outside of that context, one is on very unsure ground. Future cases may well provide clarification of the issue of the status of sister liability. Given the extant jurisprudential record, if a doctrine of such liability is eventually expressly recognised by the Court of Justice, it will surely require more than a subsidiary's mere membership of a corporate group (containing an infringing sister subsidiary) for sister liability to be imposed.