

Op-Ed



Miguel Sousa Ferro

“Sumal (C-882/19): Skanska 2.0 – descending and lateral liability in the economic unit”

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Yesterday, barely 2 years since the *Skanska* judgment ([C-724/17](#)), AG Pitruzzella has read his [Opinion](#) on the *Sumal* case ([C-882/19](#)). In another referral from the trucks cartel (1 of 6)¹, the CJEU is being asked whether the principle of liability of the economic unit for infringements of Articles 101 and 102 TFEU means that there is also descending liability. May a subsidiary be held liable for damage caused by the infringement of its parent company? The same principles will apply to lateral liability within the economic unit.

This issue has already come before national courts and was answered in diametrically opposing ways, namely in Spain and in the Netherlands.

From *Skanska*, we already knew that:

- Determining who is liable for an infringement of Article 101 TFEU “*is directly governed by EU Law*” (para 28).
- Liability for damages arising from an infringement of Article 101 TFEU is assigned by EU Law to the “undertaking” (paras 29-32).
- All case-law clarifications in public enforcement cases for the economic unit and its liability must also be applied to private enforcement cases (homogeneity of solutions), as they are the expression of what is necessary to ensure effectiveness (paras 36-47).

But public enforcement case-law hasn’t yet explicitly clarified this issue. The *Biogaran* judgment ([T-677/14](#), pending appeal in [C-207/19 P](#)) seemingly recognizes liability of a subsidiary for an infringement carried out by the parent

¹ See the Hungarian referral in *Tibor-Trans* ([C-451/18](#)), and the pending referrals from Spain: *Volvo I* ([C-30/20](#)), *Volvo II* ([C-267/20](#)), *PACCAR* ([C-163/21](#));

and from Germany: *Daimler* ([C-588/20](#)); plus the withdrawn referral *Daimler UK* ([C-2/20](#)).

company², but it could have been clearer³. The upcoming Grand Chamber judgment in *Sumal* will be relevant for both public and private enforcement.

The admissibility hurdle seems fairly straightforward, as noted by the AG (paras 11-18)⁴.

AG Pitruzzella suggests the subsidiary should be held liable, but only when it formed part of the economic unit at the time of the infringement, and if it substantially contributed to the achievement of the objective pursued by the anticompetitive conduct and to the materialization of the effects of the infringement.

The AG decisively boiled down the discussion to knowing whether the public enforcement case-law ascribed ascending liability to the parent company because it exercised decisive influence over the subsidiary, or because it was part of the same economic unit (paras 33-38). He then argues that the latter is the one which best describes the Court's position in previous cases, which looks at the general relations between the legal persons and does not require the parent's fault, or its direct participation or exercise of influence, by action or omission, specifically concerning the infringement (para 40 et ss.). Competition law disregards the legal personality and assigns liability for the infringement to the economic entity.

But then the Opinion takes a sudden turn. In paras 56-57, the AG argues that, for the subsidiary to be held liable, it's not enough that it be part of the economic unit, it must also have somehow participated or been necessary for the implementation of the infringement. It is argued that this increased requirement for subsidiaries is necessary to show unitary conduct on the market. The justification for this differentiation between the identification of a single economic unit and of unitary conduct is not explored in depth. The AG seemingly departs from the economic unit approach he argued had prevailed in the case-law, and arrives at a solution based on the participation or fault of the legal person. The AG also seems to present this as a consequence of the functional approach, but he relates this functionality, not to the pursuit of an economic activity, but to the contribution to the specific economic activity involved in the infringement.

The AG's proposed solution would provide for the liability of the subsidiary in a case such as the one before the Court this time, where the subsidiary being sued sold the cartelized trucks, but it could open the door to unwanted results in different future cases, and to a lack of effectiveness of EU Competition Law.

As AG Pitruzzella recognizes (para 68), being able to sue a subsidiary may impact the effectiveness of the right to damages. Claimants for damages have various incentives to sue

² *Biogaran* ([T-677/14](#), EU:T:2018:910), *maxime* para 216.

³ Other cases came close to the issue, but did not clarify it – see: *Siderúrgica Aristrain Madrid* ([C-196/99 P](#), EU:C:2003:529); *Aristrain Madrid* ([T-156/94](#), EU:T:1999:53); *Jungbunzlauer* ([T-43/02](#),

EU:T:2006:270); *HFB Holding* ([T-9/99](#), EU:T:2002:70).

⁴ But see the recent decision of inadmissibility by the CJEU in the referral with difficult questions in *Repsol* ([C-716/19](#)), later resubmitted as pending case *Repsol* ([C-25/21](#)).

subsidiaries: (i) difficulties in executing judgments in another Member State or even outside the EU; (ii) translation costs; (iii) existence of anchor defendant allowing bundling of claims by injured persons in that MS before one single court; (iv) risk of corporate restructuring and of transfers of assets from one legal person to another within the economic unit to escape liability for damages; etc.

If the Court accepts the AG's proposal, it could open up a "sausage gap" for private enforcement of Articles 101 and 102. Legal solutions which allow companies to invoke fictional separations between legal persons who all belong to the same economic unit have the potential of rendering EU Competition Law and the right to damages less effective. They also give unnecessary protection to parent companies who can direct the behaviour and control the management of subsidiaries, including in their responses to actions for damages.

On a different issue, the phrasing of the Opinion arguably places superfluous emphasis on the fact that the EC Decision was only addressed to the parent company. The referral concerned only the liability of legal persons within the economic unit for infringements carried out by that economic unit. This is regardless of whether the action is follow-on or stand-alone. A different discussion, not raised by the national court nor addressed by the AG, is whether all legal persons in the economic unit are bound by the irrefutable presumption created by the finding of infringement in the Commission or NCA decision.

The Defendant in the national case argued that national courts should be bound by the Commission's determination of who was liable for the infringement. The AG's Opinion rejects that argument, noting that the Commission can exercise its discretion on who to address the fine to, and such choice does not imply an opinion about the liability of other legal persons within the economic unit (paras 70-75).

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