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ECJ Redefines the "Economic Entity" Doctrine and Rules that a Subsidiary May be Liable for Behavior of Its Parent Company (*Sumal* C-882/19)

By Marc Barennes, Bas Braeken & Jade Versteeg[1]

Last week, on October 7, 2021 the Grand Chamber of the Court of Justice of the EU ("ECJ") handed down a landmark judgment for the victims of antitrust infringements in Case C-882/19 *Sumal*. In essence, it held for the first time that victims of a cartel infringement may, under certain circumstances, bring an action for damages against the subsidiary of a parent company which was found guilty of that infringement. This ruling has numerous practical implications for antitrust victims, notably in terms of choosing the legal entities against which they may bring a private damages claim and the jurisdiction(s) before which they may bring their claims. In so doing, the ECJ also appears to nuance the well-established "economic unit" doctrine.

In this piece, we briefly (i) sum up the background to the dispute, (ii) recall the questions asked to the ECJ and the Opinion of its Advocate General Pitruzzella, (iii) examine and clarify the answer and the reasoning of the ECJ, (iii) and formulate some observations about the solutions adopted by the ECJ.

Background to the Dispute

The case referred to the ECJ is one of the many referrals sent by the Courts to the ECJ in the aftermath of the 2016 decision of the European Commission imposing fines on the European truck manufacturers for their participation in a cartel ("cartel decision").

In casu, the claimant, a Spanish company seated in Barcelona had acquired between 1997 and 1999 two Daimler trucks from a dealership in Spain under a leasing contract.

To obtain compensation for the trucks it had purchased at cartelized prices, it brought a damages action before the Barcelona Commercial Court against the Spanish subsidiary of Daimler AG. While Daimler AG is one of the addressees of the European Commission's cartel decision, its Spanish subsidiary was not.

On January 23, 2019, the Barcelona Commercial Court dismissed the action brought against the Spanish subsidiary, reasoning that it could not be sued since the cartel decision was only addressed to its parent company.

The Claimant appealed this ruling before the Barcelona Court of Appeal ("Audiencia Provincial"), which asked the ECJ for a preliminary ruling.

The Question Asked to the ECJ and the AG's Opinion

In essence, the referring court asks the ECJ whether the victim of an anti-competitive 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 (para. 31). While the question whether a parent company may be held liable for the behavior of its subsidiary ("upward liability") has been answered by the ECJ both in the public (*Akzo*) and private antitrust (*Skanska*) contexts, it is the first time that the ECJ addresses the question whether a subsidiary may be held liable for the behavior of its parent company in the context of a damages action ("downward liability").

In its Opinion delivered on April 15, 2021 ("Opinion") Advocate General ("AG") Pitruzzella proposes to give a positive answer to the

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question asked to the ECJ.

After quoting the case law regarding the concepts of “undertaking” and “economic unity” which, according to the AG, allow a parent company to be held liable for the anti-competitive behavior of its subsidiary when the parent company “*exercises a decisive influence on the commercial policy of its subsidiary*,” AG Pitruzzella considers that, for the subsidiary to be held liable for its parent’s behavior, the subsidiary must have taken part in the economic activity of the parent company that has materially committed the infringement (paras. 56 and 57 Opinion).

This leads the AG to consider that the criteria to hold the parent company liable for its subsidiary’s anti-competitive behavior are different from those required to hold the subsidiary liable for the parent’s anticompetitive behavior (para. 59 Opinion).AG Pitruzzella concludes therefore that a subsidiary may be held liable for its parent’s behavior if two requirements are met:

> (i) They formed an “economic unit” as established by their economic, organizational and economic links;
>
> (ii) The subsidiary has contributed substantially to the realization of the objective pursued by the parent company and in the materialization of the effects of the infringement (for example, because the subsidiary sells the goods that are the subject of the cartel) (para. 53 Opinion).

The ECJ's Ruling

In its ruling, the ECJ agrees with the AG's Opinion that a subsidiary might be held liable for the damage resulting from anti-competitive conduct of its parent company under certain circumstances but adopts a different reasoning from the AG.

As a first step of its reasoning, the ECJ relies notably on *Skanska* to insist on the right of antitrust victims to obtain redress against the “undertakings” which participate in anti-competitive behaviors (paras. 31 to 36), as well as the fact that the concept of “undertaking” has a similar scope in the context of private and public competition enforcement (para. 37).

As a second step, the ECJ details the concept of “undertaking” as defined in its well settled case law and its consequences on liability, i.e. the possibility of holding the parent company liable for the anti-competitive behavior of its subsidiary when they form an “economic unit.” As the ECJ notes it, pursuant to the well-known *Akzo* judgment, such an economic unit exists when the 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, organizational, and legal links between those two legal entities (paras. 38 to 43).

As a third step, the ECJ appears to apply a new and nuanced approach to the existing functional concept of "undertaking.” It first finds (in para. 45) that there are groups of companies of the "conglomerate" type which are active in several unrelated economic fields. As a consequence of this finding, it considers (in para. 46) that an action for damages cannot automatically be brought against any subsidiary of the parent company referred to in a Commission decision. According to the ECJ (still in para. 46), this is because “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.” The ECJ then explains (in para. 47) that, if the “undertaking” was not identified having regard to the agreement at issue, a subsidiary within a group of companies of the conglomerate type “*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*.”

The ECJ finds, as a consequence, that establishing that a subsidiary and the parent company which participated in the anti-competitive behavior constitute an “undertaking” requires to prove, on the one hand, “*the economic, organizational and legal links*” between them, and, on the other hand, 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*" (para. 51).

Applying this rule to the circumstances of the case, the ECJ rules (in para. 52) 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. 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" (para. 52).

The ECJ goes on (in paras. 53 et seq.) to address the rights of defense for a subsidiary which is faced with an action for damages. The ECJ distinguishes two situations. In cases where no prior Commission decision has been adopted against the parent company, the ECJ states (in para. 54) that the subsidiary is entitled to dispute both that it belongs to the same undertaking as its parent company and to rebut its liability for the alleged damage (paras. 53 and 59). By contrast, in cases where the Commission adopted a prior decision against the parent company, this decision is also final *vis-à-vis* the subsidiary which may dispute before the national courts that it belongs to the same undertaking as the parent company, but which may not dispute the existence of an infringement if it is found to be part of the same "economic unit" (paras. 52 to 55). This is because the undertaking has had opportunity to challenge the finding of an infringement in the administrative procedure.

The ECJ observes (in paras. 62 and 63) that the Commission is free to impose a fine on any legal entity of an undertaking which has taken part in an infringement of Article 101 TFEU. The Commission's choice of a parent company as an addressee of its decision, does not preclude the national courts from finding that any of its subsidiaries being part of the same undertaking are also liable for the same infringement.

Finally, the ECJ finds that in the case at hand, the claimant could have brought an action before the Spanish Courts against both the parent company and the subsidiary if the conditions the ECJ set out in its ruling were met. Relying on its *Tibor Trans* judgment, it rules that 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.

In light of those considerations, the ECJ finds (in paras. 68 et seq.) that – to ensure the full effectiveness of European Union Law – Article 101 TFEU must be interpreted as precluding national legislation which provides for the possibility of imputing a liability for the conduct of one company to another only if that second company controls the first company.

Some Observations

Firstly, the *Sumal* judgment sheds (long awaited) light on the matter of downward liability, and more generally, whether a broad interpretation of the concept of "undertaking" in private enforcement as formulated in the Skanska judgment, is justified. While some argued that Skanska should be interpreted restrictively as applying only to a situation of economic continuity, others argued that it referred to a complete concurrence between public and private enforcement. The *Sumal* ruling brings the desired clarification on this matter. In the *Sumal* ruling – which will constitute for sure an important precedent as it was adopted by the Grand Chamber – the ECJ makes explicit that the concept of "undertaking" is of paramount importance, also in the context of private actions for damages. Although with a small nuance in the form of the substantive requirement that the entities which constitute an economic unit are active on the same market, it is the concept of "undertaking" that determines which entities can be held liable for damages

resulting from anti-competitive behavior of that undertaking, irrespective of which exact entity was fined by the Commission.

The ECJ appears to apply a less strict test to establish downward liability than AG Pitruzzella suggested in his Opinion. Whereas the AG explicitly formulated additional requirements on top of the existence of an economic unit, the ECJ incorporates all relevant criteria for the determination of civil liability within the concept of "undertaking."

The distinction between upward and downward liability which AG Pitruzzella had identified becomes therefore less clear. While in practice, it will likely be easier for a victim to prove the existence of an economic unit and involvement in the same market in the context of upward liability, the legal requirements are in principle similar for upward and downward liability.

Secondly, the *Sumal* judgment may also be a first insofar as the influence of damages proceedings will also be felt in administrative proceedings. In a brief paragraph (para. 47), the ECJ appears to narrow down the classical concept of an "economic unit" which has been developed over decades. For the first time, the ECJ considers that one parent undertaking can be part of several economic units. According to the ECJ, this approach stems of the idea that it would be illogical for a subsidiary to be held liable for damages caused by activities that are completely unrelated to its own activities. While this solution seems fair and logic, the practical consequences of this revolutionary approach of the concept of economic unit, merit further exploration and research.

Moreover, since the ECJ reiterates in this ruling its position in its *Skanska* judgment that the concept of "undertaking" in the context of public and private competition enforcement cannot be different, it may be interpreted as an indication that the ECJ is likely to also confirm the solution adopted by the General Court in *Biogaran*. In that case, the General Court considered that the Commission could impose fines on the subsidiary which could be held liable for the infringement of its parent company when it somehow took part in this infringement by, for instance, selling some of the products.

Thirdly, the main practical consequences of the *Sumal* judgment in relation to bringing an action against subsidiaries of the parent company to which the Commission decision is addressed may be viewed as two-fold. On the one hand, as far as claimants are concerned, it strengthens their access to justice. First, they can sue subsidiaries which are not addressees of the Commission decision under the aforementioned conditions. Second, as pointed out by the AG in his Opinion in particular, it allows claimants to bring actions before the courts in their home jurisdiction against a subsidiary from which they brought the cartelized products rather than against parent companies to which the Commission addressed its decision but which are located in foreign jurisdictions (both inside or outside the EU) with which they may be less familiar. This prevents possible higher litigation costs, more complex service and enforcement, as well as risks of restructuring or transfers of assets. It also allows claimants to bring actions in more claimant friendly jurisdictions than their home jurisdiction. On the other hand, as far as competition law infringers are concerned, it clearly increases their risks of being sued by claimants which otherwise might not have brought an action against them.

Conclusion

In short, like all the recent rulings adopted by the ECJ over the past few years, the *Sumal* judgment will certainly be welcomed by the victims of antitrust infringements in so far as it contributes to increasing their access to justice. The question remains, however, to what extent this approach will also be applied to sister companies. In our view it is likely and consistent with the new approach of the concept of an economic unity, as introduced by the ECJ in *Sumal*, that if a sister company is active on a market related to the one that is the object of a cartel decision and if it is part of the same economic unit as the addressee of the decision, this company could be sued for damages arising of the cartel prohibition as well.