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The EU Court of Justice issues a long-awaited judgement clarifying the extent of an undertaking's liability in follow-on actions *(Sumal / Mercedes Benz Trucks España)*

ANTICOMPETITIVE PRACTICES, CARTEL, DAMAGES, UNDERTAKING (NOTION), PRIVATE ENFORCEMENT, AUTOMOBILE, LIABILITY (GROUP), PRINCIPLE OF EFFECTIVENESS, JUDICIAL REVIEW, EUROPEAN UNION, PRELIMINARY RULING (ART. 267 TFEU)

EU Court of Justice, *Sumal / Mercedes Benz Trucks España*, C-882/19, 6 October 2021

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On October 6, 2021, the Grand Chamber of the Court of Justice of the European Union (the "**ECJ**" or "**Court**") issued a long-awaited decision in case C-882/19, Sumal SL ("**Sumal**") v Mercedes Benz Trucks España SL ("**MBTE**") [*1*]. The judgment shed light on whether, under EU competition law, the victim of an anticompetitive practice may pursue a "follow-on" action against the subsidiary of a parent company, even when only the parent was found liable for antitrust infringement by decision of the European Commission ("**Commission**"). This largely regards anticompetitive agreements under Section 101 of the Treaty on the Functioning of the European Union ("**TFEU**"), but also applies to abuse of dominance under Section 102 TFEU.

Background

In July 2016, the Commission discovered a cartel between truck makers after MAN – one of the participants — blew the whistle and applied for leniency in exchange. At the end of the investigation, the EC imposed a 2.92 billion euro penalty on truck makers Daimler, Iveco, Volvo/Renault, and DAF.

In this context, Spanish container manufacturer Sumal sued Daimler subsidiary MBTE, seeking 22,204 euros in compensation for an alleged overcharge it paid when it bought two trucks from MBTE back in the 1990s. The Barcelona commercial court dismissed the action for lack of standing on the part of MBTE, on the grounds that the Commission had not mentioned the subsidiary in its decision. Sumal then appealed the Barcelona commercial court's decision before the Audiencia Provincial de Barcelona.

The latter decided to stay the proceedings and referred three questions to the ECJ for a preliminary ruling. Essentially, the Spanish court asked whether Article 101(1) TFEU must be interpreted to mean that the victim of an anticompetitive practice by an undertaking may sue for damages against the parent company or against one of its subsidiaries, without distinction, even when only the parent company has been found liable and punished by a decision of the Commission.

The ECJ ruled that under EU competition law and the notion of "undertaking" enshrined therein, a parent company's liability for antitrust infringement also extends to subsidiaries if they form part of the same "economic unit".

The reasoning behind the judgment

The ECJ argued that the answers to the preliminary questions posed by the Spanish court rest on the principle of effectiveness underlying Section 101 TFEU. In this regard, the Court cited the reasoning and principles in Skanska [*2*], namely that public enforcement and private enforcement of EU competition law share the same overall objectives. The two types of enforcement complement each other in service of the goal of preserving the undistorted functioning of competition within the internal market, to the ultimate benefit of consumers. As a result, private antitrust enforcement must be deemed a fundamental prong of EU competition law, not only because it allows full compensation of private damages suffered by the victims of antitrust infringements, but also because it serves as a strong deterrent to dissuade undertakings from anticompetitive conduct, thus contributing to public enforcement objectives.

Consequently — the reasoning goes — it would make no sense to interpret the notion of "undertaking" in private enforcement cases differently than it is interpreted in public enforcement cases. Indeed, the concept of "undertaking" is an autonomous concept of EU competition law. In contrast to similar notions used in other areas of national or EU law – such as those of "company" or "legal person" — the notion of an "undertaking" is directly applicable in all Member States and must be interpreted consistently by national courts across the board.

Citing vast public enforcement case-law on this notion, the Court stated that the EU legislature conceived the concept of an "undertaking" as a "functional" one, namely to assist in a finding of antitrust infringement by an "economic unit", and thus to establish the existence of a "unity of conduct" on the market by an "infringer", irrespective of its legal status and the corporate guises that may distinguish different entities within the same "infringer". It is easy to see that allowing the formal separation between various companies within the same group to serve as grounds for preventing a finding of antitrust liability (resulting in either public fines or payment of private damages) would make Article 101 TFEU (and EU competition rules in general) moot or ineffective in many instances.

On that basis, the concept of an "undertaking" automatically triggers the application of joint and m liability of the entities making up an economic unit at the time the infringement was committed. In this regard, quoting earlier case law, the ECJ reaffirmed that the conduct of a subsidiary may be attributed to its parent company if 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, with the result that, in such a situation, they form part of the same economic unit and, hence, form one and the same undertaking responsible for the conduct that constitutes an infringement.*"

However, with this judgment, the Court clarified that this principle not only works upstream (i.e., holding the parent company jointly and severally liable for a subsidiary's conduct) but also downstream, as in the case at stake. By this token, the ECJ also stated that national legislation precluding a subsidiary from being held liable for the anticompetitive conduct of a parent company would conflict with prevailing EU legal principles and therefore should be disapplied.

Nonetheless, the ECJ took pains not to bring the specific notion of an undertaking to the extreme — which would mean holding any entity within a group of companies subject to a common center of control liable for antitrust infringement indiscriminately, irrespective of its substantive links and involvement with the specific company addressed by a Commission decision. The Court outlined the scope of application of the "economic unity" principle and clarified that, in the context of an action for antitrust damages, joint and multiple liabilities cannot be attributed automatically to any subsidiary of the company addressed in a Commission decision. Instead, the claimant must prove 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 has been held responsible. Thus, in circumstances such as those in the case at issue, at the outset, the victim should at least establish that the anticompetitive conduct for which the parent company has been punished concerns the products marketed by the subsidiary.

Notably, in this respect, the ECJ observed that the organization of groups of companies may vary significantly and, in particular, there are "conglomerates" that operate in several different economic sectors with no connection between them. In such a scenario, "*the same parent company may be part of several economic units made up, depending on the economic activity in question, of itself and of different combinations of its subsidiaries all belonging to the same group of companies. If that were not the case, a subsidiary within such a group could be held liable for infringements committed in the context of economic activities entirely unconnected to its own activity and in which they were in no way involved, even indirectly.*"

Comments

On the one hand, the ECJ is crystal clear on the matters referred by the Spanish judges, as it plainly affirmed victims' rights, under EU competition law, to sue subsidiaries of a parent company even when the latter is the only entity found liable in a Commission decision. On the other hand, the Court did leave room to fine-tune the definition of an "economic unit" While this judgment provides some criteria to define the scope of the principle of joint and multiple liabilities of the various entities constituting an "undertaking", it also leaves a degree of uncertainty as to how much that principle can be stretched in specific cases.

Moreover, one could argue that this decision has the potential to create inconsistency in the interpretation of the notion of an undertaking across different sets of EU competition rules, namely between Article 101/102 TFEU and merger control rules. Arguing — as the ECJ does in this judgment — that different "economic units" may exist within a "conglomerate" group, seems to indicate that the notion of "control" (or "decisive influence") is not the only requirement that must be met to establish that separate entities form part of a single "undertaking", as set out in the Consolidated Jurisdictional Notice [*3*]. According to the ECJ reasoning in this judgment, "sharing an economic field" may be deemed an additional requirement in both private and public enforcement cases. However, the difference in the criteria to establish the perimeter of an "undertaking" or "economic unit" between Article 101/102 TFEU and merger control cases can be justified by the "functional" nature of the notion in question, which as such needs to be molded into the specific objectives pursued by the competition provisions applied to the case.

With this in mind, it will be interesting to see how strong an economic connection will be required in the future in order for courts to assign a subsidiary liability for an antitrust infringement when only its parent was expressly found liable in a related Commission decision.

[1] Grand Chamber of the European Court of Justice, October 6, 2021, Case C-882/19, *https://curia.europa.eu/juris/document/document.jsf?text=&docid=247055&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=8932845*.

[2] For a review of the Skanska judgment, please refer to our previous article: *https://portolano.it/en/newsletter/portolano-cavallo-inform-corporate/ecj-skanska-judgement-undertaking-economic-continuity-and-interplay-between-public-and-private-enforcement-in-eu-competition-law*.

[3] Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, in OJEU N. C 95 of 16 April 2008 (*https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:095:0001:0048:EN:PDF*). More specifically, these guidelines contemplate a similar additional requirement only as an exception for state-owned entities, where there is a clear need to limit the range of state-controlled entities that could be deemed part of an undertaking involved in a merger.