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Preview

The EU Court of Justice issues a preliminary ruling clarifying the single economic unit doctrine in private enforcement providing an analysis that has tremendously far-reaching consequences on future damages claims across the EEA *(Sumal / Mercedes Benz Trucks España)*

ANTICOMPETITIVE PRACTICES, DAMAGES, UNDERTAKING (NOTION), PRIVATE ENFORCEMENT, AUTOMOBILE, LIABILITY (GROUP), 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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Abstract:

The determination of the liability of a subsidiary for the anticompetitive conduct of its parent company ignited, long time ago, a sharp debate between those advocating for the single economic unit doctrine and those supporting the corporate separability doctrine. This paper, after making a brief journey through the diverse implications arising from the transposition of the European Union Damages Directive in Spain, elaborates on the *locus standi* of an undertaking within the meaning of Article 101 TFEU from what the author refers to as *the legacy of 'Skanska'*. It takes stock of the difficulties that Spanish domestic Courts found in ascertaining the extent of liability that stems from a Competition Law damage claim within a corporate group. From the foundations of the case-law on the issue, the paper brings to the forefront the latest judgment of the Court of Justice on occasion of the clarifying preliminary ruling on the landmark *'Sumal'* case.

I. Overview of the 'Damages Directive':

Both European Union Law and Spanish Law were originally fashioned in a way that only administrative bodies would be endowed with the necessary powers to enforce Antitrust rules. This trend changed, however, when it was appreciated the co-existence of a private interest alongside the goal of maintaining effective competition in the market [***1***]. Such a private interest was namely evidenced by the need of all those individuals, including consumers and undertakings, and even public bodies acting in their commercial law capacity, who having been harmed by anticompetitive market conduct, yearned for making their way to redress from perpetrators.

The gate for private enforcement was opened at a supranational level by Regulation 1/2003 and subsequently at a national level in Spain by the Spanish Competition Act of 2007 (Ley de Defensa de la Competencia, LDC 15/2007). Against this legislative backdrop, all those who had been harmed by an anticompetitive agreement or by an abuse of dominance had the possibility to claim damages: a) either by means of the national rules governing civil tort liability or; b) through the legal framework on unfair competition. Additionally, the Regulation was supplemented by the Recommendation of the Commission of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States [*2*].

It must be said that the Spanish Act of 2007 already represented a major step forward in the Spanish legislation on damage claims. This is so since the former Spanish Competition Act of 1989 refrained victims from claiming damages until the infringement decision of the public authority became final [*3*]. This implied a time lapse that could range from eight to ten years since the beginning of the infringement proceeding. Subsequently, any intent of seeking compensation was easily discouraged as supporting evidence of any harm faded away over time. This hurdle was eventually overcome by the aforementioned legislation as it allowed to resort to civil law in order to claim damages before national courts. The new legal system introduced an effective deterrent mechanism to prevent anticompetitive behavior. It also helped reduce the administrative burden placed on the Commission and the National Competition Authorities ("NCAs") by diverting Antitrust cases to national courts.

Nonetheless and despite the major overhaul in the rules governing actions for damages under national law for infringements of Competition Law, the lines of the legal framework continued to be blurred. Deadlines were short and access to supporting evidence of the damage inflicted was burdensome [*4*]. Additionally, as pointed out by the Secretariat of the OECD, from 2006 to 2012 less than 25% of the EU Commission's infringement decisions were followed by damages actions [*5*]. This meant that only a few victims were able to obtain compensation for damages [*6*]. These facts and figures called for further harmonization in the field across the EU.

Such legal barriers were lifted upon the entry into force of the 'Damages Directive' (Directive 2014/104/EU) which brought a package of streamlined procedural rules into the Spanish Procedural Law (*Ley de Enjuiciamiento Civil*) and a series of material provisions into the Spanish Defense of Competition Act (*Ley de Defensa de la Competencia*) [*7*]. Among the main changes set forth by the Directive it can be mentioned the following:

- It establishes a limitation period of five years to claim damages starting from the very moment that the victim has the possibility to know that it has suffered harm from the infringement in question [*8*]. The initiation of an infringement proceeding by the competition authority puts on hold such a limitation period in such a way that victims could decide in accordance with the decision to be adopted and on the merits of the case. If the infringement decision is final claimants have at least one year to file for compensation.

- It allows claimants to file for a court order for the disclosure of evidence [*9*]. With this measure the Directive puts an end to the strict legal requirements that traditionally had refrained victims of Antitrust infringements from asserting in detail all the facts of their case. In order to secure the effectiveness of public enforcement, the disclosure of evidence cannot entail the exposure of the documents related to leniency statements and settlement submissions.

- When asserting their right to claim damages claimants may request full compensation, which includes actual loss (*damnum emergens*) and loss of profit (*lucrum cessans*), plus the accrued interest from the time the harm occurred until compensation is paid [*10*]. This represents an improvement in respect of article 1100 of the Spanish Civil Code according to which interests shall be payable from the moment legal proceedings for compensation are initiated. It must be stressed that full compensation does not entail overcompensation, whether by means of punitive, multiple or other damages.

- Final infringement decisions issued by NCAs are given the same evidential value as a Commission infringement decision when brought before civil courts in the same Member State as that where the infringement occurred [***11***]. And when national infringement decisions are brought before a court of a different Member State they will constitute at least *prima facie* evidence of the infringement in question [***12***]. It must be added to the latter that the Directive makes it easier on claimants to uphold their rights for compensation since it establishes a rebuttable presumption that cartels cause harm. Such an *iuris tantum* presumption might be overridden by the alleged cartelists if they manage to prove that prices were not raised because of their market conduct.

A whole other issue of the highest importance is the clarification set out in the Directive on the so-called 'passing-on'. The passing-on is generally understood as the defense that the infringer is entitled to invoke with the aim of showing that the claimant has not incurred any actual loss as a result of the price increase derived from the collusion in the upstream market [***13***]. In order to make use of this defense mechanism it is necessary to prove that the claimant reduced its actual loss by passing the overcharge on to its own customers. Only by following this argument the infringer could "shield" itself from paying the actual loss. Otherwise, an unjust enrichment would take place for overcompensation, if the downstream-claimant were compensated after having overcharged its own purchasers the price increase prompted at the top of the supply-chain.

In an attempt at assisting national judges and based on Article 16 of the Damages Directive, the European Commission elaborated on the passing-on of overcharges and issued guidelines that would help estimate the share of them that reaches indirect purchasers [***14***]. From an economic approach, these guidelines should be interpreted jointly with the Practical Guide on quantifying harm in actions for damages based on breaches of Article 101 or 102 TFEU accompanying the Communication from the Commission on quantifying Antitrust harm in damages actions [***15***]. The latter puts the spotlight on the overcharge whereas the former is focused on the passing-on of such overcharges.

The guidelines distinguish between two different scenarios under which the passing-on of overcharges might be brought forward, "Shield" and "Sword":

- The passing-on as a SHIELD: As explained right above, under this scenario the passing-on is used as a defensive strategy on the part of the infringer. As a shield, the infringer can argue that the direct or indirect purchasers passed on any price rise by overcharging their own purchasers in a way that they did not incur any actual loss.

- The passing-on as a SWORD: Under this scenario the passing-on is used as an attack strategy on the part of the indirect purchaser. As a sword, the indirect purchaser may claim that the direct purchaser of the infringer integrated the unnatural price increase, which originated at the top of the supply chain, into its own price in order to offset such an increase. In this way, an additional overcharge was also passed down to ultimately reach and harm the indirect purchaser. In line with the Damages Directive the guidelines state that national courts are tasked with the economic estimate of the share of overcharge that is passed on. And that despite being able to do so, in accordance with the national procedural rules, national courts must comply with the 'principle of compensation'. This means that the redress must drive the victim back to the economic position that held absent the infringement [***16***]. But most importantly and as evidenced from the spirit of the guidelines, the estimate of overcharges must strike the right balance between the autonomy of domestic procedural rules and the EU's concern for living up to the standards of judicial protection. On account of this consideration, domestic rules on the standard and burden of proof must be at the disposal of the full effectiveness of supranational Antitrust rules. All in all, the pursuit of the right balance between national procedural rules and supranational material ones have been elaborated on by the case-law [***17***].

Additionally, national courts have also found themselves at a crossroads when determining the accountability to be held by cartelists belonging to a corporate group. Divergence of opinion has been observed in this regard not just across countries but also between courts pertaining to the same domestic jurisdiction. There has traditionally been a more than obvious clash between that part of the judiciary advocating for the corporate separability doctrine and those sticking to the EU concept of undertaking for the purposes of EU Competition Law enshrined by the economic unit principle, also known as the principle of economic continuity [***18***].

In accordance with the corporate separability doctrine the parent company and its subsidiaries are separate legal entities. Companies within a corporate group hold distinct legal personality and subsequently cannot be imputed liability for the actions made by others. This doctrine is repeatedly invoked in practice by most defendants' attorneys who attempt to make the most of it by arguing that their clients never participated in the infringement. Especially when their clients are not the explicit addressees of a prohibition decision for enforcement of Articles 101 and/or 102 TFEU. Hence, advocates of this doctrine claim that some nuances must be conveyed, especially when it comes to the protection of the subsidiary when liability is demanded downwards, i.e. from the parent to its ramifications.

Pursuant to this doctrine, a presumption of liability of a company for the acts of another can amount to: a) An infringement of the "principle of legality" and b) A violation of Article 6(2) of the Convention for the Protection of Human Rights and Fundamental Freedoms, which claims that penalties should be applied solely to the offender [***19***].

On the other hand, other commentators argue in favor of the economic unit principle. In accordance with this, each individual company within a group must be held accountable for an infringement by another which belongs to the same economic unit. Thus, the principle of economic continuity builds on the concept of undertaking for the purposes of Competition Law. Advocates of this principle state that, in order to provide private enforcement of Competition Law with the necessary effectiveness, claimants should be entitled to address their action against the economic unit as a whole and not solely to a particular company within the broader concept of undertaking.

Although it has not been until quite recently that the Court of Justice of the European Union (CJEU) dispelled the remaining doubts on this particular issue, some clarifying case law gradually paved the way for the latest of the decisions. It is thus convenient to firstly look back on time and observe the evolution of such case law.

II. The legacy of 'Skanska':

How far the liability for damages extends? Neither the Directive itself nor the guidelines got altogether to answer this question. The Directive clarifies that whenever there are several companies who jointly breach Antitrust rules co-infringers are jointly and severally liable for the damages as a whole. However, what remains unanswered is whether or not the responsibility for damages may, within a corporate group, be extended to or shared between a parent company and its subsidiaries when it comes to private enforcement.

It was actually the CJEU who, on occasion of its judgment in the landmark case *Skanska* (C-724/17), bridged the gap left by the Directive and its guidelines [***20***]. In relation to the 'principle of economic continuity', *Skanska* bears a certain resemblance to the ruling in *Akzo Nobel and Others v Commission* (C-97/08) [***21***]. The latter enshrined the above-referred principle when stating that: "the conduct of a subsidiary may be imputed to the parent company in particular where, although having a separate legal personality, that subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent

company" [*22*].

The rationale behind this statement has nothing to do with the involvement of the parent company in the infringement but with the fact that the parent and its subsidiaries comprise a single economic unit for the purposes of Competition Law.

In *Skanska* the Court went a step further by bringing this very argument to the private enforcement arena and, in particular, to the judicial protection of Union rights before national courts when an action for damages for the infringement of Competition Law is at stake. The case concerned the prohibition of a cartel in the asphalt market in Finland between 1994 and 2002. Although the cartel had a clear impact on the Finnish asphalt market it actually entailed far-reaching consequences liable to affect trade between Member States. Throughout the cartelization period and in its aftermath the asphalt market in Finland went through a major restructuring process. Some of the cartel participants wound up and their businesses were taken over by other operators.

This was especially relevant for determining which undertakings should be held liable for the damages arising from the cartel. In principle, it seems that it should be up to the domestic legal order of each Member State, whenever there is no supranational rule governing the matter, to lay down the detailed rules on the exercise of the victims' rights to claim compensation for damages. But the rules on civil liability in Finnish law, with just a few exceptions that allow lifting the corporate veil, are based on the principle that only the legal entity that causes the damage is liable. Such a provision inevitably clashes head-on with the principle of economic unit as conceived under EU Competition Law.

Whereas there was no denying that the principle of economic continuity is applicable to Competition Law fining cases there remained some doubts as for its application to actions for damages. The Finnish Supreme Court subsequently decided to stay the proceedings and asked for a preliminary ruling on the issue. Basically, on whether or not supranational law, i.e. Article 101 TFEU, prevailed over domestic law to determine who was to be held liable. And, if applicable the supranational provision, whether or not the notion of an 'undertaking' should also be taken from it.

The CJEU, as in previous case-law (*Kone and Others*, C-557/12), reaffirmed that both Articles 101 and 102 TFEU are directly applicable and that any individual may claim damages whenever there is a causal link between the damage and the conduct prohibited [*23*]. And, as far as the infringer is concerned, "the undertaking which infringes those rules must answer for the damage caused by the infringement" [*24*]. Following this line of argument, the entity liable to redress damages caused by a cartel prohibited by Article 101 TFEU is an undertaking "within the meaning of that provision" [*25*]. Thus, in compliance with the principles of equivalence and effectiveness of EU Law, no national rule shall prevent victims of a cartel from seeking compensation to be paid by the undertaking that resumes the economic activity of the perpetrator.

It must be noted that the ruling in *Skanska* is aligned with the wording of Article 11 of the Damages Directive which comes down to state that, in the absence of EU rules governing the matter, it is up to the legal order of each Member State 'the determination' of those entities which are liable to compensate for damages. However, this freedom to determine the liability of companies within a group seems to be somewhat conditional upon the fact that the definition of 'undertaking' for the purposes of Competition Law is already governed at a supranational level.

Hence, pursuant to the principle of economic continuity, any acquirer of a cartel participant that continues the economic activity of the latter, even when it fully ceased to exist, must be regarded as equally responsible for the damages caused by the liquidated undertaking and must redress the harm accordingly. Otherwise, victims of Antitrust infringements would be deprived of compensation and infringers would always find a way to divert the law.

This intriguing dichotomy between corporate separability and economic continuity has been especially highlighted on occasion of the Trucks cartel. The bottom line is that national courts across Europe have not followed a uniform path when determining the imputability of responsibility for Antitrust violations. Even more mind-blowing than that, it is the lack of a consensus between the judiciary of the same Member States.

III. Experience from the Trucks Cartel:

Corporate accountability within corporate groups has also been a hot topic on occasion of the renowned *Trucks Cartel* [***26***]. Taking as a reference Spanish case law in the matter, Courts across the southern European country passed notorious judgments in which a variety of questions about the Directive's applicability arose. Amongst these questions it might be highlighted the topic of the responsibility within the corporate group affected by the Commission's Decision [***27***].

In early 2011 the Commission decided to begin an unannounced investigation of suspected cartel activity involving truck manufacturers [***28***]. Having good reasons to believe that prices had been fixed between the industry's top producers, EU officials launched cartel raids so as to gather the necessary evidence to pursue the case as a matter of priority and conduct an in-depth investigation. Without prejudging the outcome of the investigation, the Commission confirmed its concerns that truck manufacturers had allegedly been coordinating prices in breach of Article 101 TFEU and Article 53 of the Agreement on the EEA [***29***]. After a large-scale scrutiny, on 19 July 2016 the Commission found that a fourteen-year collusion between truck manufacturers *MAN* (immunity applicant), *Volvo/Renault*, *Daimler*, *Iveco* and *DAF* had taken place since 1997 [***30***]. It is thought that parties put an end to the misconduct in 2011 right after the commencement of the probe.

In particular, the Commission's investigation found that the cartelists had taken part in the following practices:

- Coordination of trucks' factory prices: Such a coordination, also referred to as prices at 'gross list' level, had covered the whole of the EEA for medium and heavy trucks. The 'gross list' price level relates to the factory price of trucks, as set by each manufacturer.
- Agreements or concerted practices over the timing for the implementation of the necessary technologies for the reduction of CO2 emissions as required by the rules EURO III and EURO VI.
- Agreements or concerted practices for the passing-on of the overcharge of the cost from the introduction of such technologies. The Swedish manufacturer of commercial vehicles SCANIA was also fined by the Commission on 27 September 2017 [***31***]. This truck producer did not settle with the Commission as the other five participants in the cartel did and because of that it followed the standard cartel procedure.

The sanction over SCANIA along with the previous sanctions imposed on the other manufacturers implied a record fine of €3.8 billion [***32***].

From that moment onwards, it has been observed across Europe the implementation of the mass litigation model introduced by the Damages Directive whereby victims of cartels, in this case purchasers of trucks, are entitled to pool their claims in a single case to obtain compensation for the overcharge.

Lots of hype has surrounded the application of the Damages Directive to the Trucks cartel in Spain. Before the lockdown of Justice as a result of COVID-19 pandemic nearly a hundred judgments had already been passed across the country. Over these years, both attorneys and public officials have had the chance to learn by doing. The novelty of the Damages Directive alongside the lack of knowledge of Competition Law in most of the judiciary nurtured the debate on a few issues in relation to private damages actions.

As mentioned above, one of the most talked-about contentious issues concerned *locus standi* in relation to companies of the same group. Lack of *locus standi* has been one of the most frequently used arguments by defendants, whether by subsidiaries or by the parent companies themselves. Subsidiaries may challenge their participation in the price fixing by arguing that they have not been directly affected by the Commission's Decision or that responsibility should be taken by the parent company itself [*33*]. Likewise, parent companies and those directly concerned by the Decision are likely to argue that they were not directly involved in the sale to the applicant. Legal practice has shown that the measurement of the extension of the causal relationship that there should be between harm and the defendant(s) is not that easy to prove, especially when it comes to determine the responsibility within a corporate group.

On Spain's eastern Mediterranean coast three noteworthy judgments are worth mentioning after claims were brought before Commercial Courts of Murcia, Valencia and Barcelona. The first two judgments brought forward lines of argument that keep greater consistency with the principle of economic continuity as enshrined by the CJEU. In addition to these, it is of a high relevance the judgment passed in Barcelona which leaned towards the argument of the corporate separability and subsequently dismissed the claim in favor of the defendant. As a follow up to the Barcelona claim, the applicant pursued the case before a second instance court (Provincial Court of Barcelona) who decided to submit a compelling and thought-provoking request for a preliminary ruling to the CJEU. The long-awaited outcome of such a preliminary ruling showed, from the very beginning, great promise of what might be the definitive benchmark standard to be followed by the judiciary across the EEA. Here is a summary of the referred case law:

- **1. Murcia claim** [*34*]:

In 2018 the applicant filed a claim against *Volvo Group España, S.A.* (hereinafter "*Volvo Group*" or the defendant) seeking compensation for the overcharges paid in consequence of the price fixing Trucks Cartel. *Volvo Group* is a manufacturer of vehicles such as trucks and buses and it also produces engines and construction equipment. Its success in the industry led the Group to purchase *Renault Trucks Spain S.L.*

The defendant upheld that it lacked *locus standi* (passive legitimation under Spanish Law) and because of it no action could ever be brought against itself. The grounds on which it based its defending line were that the applicant had originally purchased the overpriced tractor trucks from *Renault Trucks Spain S.L.* and not directly from *Volvo Group*. Nonetheless, the judge dismissed this argument by stating that any acquiring company becomes the owner of those assets, rights and obligations that used to belong to the target and, for this reason, the lack of *locus standi* argument could not be held. The ruling shows consistency with the economic unit doctrine.

- **2. Valencia claim** [*35*]:

The claimant brought legal action against *Fiat Chrysler Automobiles N.V.* (hereinafter 'Fiat') and *CNH Industrial N.V.* (hereinafter, 'CNH'). These two companies belong to the group *Iveco* which was indeed sanctioned by the European Commission. Because of it, the applicant claimed damages for those additional costs allegedly incurred as a result of the overprice paid for the purchase of a couple of trucks.

The controversy resides in the fact that none of those manufacturers that belong to Iveco did actually sell those trucks by themselves. The sale was in fact concluded through independent dealers with autonomy to determine the trucks' selling prices. Aside from it, neither *Fiat* nor *CNH* marketed their vehicles in the Spanish territory but *Iveco España* did. Although Iveco was addressee of the Commission's Decision *Iveco España*, as subsidiary, was not.

In principle, and in accordance with Spanish Company Law as regards torts, it might be argued that in order for those two manufacturers to bear the burden from a *follow on* action they should be addressees of the Commission's Decision. This was in fact a long-standing practice in Competition Law in Spain until the Damages Directive was transposed.

Fully aware of the controversy here, the judge in Valencia adopted a well-informed decision. In fact, he expressly acknowledged the ease with which addressees of a Competition Authority Decision may be held accountable to compensate damages. Likewise, the judge underlined the controversy that arises when it is to be determined the liability of companies belonging to the same economic unit when these have not been expressly mentioned in the wording of the Decision. And maybe, because of that difficulty, the judge of the Commercial Court of Valencia accurately ruled that the doctrine enshrined by *Skanksa* soundly operates in two ways:

- To extend liability to companies pertaining to a group; and,
- To retain the *locus standi* of the infringing parties to a cartel in a manner that the injured subject could not see itself deprived of a redress mechanism.

The ruling continues to argue that a group of companies might be used as a network and thus as a guiding thread that links the parent and the subsidiary by bringing the misconduct of the former to the latter. Subsidiaries may be used in this sense as a means to penetrate new markets and to implement in their territories the decision-making of the parent company. Even the Commission's Decision in the Trucks cartel claimed that: "The parties, including the Addressees, have national subsidiaries in key market countries that usually import the trucks and sell their products as national distributors and marketing entities through their respective networks of authorized dealers or, in certain particular cases/regions, directly to key customers" [***36***].

On account of all this, it is irrelevant that Iveco trucks were marketed in Spain by a company distinct from that nominally affected by the Commission's Decision. And because of it the judge refers to the defendant's line of argument as a contradictory syllogism. In no way it could be accepted the argument that neither the subsidiary is responsible because it is not an addressee of the Decision nor the parent company is responsible because it did not make the sale of the trucks. If this were to be true it would be pointless to make use of a *follow on* action for the purposes of Competition Law [***37***].

As regards the argument of the independent nature of the dealers that concluded the sales contract, the judge acknowledged that it might work, if at all possible, to reduce the percentage of the compensation to be paid but never to escape responsibility for the consequences of the cartel [***38***].

- **3. Barcelona claim** [*39*]:

In this case the applicant, *Sumal SL*, brought an action against *Mercedes Benz Trucks España S.L.* (hereinafter "Mercedes Benz") for damages arising from the Trucks Cartel. In particular, Sumal had signed a lease agreement for trucks with a dealer of the referred defendant company, *Mercedes Benz*, which belongs to the fined company *DAIMLER*. Against this backdrop, *Mercedes Benz* pled not guilty to all counts stemming from the Antitrust misconduct of its German parent company. In its favor, the defendant claimed that it lacked the necessary legitimation to stand in trial on the bases that it had never participated in the cartel and that the Commission's Decision was addressed solely to the parent company.

In line with the defendant's argument, the judge recalled that the second paragraph of Article 71 of the Spanish Competition Act, as amended by RD 9/2017, sets outs that accountability for anticompetitive behavior might additionally be held by the controlling company over the misconduct of its subsidiaries except for when the parent is fully unaware of such conduct. The judge made a reference to the Antitrust doctrine which sustains the argument that imputability of damages becomes more effective when the behavior of the subsidiary is determined by the parent company. But, in exchange, it can never be claimed responsibility to the subsidiary for the behavior of its parent company. On these grounds the Court of Barcelona dismissed the lawsuit in first instance.

Nevertheless, the applicant pursued the case in second instance before the Provincial Court of Barcelona (Audiencia Provincial). As a follow up to its original damages claim, the applicant argued that the first instance Court committed manifest errors of assessment as regards the *locus standi* of the initially intended defendant. This part of the appeal was fundamentally based on the difficulty in making effective the claimant's rights for compensation when applicant and defendant are domiciled in different Member States of the Union.

In consequence, of all the doubts raised by the recurrent conflict between the principle of economic unit and that of corporate separability, the Court of second instance cleverly opted for submitting a question for a preliminary ruling to the CJEU. Notably, the Spanish Court raised the following questions [***40***]:

- *Does the doctrine of the single economic unit developed by the Court itself provide grounds for extending liability from the parent company to the subsidiary, or does the doctrine apply solely in order to extend liability from subsidiaries to the parent company?*
- *In the context of intra-group relationships, should the concept of single economic unit be extended solely on the basis of issues of control, or can it also be extended on the basis of other criteria, including the possibility that the subsidiary may have benefited from the infringing acts?*
- *If it is possible to extend liability from the parent company to the subsidiary, what would be required in order for it to be possible?*
- *If the answers to the earlier questions support the extension of subsidiaries' liability to cover acts of the parent company, would a provision of national law such as Article 71(2) of the (Law on the Protection of Competition), which provides only for liability incurred by the subsidiary to be extended to the parent company, and then only where the parent company exercises control over the subsidiary, be compatible with that line of the Court's case-law?'*

IV. The enlightening 'Sumal' ruling:

Nearly two years after the request for a preliminary ruling, the CJEU finally passed its judgment on 6 October 2021.

Living up to the billing, the CJEU's clarifying analysis has tremendously far-reaching consequences on future damages claims across the EEA [***41***]. The authoritative nature of the interpretation provided by the Court seems to bring to an end the long-standing debate between the corporate separability doctrine and the single economic unit doctrine.

According to the Court, it must not be accepted variations of the concept of undertaking for the purposes of Article 101 TFEU. As underlined by the Court, the concept of undertaking "constitutes an autonomous concept of EU law" which basically implies that there is no room for further interpretation of such a concept when moving from public to private enforcement of the Antitrust rules [***42***]. That is the legacy of Skanska freshly picked up and further elaborated by the Court.

It is thus clear that the principle of economic unit cannot be completely emptied out of its significance. This should not come as a surprise to anyone if taking into account previous case law on the matter. As stated by the Court in previous cases: "national rules governing the exercise of the right to claim compensation for the harm resulting from an agreement or practice prohibited under Article 101 TFEU must not jeopardize the effective application of that provision" [***43***].

Following this line of argument, private enforcement gains greater effectiveness as a mechanism of redress at the disposal of the injured party when the parent company and its subsidiaries are jointly and severally liable for the anticompetitive behavior of each other [***44***]. In this way private enforcement of Competition Law apparently gains greater consistency with its public enforcement counterpart. In accordance with the opinion of Advocate General Wahl on occasion of *Skanska*: "private enforcement through actions for damages provides a complementary deterrent for anticompetitive behavior, which public enforcement alone is unable to achieve" [***45***]. Plus, the doctrine of the single economic entity solves a problem of under-deterrence when companies within a group individually lack sufficient assets to pay for damages [***46***].

In stark contrast with the legal concept of undertaking observed in many areas of law, within the meaning of Article 101 TFEU such a concept is fully of an economic nature. In no way can the "formal separation between various companies that results from their separate legal personalities…preclude such unity for the purposes of the application of the competition rules" [***47***]. The unity of economic conduct holds companies belonging to the same unit responsible for an Antitrust infringement. Whether designated or not by a Commission decision, the claimant of damages may go indistinctly against any of the entities comprising the economic unit. Thus, the ruling allays any remaining doubts on the 'top-down' liability of a subsidiary for the behavior of its parent.

However, and in addition to the economic character of the concept of undertaking, the Court underlines the functional character of the term. This means that in Competition Law the concept of undertaking must be understood as designating an economic unit for the purposes of the subject-matter of the agreement in question [***48***]. Thus, conglomerate companies, whose economic fields are utterly unconnected with the subject-matter of the anticompetitive agreement, do not respond for the damages.

In subsequence, within any corporate group there are as many economic units as fields of activity can be distinguished. All those companies who share the same field of work belong to the same economic unit and thus must be held liable for the misconduct of their fellow companies of such a unit. And the other way round, this may well work as a firewall for those companies whose activities, neither directly nor *indirectly*, have anything to do with the subject-matter of the anticompetitive conduct.

All in all, in order for a victim of an Antitrust infringement to claim damages of a subsidiary for the misconduct of any of the entities that (together with it) comprise an undertaking within the meaning of Article 101 TFEU, the following two tests must be met [***49***]:

- *The economic unit test*: The economic, organizational and legal links between the subsidiary and the entity that actively engaged in anticompetitive conduct (either if has been subject of a Commission infringement decision or not);
- *The functionality test*: 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. It must be recalled that the precedence of EU Law must be safeguarded at all times and because of it no domestic law may narrow down the possibilities of imputing liability to companies within a corporate group. The concept of economic unit must be preserved in the private enforcement of Antitrust. As a result, such a concept cannot be made contingent on the notion of 'control' as the concept of a concentration does for the purposes of Merger Control. It is the duty of every national court to interpret, to the greatest extent possible, the national law in conformity with EU Law. By the same token, national courts are compelled to disregard any national provision clashing with the Article 101 TFEU and its interpretation from the Court on occasion of the preliminary ruling in *Sumal*.

Conclusion:

From the past few years of experience in private enforcement of Competition Law in Europe it could be drawn serious doubts on the determination of the undertakings' liability to provide compensation for harm caused by a practice prohibited under Article 101(1) TFEU. In particular, on those actions for compensation directed against the subsidiary of a parent company and brought following a decision finding only that the parent company participated in a cartel.

The ruling in 'Skanska' proved being enlightening but insufficient. It clearly provided that the undertaking who infringes Antitrust rules must answer for the damage caused by the infringement in accordance with the meaning of 'undertaking' within the meaning of Competition Law. However, inconsistencies observed in the national courts' rulings, especially after all the claims brought about by the 'trucks cartel', called for further clarification and coherence with the EU acquis as far as the principle of economic unit is concerned.

The long-standing strain between the single economic unit doctrine and the corporate separability doctrine eventually reached a breaking point on occasion of the request for a preliminary ruling from the Provincial Court of Barcelona.

After almost two years being on hold since the request, the CJEU ruled that the prohibition of Article 101 TFEU makes enough room for the victim of an anticompetitive practice to bring an action for damages indistinctly against the parent company or its subsidiaries. The so-called 'top-down liability', where the subsidiary is liable for the harm caused by its parent, is openly acknowledged provided that the claimant shows sufficient evidence of: a) The economic, organizational and legal links between the subsidiary and the entity that actively engaged in anticompetitive conduct; And, b) The existence of a specific link between the economic activity of the subsidiary in question and the subject matter of the infringement for which the parent company has been held responsible.

Preliminary rulings are binding both on the referring court and on all courts in EU countries, which means that, at last, the CJEU has found the perfect place to fit the single economic unit doctrine into private enforcement of Competition Law.

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