Kluwer Competition Law Blog

Advocate General holds that subsidiaries can be held liable for the anticompetitive conduct of their parent companies (Case C-882/19 – Sumal)

Alvaro López Usatorre (Latham & Watkins LLP) · Thursday, April 15th, 2021

Even though public enforcement of competition law has traditionally played a significant role in deterring companies from committing antitrust infringements, private enforcement has proved to be an effective ally in this quest. Ever since the adoption of Directive 2014/104/EU (***Damages Directive***) and, in particular, the European Commission's (***EC***) Decision in the Trucks cartel, litigation over damages caused by infringements of competition law has notably increased. The overwhelmingly high amount of damage claims that national courts across the European Union are currently facing clearly supports this.

The increase in private enforcement of competition law has kept European courts very busy in the last years, leading them to face many interesting yet challenging questions on not only the interpretation of the provisions of the Damages Directive and their transposition into domestic law but also on canonical principles traditionally applied in public enforcement of competition law. It is precisely in this context that Case C-882/19 – *Sumal* comes into scene.

On 24 October 2019, the *Audiencia Provincial de Barcelona* (***APB***) faced a claim for damages by Sumal against Mercedes Benz Trucks España, a subsidiary of the German company Daimler AG to whom the infringement decision in the *Trucks* cartel was not addressed. Under the well-established single economic entity doctrine, parent companies can be held liable for their subsidiaries' anticompetitive conduct under certain circumstances. However, the question of whether a subsidiary can be held liable for the anticompetitive conduct of its parent company was never addressed before either in a public or private enforcement context. Confused by the newness of the question, and in light of the discrepancies in the case-law of national courts of lower instances, the APB decided to suspend proceedings and refer several questions to the ECJ for a preliminary ruling. Essentially, the ECJ was asked (i) whether the single economic entity doctrine allows holding a subsidiary liable for the damages caused by its parent company and, if so, (ii) which are the requirements for such extension of liability.

AG Pitruzzella's Opinion

Pending the judgment from the ECJ, Advocate General (**AG**) Pitruzzella has just published its Opinion on the case, providing us with some food for thought as regards the potential answers to the questions referred by the APB.

AG Pitruzzella guides us through the concept of undertaking and the single economic entity doctrine with clarity (paras. 23-31), to finally focus on the foundation of extensions of liability from subsidiaries to parent companies under EU competition law. According to AG Pitruzzella, there are two potential explanations for such extension of liability, which at the same time can lead to different outcomes in the present case:

1. On the one hand, the extension of liability is based on the exercise of the parent company's decisive influence over its subsidiary, which is understood to lack autonomy and follow the former's directions. Under this hypothesis, the parent company is presumed to determine the anticompetitive conduct of its subsidiary.
2. On the other hand, it is the existence of a single economic unit itself that triggers such an extension of liability. Under this hypothesis, the parent company and its subsidiary are presumed to act uniformly in the market, meaning that any of them can be held liable for the infringement.

Only under the second hypothesis can a subsidiary be held liable for the infringement of its parent company, as it would not be possible for the former to exert decisive influence over the latter under the first one. This is, in fact, the hypothesis defended by AG Pitruzzella, who holds that while it is for the EC to decide on the extension of liability based on the parent company's ability to exert decisive influence over its subsidiary, such decisive influence does not necessarily need to be related to its anticompetitive conduct. Indeed, this decisive influence can simply originate from the general legal or economic links between both companies affecting, *inter alia*, the subsidiary's policy, strategy, investments or financial situation, which can ultimately have an indirect impact on its behaviour in the market (para. 43). Following this line of thought, it is the *general* relationship between parent company and subsidiary that determines the existence of a single economic unit and, consequently, the companies that can be held jointly liable for the infringement of such unit.

In light of the above, AG Pitruzzella confirms that a subsidiary could be held liable for its parent company's sins under the single economic entity doctrine. Indeed, once it has been demonstrated that a company exerts decisive influence (as just defined) over its subsidiary, and thus they both form a single economic entity, the only outstanding question is the allocation of liability within the unit.

Interestingly, AG Pitruzzella recognises that the mere existence of downwards decisive influence does not allow to hold a subsidiary liable for its parent company's infringement just as it does for a traditional upward extension of liability. Instead, it is necessary to prove that the subsidiary has been in some way necessary for the materialisation of the anticompetitive behaviour (e.g. by selling the products that constitute the object of the conduct) (para. 57). As a result, if a subsidiary does not operate in the economic sector in which its parent company's anticompetitive conduct

has materialised, no liability could be extended, whatever strong legal and/or economic links they might have.

Finally, AG Pitruzzella refers to the *Skanska* judgment to confirm that his interpretation of the implications of the single economic entity doctrine in the present case is equally applicable to private enforcement of competition law. Such an approach would (i) further strengthen the deterrent effect on future anticompetitive conduct that competition authorities ultimately seek; (ii) eliminate any potential difficulties that might arise from transnational proceedings; and (iii) increase the claimant's chances to be fully compensated for the damages caused.

Implications for future practice

Whilst not binding, AG Pitruzzella's Opinion in the present case demonstrates that even the most basic concepts in EU competition law can still raise important questions 50 years after their adoption. Although it will ultimately be for the ECJ to decide on the issue, there are definitely some important implications worth highlighting should the ECJ decide to follow the AG's proposal:

1. In the first place, the concept of "decisive influence" under the single economic entity doctrine is a broader than traditionally understood. For a single economic entity to be found, there is no need to demonstrate that the parent company exerted a decisive influence over its subsidiary in relation to the anticompetitive behavior. It is enough that, given their legal and economic links, a parent company can in any way determine the behavior (anticompetitive or not) of its subsidiary.
2. Secondly, a subsidiary can be held liable for the infringement of their parent companies, both under public and private enforcement of competition law, even if it has not directly participated in the infringement, as long as they both form a single economic unit. Consequently, any company is exposed to fines and/or claims for damages for its parent company's infringement, unless it can be demonstrated that their legal or economic links do not leave scope for decisive influence (even if indirect) over the former's general conduct. However, even if such decisive influence exists, a subsidiary will only be held liable for the infringements of its parent company when its activities have been necessary for the materialisation of the latter's anticompetitive conduct. Thus, if a company operates in an economic sector completely different to that in which its parent company has infringed the rules on competition, such company will not be held jointly liable for the infringement, neither under public enforcement of competition law nor under its private enforcement, independently of their legal and/or economic relationship.

AG Pitruzzella leaves, however, certain questions unanswered, such as the extension of liability to sister companies under this interpretation of the single economic entity doctrine or the participation of the subsidiaries in different but interrelated economic activities (e.g. vertically related or complementary products or services). Whether the ECJ will confirm his position and potentially cover any of these outstanding questions remains to be seen.

Any opinions or conclusions provided in this blog entry shall not be ascribed to Latham & Watkins or any clients of the firm.

To make sure you do not miss out on regular updates from the Kluwer Competition Law Blog, please subscribe here.

This entry was posted on Thursday, April 15th, 2021 at 10:20 pm and is filed under European Court of Justice, European Union, Parental liability
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.